

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 96-28-P-H
)	(Civil No. 99-188-P-H)
PAUL A. BLODGETT,)	
)	
Defendant)	

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

Paul A. Blodgett, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Blodgett complains that trial counsel rendered ineffective assistance as a result of his failure to present an alternative defense, to call key witnesses and to file a meaningful motion for judgment of acquittal. Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket No. 43) at 5. Blodgett also moves that his motion be given liberal consideration pursuant to *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (prisoner’s *pro se* complaint held to less stringent standards than formal pleadings drafted by lawyers). Motion for Liberal Considerations (Docket No. 42).¹

A section 2255 motion may be dismissed without an evidentiary hearing if “(1) the motion

¹Blodgett need not have moved for liberal construction of his petition inasmuch as lower courts must in any event follow *Haines*. Although *pro se* complaints are held to less stringent standards, a court is not required to “conjure up facts that are not pleaded to support conclusory allegations of the complaint.” *Luce v. Hayden*, 598 F. Supp. 1101, 1102 (D. Me. 1984). The motion for liberal construction is denied as moot.

is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (citation and internal quotation marks omitted). Blodgett's allegations, even if accepted as true, do not entitle him to relief. I accordingly recommend the dismissal of his 2255 motion without an evidentiary hearing.

I. Background

On or about June 12, 1996 Paul A. Blodgett was indicted on four counts charging knowing possession and interstate transportation by a convicted felon of a CZ model 75 nine-millimeter semi-automatic handgun and a model 1300 Winchester 12-gauge pump shotgun, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Superseding Indictment (Docket No. 7). Prior to trial, Blodgett's counsel filed a motion to dismiss premised *inter alia* on an argument that Counts I and II (related to possession of the handgun and shotgun, respectively) were multiplicative of or subsumed within Counts III and IV (related to interstate transportation of the handgun and shotgun, respectively). Motion To Dismiss, etc. (Docket No. 12) at 4-5. The motion was denied, although the court noted that the multiplicity argument could be re-raised at the time of jury instructions and/or post-verdict. Endorsement to *id.*

Blodgett was tried on the four counts of the Superseding Indictment on September 4-5, 1996, following which the jury rendered a verdict of not guilty as to Counts II and IV and guilty as to Counts I and III. Transcript of Proceedings of September 4-5, 1996 ("Trial Transcript") (Docket Nos. 34-35) at 305. Defense counsel renewed the portion of his motion to dismiss based on multiplicity. Letter from David Beneman to Lisa Witham dated September 10, 1996 (Docket No.

24). At sentencing the court granted the motion, vacating Blodgett's conviction as to Count III. Transcript of Proceedings of February 14, 1997 (Docket No. 36) at 44. The court sentenced Blodgett on Count I to a term of imprisonment of 293 months, the maximum available under the United States Sentencing Guidelines. *Id.* at 43-44. The defendant appealed his conviction and sentence directly to the First Circuit, challenging the court's decision to enhance his sentence pursuant to the Armed Career Criminal Act. Notice of Appeal (Docket No. 32); *United States v. Blodgett*, 130 F.3d 1, 1 (1st Cir. 1997). The First Circuit affirmed. *Blodgett*, 130 F.3d at 2. Blodgett petitioned for a writ of certiorari from the Supreme Court, which was denied on or about June 26, 1998. *Blodgett v. United States*, 118 S.Ct. 2374 (1998). This motion followed.

II. Discussion

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his or her Sixth Amendment right to counsel has been violated. First, the defendant must show that counsel's performance was deficient, *i.e.*, that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must make a showing of prejudice, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either precludes judgment in the defendant's favor. *Id.* at 697. The court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting

Strickland) (internal quotation marks omitted).

The “prejudice” element of the *Strickland* test also presents the defendant with a high hurdle. *Id.* The defendant must show more than a possibility that counsel’s errors had some conceivable effect on the outcome of the proceeding. *Id.* He must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel’s errors. *Id.*

Blodgett identifies three failings on the part of his trial counsel, all of which hinge on the same assertedly foregone defense: that police planted the nine-millimeter handgun that they testified was found under a bush where Blodgett was hiding when apprehended following a high-speed car and foot chase in Old Orchard Beach on the morning of May 9, 1996. *See* Memorandum in Support of Motion Under 28 U.S.C. § 2255 (“Petitioner’s Memorandum”) (Docket No. 43) at 2, 4.

On the early morning of May 9, 1996 Blodgett and a companion, Jason Olivarez, met a woman, Carol Sarazin, in the Old Port area of Portland and took her to a room at the So-Ho Inn in Old Orchard Beach. *Id.* at 2, 10; Trial Transcript at 123-26.² Early that morning Sarazin fled the room and called the Old Orchard Beach police. Petitioner’s Memorandum at 10; Trial Transcript at 126. Blodgett posits that prior to 5 a.m., Old Orchard Beach police officers Keith Babin and Kevin Riordan investigated and found Olivarez alone in the room (Blodgett having driven away). Petitioner’s Memorandum at 10-11; Trial Transcript at 95, 116-17. The officers wanted access to the room, according to Blodgett, because they knew that there was an outstanding federal warrant for his arrest. Petitioner’s Memorandum at 10. Blodgett theorizes that during that visit the officers

²Olivarez and Blodgett were renting a room together at the So-Ho Inn, according to a statement from Olivarez taken by the Federal Bureau of Investigation. *See* Federal Bureau of Investigation Report by Garry E.W. Barnes, transcribed on May 14, 1996 (“Olivarez Report”), attached as Exh. 1 to Government’s Response to Motion To Vacate, etc. (“Response”) (Docket No. 45), at 1.

intimidated Olivarez, who surrendered the nine-millimeter handgun to Babin. *Id.* at 11. Blodgett asserts that later that morning, while other police officers were engaged in pursuing the fleeing Blodgett on foot, Captain Alan Holmes of the Old Orchard Beach Police Department planted an empty gun holster on the front seat of the vehicle in which Blodgett had fled. *Id.* at 5, 9; Trial Transcript at 85. Holmes then hurried to the bush where Blodgett had been cornered and, according to Blodgett, passed the handgun to another Old Orchard Beach police officer, Girard Hamilton, while the attention of two other officers who were subduing Blodgett was diverted. Petitioner's Memorandum at 8-9; Trial Transcript at 46. Blodgett speculates that Hamilton then planted the gun and claimed to have discovered it on the ground under the bush where Blodgett had been lying. Petitioner's Memorandum at 8-9.

In support of this theory Blodgett notes, among other things, that:

1. Terry Davis, a Biddeford police detective who initially chased Blodgett on foot, testified that he abandoned pursuit because he was wearing cowboy boots and could not keep up. *Id.* at 5; Trial Transcript at 17, 22. When he returned to Blodgett's abandoned vehicle, he saw Holmes "walking away from the station wagon." Petitioner's Memorandum at 5, 9; Trial Transcript at 22-23. Holmes testified that he was examining the vehicle for additional occupants. Petitioner's Memorandum at 9; Trial Transcript at 88. However, in Blodgett's view, Holmes must have known that the vehicle contained only one occupant because he was commanding officer of those surveilling the car and was among those pursuing it. Petitioner's Memorandum at 9. Holmes also was quoted in a newspaper as stating that Blodgett was arrested with a gun in his hand. *Id.* at 12; newspaper article attached as Exh. D to *id.* Holmes was equivocal as to whether he was misquoted but admitted that the statement was untrue. Trial Transcript at 93. Finally, in what Blodgett suggests seemed

more than a matter of sheer coincidence, Holmes (who had not been among the pursuers) happened to appear at the arrest scene at about the time of the gun's "discovery." Petitioner's Memorandum at 6, 8.

2. None of the officers involved in Blodgett's arrest could testify that he saw Blodgett with a gun.³ *Id.* at 8; Trial Transcript at 42-43 (Davis); 69-70 (Hamilton); 84 (Rullo); 93-94 (Holmes); 102 (Riordan). Their testimony as to his body movements while under the bush was inconsistent. Petitioner's Memorandum at 6. Hamilton testified that while Blodgett lay under the bush his arms were outstretched but then came back in toward his body. *Id.*; Trial Transcript at 61. Rullo, who claimed to have been positioned at Blodgett's mid-section, averred that he saw no movement by Blodgett while under the bush.⁴ Petitioner's Memorandum at 7; Trial Transcript at 77. Rullo also testified that he peered under the bush immediately after Blodgett was dragged out and saw "nothing else under there." Petitioner's Memorandum at 7; Trial Transcript at 78. Riordan testified that Hamilton went back to the area of the bush and pulled out a firearm following the arrest. Petitioner's Memorandum at 8; Trial Transcript at 100.

Blodgett argues first that trial counsel rendered ineffective assistance inasmuch as he failed to present the alternative defense that the gun had been planted by police. Petitioner's Memorandum at 4. He contends that this omission was the product not of strategic thinking but rather of

³An Old Orchard Beach police corporal, Henry Rullo, testified that he heard Hamilton say that the suspect had a gun — something Hamilton had not testified that he said. Petitioner's Memorandum at 6; Trial Transcript at 72, 77. Blodgett complains that defense counsel forfeited the opportunity to object to this prejudicial remark or request a curative instruction to mitigate the damage. Petitioner's Memorandum at 6-7. I discern no basis for excluding this eyewitness's remark or for giving a curative instruction.

⁴Rullo noted, however, that his view was obstructed by Hamilton. Trial Transcript at 77.

negligence. *Id.* at 10; Affidavit of Paul A. Blodgett (“Blodgett Aff.”), attached as Exh. B to Petitioner’s Memorandum, ¶¶ 7-8 (trial counsel agreed that defense strategy would be directed toward facts showing gun was planted but then made only “lame showing”); *Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988) (“If Osborn’s counsel had made a tactical decision after adequate investigation and reasoned judgment to rely on this lone argument, we would not consider it completely untenable. In this case, however, the district court found and the record confirms that defense counsel completely failed to investigate other plausible lines of defense and was inadequately prepared to effectively present the tactical defense he chose.”).

The government rejoins that defense counsel did indeed present this defense, albeit in a subtle manner. Counsel argued to the jury that Blodgett did not have the gun in his hands during the police chase. Response at 6. By inference, the gun could have only been found in the shrub had the police placed it there. *Id.* Moreover, the First Circuit on direct appeal viewed the evidence as establishing that Blodgett was found holding the firearm; hence, the defense that Blodgett was framed would have been weak. *Id.*; *Blodgett*, 130 F.3d at 2.

The record reveals that trial counsel did indeed elicit from police witnesses — and underscore to the jury — the fact that no one had seen a gun in his client’s hands. *See, e.g.*, Preliminary Instructions and Opening Statements, Transcript of Proceedings of September 4, 1996 (Docket No. 37) at 24-28; Jury Charge[,] Closing Arguments, Transcript of Proceedings of September 5, 1996 (“Transcript of Closings”) (Docket No. 38) at 28-29, 31. Counsel made what appears to have been a sound tactical decision to avoid a direct accusation that the police planted the handgun — a theory that would have strained credulity, potentially affronting the jury. There is no direct evidence, for example, that Babin and Riordan had access to the handgun prior to the chase

that ended in Blodgett's capture. Both officers testified that they responded to a call for help from the motel at about 4:15 a.m. on May 9, 1996; however, neither stated that he interviewed or otherwise confronted Olivarez at that time.⁵ Trial Transcript at 100-01, 117-19.

Further, it is difficult to believe that in the few hours spanning the time of Sazarin's call for help and Blodgett's arrest, the police would have had the motive or wherewithal to concoct an elaborate scheme (involving at least four officers) to plant a handgun on Blodgett. Even assuming *arguendo* that the police had reason to risk their careers to implicate Blodgett on a weapons-possession charge, the evidence demonstrates that Blodgett, rather than the police, controlled the course of the high-speed auto and foot chase that ensued. Holmes could not have been assured either of the opportunity to plant the holster in Blodgett's abandoned vehicle or of the chance to slip the handgun to Hamilton in the few available seconds between Blodgett's arrest and the gun's "discovery."⁶

In short, trial counsel's decision to downplay the Blodgett police-conspiracy theory fell well within the bounds of competent legal assistance.

Blodgett next complains that counsel rendered ineffective assistance in failing to call three important witnesses — Olivarez, Carol Gorham and Alan Clendenning. Petitioner's Memorandum at 10-12. Blodgett asserts that Olivarez would have testified that prior to 5 a.m. on May 9, 1996 he was intimidated, coerced and threatened by officers Babin and Riordan, to whom Olivarez turned

⁵Following Blodgett's arrest, Olivarez was interviewed by FBI agent Garry Barnes and two police officers. Olivarez Report. According to the report, Olivarez denied that there were any firearms in the motel room and stated that Blodgett had a nine-millimeter pistol that he never took out of his station wagon. *Id.* at 1-2.

⁶Moreover, such a scheme would have entailed danger both to the police and passersby. The gun was found loaded and half-cocked. Trial Transcript at 63-64, 90-91.

over the handgun. *Id.* at 10-11; *see also* Blodgett Aff. ¶¶ 3, 5. The government points out that Olivarez actually could have been expected to have given testimony highly unfavorable to Blodgett and that, in any event, Olivarez was unavailable to testify. Response at 10-11. Olivarez failed to appear at Blodgett’s trial despite a government subpoena — a default for which he subsequently was prosecuted and found guilty. *Id.* at 11; Exh. 2 to *id.* The government reasons that under the circumstances, counsel’s failure to call Olivarez cannot be tantamount to ineffective assistance. Response at 12. Blodgett contends in response that the government did in fact know of Olivarez’s whereabouts and was reluctant to call him to the stand because Olivarez had been arrested on a rape charge. Motion To Supplement Pleading, etc. (“Petitioner’s Reply”) (Docket No. 46) & attachments thereto. The fact remains, however, that whatever doubts the government may have harbored concerning Olivarez, he was under subpoena to testify at Blodgett’s trial, failed to do so and was prosecuted and found guilty of contempt of court as a result. There is no reason to suppose that Olivarez would have responded any more readily to a subpoena from defense counsel than from the government. Thus, Blodgett cannot show prejudice in the manner contemplated by *Strickland*: that there was a reasonable probability that the outcome would have been different had trial counsel subpoenaed Olivarez.⁷

Blodgett next complains that trial counsel failed to interview or call Gorham or Clendenning. Gorham was a bystander who spotted Blodgett hiding under the bush and pointed him out to police;

⁷Alternatively, Blodgett cannot demonstrate that a decision to forgo calling Olivarez fell outside the bounds of reasonable trial strategy. Olivarez was potentially a highly damaging witness for the defense. The government observes that Olivarez’s testimony might have implicated Blodgett on the two counts as to which he was acquitted (concerning possession of the shotgun) inasmuch as Olivarez had told the FBI that Blodgett paid him to purchase the shotgun on his behalf. Response at 11; Olivarez Report at 2.

Clendenning was a Portland Press Herald reporter who reported that Holmes had stated that Blodgett had a loaded nine-millimeter pistol in his hand when arrested. Petitioner's Memorandum at 11-12; Blodgett Aff. ¶¶ 3-4, 6; Federal Bureau of Investigation Report by Garry E.W. Barnes, transcribed on May 22, 1996, attached as Exh. C to Petitioner's Memorandum; newspaper report attached as Exh. D to Petitioner's Memorandum. According to Blodgett, Gorham could have corroborated that she did not see Blodgett with a gun and possibly could have testified that she saw the police plant the weapon, while Clendenning could have established that Holmes lied to the press (in an apparent coverup of the police's own misdeeds). Petitioner's Memorandum at 11-12; Petitioner's Reply at [3].

The government contends, and I agree, that trial counsel sufficiently elicited that Gorham did not observe Blodgett with a gun and that the information attributed to Holmes in the Clendenning story was false. Response at 12-13; *see also* Trial Transcript at 93-94; Transcript of Closings at 29. There is no evidence that Gorham observed police planting the weapon or that Clendenning was in a position to testify whether Holmes lied and, if so, what might have motivated Holmes to do so. *See David*, 134 F.3d at 478 ("To progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings."). Blodgett thus falls short of demonstrating that the decision not to interview or call either Gorham or Clendenning had outcome-determinative implications for his case.

Blodgett finally argues that counsel was ineffective inasmuch as he failed to make a meaningful motion for acquittal. Petitioner's Memorandum at 14-15. Blodgett complains counsel omitted, in making his cursory motion, to recap suspect portions of the government's case. *Id.* at 14. The government observes that on a motion for acquittal the court must view the evidence in the light

most flattering to the government, deferring any determinations as to witness credibility to the jury. Response at 14; *United States v. Hernandez*, 146 F.3d 30, 32 (1st Cir. 1998); *United States v. Olbres*, 61 F.3d 967, 974-75 (1st Cir. 1995). The government therefore reasons, correctly in my view, that a failure to recap suspect portions of the case could not have prejudiced Blodgett. *See* Response at 14.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a 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 this 19th day of August, 1999.

David M. Cohen
United States Magistrate Judge