

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
<i>v.</i>)	
)	Criminal Nos. 92-14-P-H
ARMAND PAUL VEILLEUX,)	93-2-P-H
)	(Civil No. 97-142-P-H)
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Armand Paul Veilleux, appearing *pro se*, moves this court to correct his sentences in two cases, imposed during a single sentencing proceeding, pursuant to 28 U.S.C. § 2255. In Docket Number 92-14 Veilleux pleaded guilty to charges of conspiracy to possess with intent to distribute in excess of 500 grams of cocaine, a violation of 21 U.S.C. §§ 841 and 846, and income tax evasion, a violation of 26 U.S.C. § 7201. In Docket Number 93-2, Veilleux was convicted after a jury trial of assault on a federal officer, in violation of 18 U.S.C. § 111; use of a firearm in a crime of violence, in violation of 18 U.S.C. § 924(c)(1); failure to appear, in violation of 18 U.S.C. § 3146(a)(1); unlawful currency importation, in violation of 31 U.S.C. § 5316(a)(1)(B); false written declaration, in violation of 18 U.S.C. § 1001; and passport forgery, in violation of 18 U.S.C. § 1543. He was sentenced to a total term of imprisonment of 294 months, 46 of which were to run concurrently with a 162 month sentence, and a period of three years of supervised release upon release from prison. A fine of \$20,000 was also imposed.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations,

accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that the allegations would not entitle Veilleux to relief, and, accordingly, I recommend that his motion be denied without an evidentiary hearing.

I. Background

After pleading guilty to the charges in Docket No. 92-14, Veilleux failed to appear for sentencing. *United States v. Veilleux*, 40 F.3d 9, 10 (1st Cir. 1994). Instead, he moved to Canada. Transcript of Proceedings (“Trial Tr.”), Docket No. 93-2-P-H (Docket No. 36) at 184. Some time later, he attempted to re-enter the United States by car; he was stopped at a border checkpoint. *Id.* at 186-89. The charges in Docket No. 93-2 arose from the events that followed at the checkpoint. *United States v. Veilleux*, 40 F.3d at 10. Veilleux presented a false passport, filled out a customs declaration form falsely, pointed a gun at a customs officer, and was found to be carrying over \$176,000 in cash on his person. Trial Tr. at 189-94, 201-09.

Veilleux was represented by different counsel in the two cases. He was represented by a third lawyer on his appeal to the First Circuit, where his convictions and sentences were affirmed. 40 F.3d at 11.

II. Analysis

A. Procedural Issues

Veilleux’s motion is submitted on a form that he signed and dated April 20, 1997, on the line following the words “I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.” Docket Nos. 39 (in Docket No. 92-14) and 41 (in Docket No. 93-2).¹ However, on section 12 of the form, where the moving defendant is instructed to state every ground on which he bases his claim, Veilleux simply wrote “See Attached Pleadings” three times. In section 13 of the form, where the moving defendant is instructed to state briefly which of the grounds listed in section 12 were not previously presented, and why, Veilleux wrote “Ineffective assistance of counsel, all claims concerning Case No. 92-14-P-H.” The form is accompanied by a document entitled “Motion to Vacate, Set Aside, and Correct Sentence and Conviction by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255.” That document includes 27 numbered paragraphs of general factual assertions and a detailed statement concerning each of the three grounds upon which the claim is based, in a total of 21 pages. This document is signed by Veilleux but not sworn. It is also accompanied by a document entitled “Notice” in which Veilleux “certifies” that he mailed the motion on April 20, 1997. The motion was received and filed in this court on April 28, 1997. On April 20, 1997 Veilleux was incarcerated in a facility located in Illinois.

The government argues that Veilleux’s motion is untimely under the amendment to section 2255 that was enacted by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1220, which took effect on April 24, 1996. That amendment established a one-year statute of limitations for claims brought under section 2255, to run, *inter alia*, from the date upon which the judgment of conviction becomes final. However, this court has allowed a one-year grace period for application of the new statute of limitations for section 2255 motions. The Constitution requires that statutes of limitation allow a reasonable time after they take effect for the

¹ The same document appears in the court files of both cases in connection with this section 2255 motion. For the sake of convenience, further references will be to the docket number assigned to a given document in Case No. 92-14 only.

commencement of suits upon existing causes of action. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982). The government does not challenge this policy, but argues that the date of receipt and filing of Veilleux's motion, four days after the extended deadline, means that the motion must be dismissed as untimely.

For prisoners who are not represented by counsel, as is the case here, the date of filing of a petition for post-conviction relief with a court is the date upon which the document is given to prison authorities by the prisoner for mailing. *Houston v. Lack*, 487 U.S. 266, 276 (1988). Veilleux's "Notice" states that he mailed his motion on April 20, 1997 "by turning the same over to prison mailroom personnel to forward . . . by U.S. Mail, for timely filing with the Clerk." The government argues that Veilleux's certification, which shows a timely filing under *Houston*, is insufficient because it is neither notarized nor signed under penalty of perjury. *Houston* requires neither formality; the Supreme Court requires only "reference to prison mail logs." *Id.* at 275. At my request, the government obtained a copy of the mail log of the Federal Correctional Institution at Greenville, Illinois, showing that Veilleux gave his motion to prison authorities for mailing on April 19, 1997. Docket No. 47. The motion is therefore timely.

The government next argues that dismissal of the motion is required because the factual allegations central to Veilleux's challenge are not made under oath. Here, while the motion form is signed under penalty of perjury, all factual allegations are made in the accompanying memorandum which is not sworn. In *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), *rev'd on other grounds*, 117 S.Ct. 1673 (1997), the First Circuit held in identical circumstances that "[f]acts alluded to in an unsworn memorandum will not suffice" to meet the requirement that allegations in a section 2255 motion be presented under oath. *Id.* at 1413. Veilleux, in response to

this argument, included with his reply to the government’s memorandum an affidavit, Docket No. 46 (“Def. Aff.”), in which he restates several of the factual allegations made in his earlier memorandum. For those factual allegations that are not included in this affidavit, Veilleux, like the *LaBonte* defendant, would not “find surcease” even if the court were empowered to overlook this “fatal shortcoming,” *LaBonte*, 70 F.3d at 1413, because they do not entitle him to relief on the merits.

B. Substantive Issues

1. Plea in Docket No. 92-14

The first of three substantive grounds for relief presented by Veilleux is an argument that his guilty plea to the charges of conspiracy and tax evasion in Docket No. 92-14 was not knowing and voluntary because the court, his counsel and the assistant United States attorney prosecuting the charges all stated, erroneously, when he entered his plea that there was no minimum sentence on the conspiracy count and that a period of supervised release could not be imposed on that count. Transcript of Rule 11 Proceeding, Docket No. 92-14-P-H (“Rule 11 Tr.”) (Docket No. 37), at 10-13, 20-22. Veilleux’s failure to present a sworn statement that he would not have pleaded guilty if he had known that a period of supervised release might be imposed on the conspiracy count is fatal to his claim for relief on that basis. *Padilla Palacios v. United States*, 932 F.2d 31, 35 (1st Cir. 1991).²

² In any event, a period of supervised release was authorized on the tax evasion counts in the same indictment as the conspiracy count, and Veilleux’s sentence does not specifically tie the term of supervised release imposed to any of the individual counts. Thus, the term of supervised release could have been imposed solely on the tax evasion counts, irrespective of the conspiracy count, making Veilleux’s knowledge concerning the availability of such a term on the conspiracy count irrelevant.

Veilleux does present, in his recently filed affidavit, the following sworn statement: “[H]ad I known that my guideline sentence was calculated based on the applicable mandatory minimum, I would have then not plead [sic] guilty, but rather I would have elected to proceed to trial.” Def. Aff. ¶ 2. The First Circuit dealt with a similar claim just last month in *United States v. McDonald*, 1997 WL 464957 (1st Cir. Aug. 20, 1997). In that case, the defendant was not informed at the Rule 11 hearing during which he tendered his guilty plea that a ten-year mandatory minimum sentence applied to the charge. *Id.* at *1. The trial court imposed a sentence of 135 months “and calculated that sentence without any reference to the mandatory minimum.” *Id.* at *4. In affirming the trial court’s denial of the defendant’s motion to vacate his guilty plea, the First Circuit observed:

It is, therefore, readily apparent that because the guideline sentencing range (at its nadir) outstripped the mandatory minimum, the latter had no relevance to, and no actual effect upon, the appellant’s sentence. Consequently, the district court’s failure to apprise the appellant of the mandatory minimum was an error that did no discernible harm.

Id. The First Circuit also found it significant that the Presentence Investigation Report included an unambiguous reference to the mandatory minimum sentence. *Id.* n.4. Like *McDonald*, Veilleux informed the court at sentencing that he had read the Presentence Investigation Report concerning the charges to which he had pleaded guilty, Transcript of Proceedings, Docket Nos. 92-14-P-H & 93-2-P-H (July 28, 1993) (“Sentencing Tr.”) (Docket No. 34), at 3, and there is no dispute that this report establishes a minimum sentence under the guidelines that is well in excess of five years, Presentence Report, Docket No. 92-14-P-H (revised as of Mar. 24, 1993) (“PSR”), at 10.

It is readily apparent that the application of the sentencing guidelines to the conspiracy count in the instant case resulted in a sentence in excess of the 60-month mandatory minimum sentence.

The guideline range was 151 to 188 months. Memorandum of Sentencing Judgment (Docket No. 31) at 2-3. The court calculated this sentence without any reference to the mandatory minimum. *Id.* Therefore, the failure to inform Veilleux of the mandatory minimum sentence, or, more correctly, the court's acquiescence in the misrepresentation by both defense counsel and the assistant United States attorney concerning the mandatory minimum, did "no discernable harm" to Veilleux, and he is not entitled to relief on the first ground asserted in his motion.

2. Ineffective Assistance of Counsel (Both Cases)

a. Docket No. 92-14

The second asserted ground for relief alleges ineffective assistance of counsel in the conspiracy and tax evasion case deriving from counsel's failure to seek a downward adjustment in Veilleux's sentence for acceptance of responsibility based on his guilty plea, despite the fact that Veilleux failed to appear for sentencing and fled the country. Veilleux relies on Application Note 4 to Section 3E1.1 of the United States Sentencing Commission Guidelines ("U.S.S.G.").

In fact, Veilleux's counsel did seek a downward adjustment on this basis. PSR at 20. Even if he had not done so, however, Veilleux would not be entitled to relief on this basis.

A claim of ineffective assistance of counsel brought in a section 2255 proceeding is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A court applying the *Strickland* test need not address the two prongs in any particular order, nor need it address both prongs if the defendant makes an insufficient showing on one of the two. *Strickland*, 466 U.S. at 697. Counsel’s performance cannot be deficient if the only “error” alleged is a failure to engage in a futile exercise. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir. 1997), *petition for cert. filed* Aug. 8, 1997 (No. 97-5538).

U.S.S.G. § 3E1.1(a) provides a decrease of two levels in the offense level used to calculate a sentence “[i]f the defendant clearly demonstrates acceptance of responsibility for his offense.” Subsection (b) provides a further decrease of one level if the offense level is 16 or greater and the defendant has timely notified the authorities of his intention to enter a plea of guilty or timely provided complete information concerning his own involvement in the offense. Application Note 4 to this section provides:

Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both § § 3C1.1 and 3E1.1 may apply.

Section 3C1.1 requires an increase in the offense level by two levels if the defendant willfully obstructed or impeded the administration of justice, or attempted to do so, by, *inter alia*, willfully failing to appear, as ordered, for a judicial proceeding and providing materially false information to a probation officer in respect to a presentence investigation for the court. U.S.S.G. § 3C1.1,

Application Note 3. Veilleux falls within both of these categories, as the court found at sentencing, although it applied only the second category in deciding that the increase was indicated. Sentencing Tr. at 23-24.

Veilleux does not suggest in what way his guilty plea constitutes an “extraordinary” case indicating acceptance of responsibility in spite of his obstruction of the administration of justice. He offers no sworn factual statements to support his argument. An attempt by counsel to obtain the decrease for acceptance of responsibility under the circumstances would have been a futile exercise, as it proved to be.

b. Docket No. 93-2

The final claim in Veilleux’s motion concerns the conduct of his counsel on the charges arising out of his re-entry into the United States, of which he was found guilty after trial.

With respect to Veilleux’s first specific claim of ineffective assistance — that his lawyer met with him only on “approximately” three occasions for approximately fifteen minutes each to discuss the case, presumably before trial — Veilleux makes no showing that the result of the trial would have been different if his counsel had spent more time with him. He does not suggest that he possessed information that he was unable to provide to his counsel due to the brevity of these meetings that might have been used at trial, such as the names of witnesses or avenues for factual investigation. The First Circuit has observed:

The most liberal standard on this issue suggests that “[c]ounsel should confer with his client without delay and *as often as necessary* to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.”

United States v. Maguire, 600 F.2d 330, 332 (1st Cir. 1979) (citation omitted) (emphasis in original). As was the case in *Maguire*, Veilleux's trial counsel displayed obvious competence in court, and there is a total lack of any record evidence that he lacked significant information at trial. *Id.* Veilleux has failed to meet the second prong of the *Strickland* test. *Strickland*, 466 U.S. at 694 (defendant must show reasonable probability that result would have been different, but for counsel's unprofessional error).

Veilleux next challenges his trial counsel's performance on the ground that he never discussed a plea agreement with Veilleux and never conveyed any offers from the prosecutor. Significantly, Veilleux does not allege that any plea bargain was offered by the prosecutor. Indeed, Veilleux's own evaluation of the overwhelming strength of the case against him, Traverse (Docket No. 45) at 18-19, offers a reasonable basis to conclude that no bargain was offered. In any event, under the Sixth Amendment, "it is not necessary that the defendant have counsel who recommends that a plea bargain be pursued." *Brown v. Doe*, 2 F.3d 1236, 1246 (2d Cir. 1993). Veilleux, having pleaded guilty in Docket No. 92-14 pursuant to a plea agreement, Agreement to Plead Guilty and Cooperate, Docket No. 92-14-P-C [sic] (Jan. 10, 1992), was certainly aware that plea bargaining was possible when he met before trial with his counsel in Docket No. 93-2. If he did not ask his counsel about the possibility, counsel was under no duty to pursue this avenue with the prosecutor. In this regard, Veilleux has not satisfied the first prong of the *Strickland* standard. Further, in order to meet the prejudice prong of the *Strickland* standard, Veilleux would have to show that the government would have offered him a plea bargain, had he shown any interest. *United States v. Turchi*, 645 F. Supp. 558, 568 (E.D. Pa. 1986), *aff'd*, 815 F.2d 696 (3d Cir. 1987). He has made no allegation at

all concerning this element of proof.

The next deficiency of counsel alleged by Veilleux is that his counsel “permitted [him] to testify, knowing that his testify [sic] could do virtually nothing to enhance his defense.” Traverse at 21. The decision that a defendant will testify “is a classic example of a strategic trial judgment, the type of act for which *Strickland* requires that judicial scrutiny be highly deferential.” *United States v. Chavez-Marquez*, 66 F.3d 259, 263 (10th Cir. 1995) (internal quotation marks and citations omitted). Here, as in *United States v. Lively*, 817 F. Supp. 453 (D. Del.), *aff’d* 14 F.3d 50 (3d Cir. 1993), Veilleux

makes absolutely no factual allegations whatever concerning how the decision that he testify was made. For example, [he] does not allege that he did not make the decision to take the witness stand. [He] does not allege that his trial counsel coerced him to testify on his own behalf at trial, thereby waiving his Fifth Amendment right not to testify. . . . [He] does not allege that the decision to testify . . . was made without his participation or concurrence. [He] likewise does not allege that other defenses were available to him which would met with greater success. [He] does not suggest that he raised other defenses to his counsel and that they were rejected. Finally, [he] does not suggest that other defense witnesses were available who may have contributed to a more successful defense.

Id. at 461. In the absence of such allegations, the court must assume that Veilleux made the decision to testify on his own behalf. *Id.* The fundamental right to testify may not be waived by counsel, but is personal to the defendant, “who alone may decide whether the right will be exercised or waived.”

Id. Veilleux’s claim in this regard “boils down to a disagreement with his counsel’s trial strategy.”

Id. at 462. Counsel’s trial strategy, especially strategy that the defendant does not claim he disagreed with at the time of trial, cannot form the basis of a claim of ineffective assistance of counsel. *Id.* Counsel was under no duty to inform Veilleux of every possible consequence of his testimony, even assuming that he could foresee that Veilleux would testify in a manner that could be used to support

the court's finding, when later sentencing him on the earlier charges, that he had not provided fully truthful information to the probation officer concerning his assets. While it might have been better practice to do so, the failure to warn Veilleux specifically about this possibility does not constitute ineffective assistance of counsel in violation of the Sixth Amendment.

Finally, Veilleux asserts that his counsel never informed him that he would be eligible for a reduction in offense level, presumably under U.S.S.G § 3E1.1, if he pleaded guilty instead of going to trial. This assertion is disingenuous at best. Within one week before he failed to appear for sentencing on the first set of charges, Veilleux had discussed sentencing on those charges with his counsel in that case. Transcript of Proceedings, Docket No. 92-14-P-H (October 30, 1992) (Docket No. 21), at 2. Fed. R. Crim. P. 32(b)(6)(A) requires that the presentence report be furnished to the defendant 35 days before the sentencing hearing. That report clearly discusses the availability of an adjustment for acceptance of responsibility. Revised Presentence Report (Apr. 28, 1992) at 6. Therefore, Veilleux was aware of the existence of the guideline sentencing reduction for acceptance of responsibility before he even committed the crimes with which he was charged in the second proceeding. Any failure by his counsel to tell him what he already knew cannot have had any effect on the outcome of the second proceeding. Thus, the second prong of the *Strickland* standard is not met on this ground.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.

Dated at Portland, Maine this 19th day of September, 1997.

*David M. Cohen
United States Magistrate Judge*