

The Court has reviewed the pleadings relative to the Motion to Vacate, Set Aside or Correct Sentence, and is satisfied that Defendant may have been confused as to the status of his original three claims after the hearing was scheduled on the fourth claim. Defendant indicated in his January 16 "Response" as follows: "If the Court fails to address my issues and merely grants the Government's Motion [for an evidentiary hearing on the appeal issue], I then will be unfairly prejudiced" Contrary to Defendant's apparent understanding, the three issues raised in the original Motion to Vacate would have remained pending before the Court. The Court was simply indicating that an evidentiary hearing was unnecessary on those claims, as explained below.

1. Insufficient evidence in light of Bailey v. United States.

Defendant asserts that his conviction under 18 U.S.C. § 924(c) for using or carrying a firearm in during and in relation to a drug trafficking offense is invalid in light of the Supreme Court's decision in *Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501 (1995). This claim is without merit. The record reflects that Defendant was arrested immediately following the drug transaction forming the basis for Count II of the indictment, and that he was found to have a semi-automatic handgun and holster hidden in the front of his pants. This is the very conduct described in *Bailey* as sufficient to support a conviction under the *carrying* prong of section 924(c). *Id.* at 507 ("a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction"). Defendant was charged and convicted under alternative prongs of section 924(c); namely, using *or* carrying the firearm. *Cf. Alicea v. United States*, 931 F. Supp. 111, 113 (D.P.R. 1996) (invalidating conviction of "use" of a firearm where defendant arguably "carried" it). Accordingly, because his conviction (on his guilty plea) for carrying a firearm in connection with a drug trafficking offense was amply supported by the record, the Motion to Vacate, Set Aside, or Correct Sentence should be denied as it relates to this claim.

2. ***Competency of Guilty Plea.***

Defendant's claim that he was under the influence of prescription medication at the time of his plea implicates the due process clause. *United States v. Lebron*, 76 F.2d 29, 31 (1st Cir. 1996). "The test for a defendant's mental competency to plead guilty is the same as that of a defendant's competence to stand trial. . . . That test, as set forth by the Supreme Court, is whether the defendant understands the proceedings against him and has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* (citations omitted). A district court is under an obligation to hold a competency hearing, whether or not one is requested, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." *Id.* at 32 (quoting 18 U.S.C. § 4241(a)).

In this case, Defendant's attorney did not request a competency hearing, and no such hearing was held. The Court did, however, engage in its usual inquiry under Rule 11, Federal Rules of Criminal Procedure. During that inquiry, Defendant informed the Court that he was given the drug amitriptyline at the jail, which he described as a muscle relaxant. Defendant's counsel then indicated "[i]t's an Ibuprofen drug, your Honor." Tscpt. at 3. The Court gave no indication that it was concerned with the effect amitriptyline might have on Defendant's mental capacity, and the Rule 11 hearing continued. Throughout the course of the hearing, Defendant was repeatedly asked if he understood the proceedings, and the nature of any rights he was waiving by virtue of the plea. Defendant responded in the affirmative each time. When asked, Defendant's attorney indicated he knew of no reason why Defendant should not be permitted to proceed. In short, there was nothing out of the ordinary about the Rule 11 proceeding itself which should have led the Court to inquire further about the possible effects of the amitriptyline.

Although the Court ordinarily is obligated to inquire further into a defendant's mental competence once informed that he had ingested drugs within the last 24 hours, its failure to do so is not fatal where it is possible to conduct an inquiry at this stage into whether the medication "could have significantly interfered with his mental functioning at the time of entering his plea." *United States v. Parra-Ibanez*, 936 F.2d 588, 597 (1st Cir. 1991). In this case, the Government has presented competent evidence that Defendant was prescribed 25 milligrams of amitriptyline, to be taken at bed time. There is further evidence that amitriptyline is not a mind-altering substance at this dosage, and that the sedative effect of the drug would have worn off prior to Defendant's change of plea. The Court thus concludes that, under these circumstances, any error in the Court's failure to conduct further inquiry is harmless as a matter of law.

3. *Ineffective Assistance of Counsel.*

There is no ineffective assistance of counsel with respect to either of Defendant's claims. Ineffective assistance claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668-69 (1984). Specifically, Defendant must show the Court that counsel's performance was constitutionally deficient. *Id.* Defendant must also show that, but for counsel's deficient performance, the outcome the proceeding would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* Even were the Court to conclude that counsel's performance was somehow deficient, which it does not, Defendant's claim would fail because there was no prejudice either on account of counsel's advice regarding the firearm charge, or as a result of counsel's failure to seek a hearing on Defendant's competence to enter a guilty plea. Accordingly, Defendant's third claim should also be denied.

Conclusion

For the foregoing reasons, I hereby recommend Defendant's Motion to Vacate, Set Aside or Correct Sentence be DENIED with respect to his claims regarding the firearm charge, his competence to plead guilty, and his attorney's performance. In light of the apparent confusion described above with respect to his claim regarding the calculation of the guideline sentence, I further recommend Defendant be directed to inform the Court within 10 days whether he intends to proceed on the claim, following which a hearing may be scheduled, if necessary.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on April 16, 1997.