

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 98-30-P-H
)	(Civil No. 99-346-P-H
WILLIAM S. BROWN, JR.,)	
)	
Defendant)	

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

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Concurrent sentences of twelve months and one day were imposed after he pleaded guilty to two counts of mailing threatening communications in violation of 18 U.S.C. § 876. Judgment (Docket No. 14) at 1-2. The defendant now contends that his guilty plea was not made voluntarily, willingly or knowingly; that he did not commit the crimes to which he pleaded guilty; and that he received constitutionally deficient assistance of counsel. [Affidavit of William Brown, Jr.], attached to Motion Under 28 USC § 2255 to Vacate, Set Aide, or Correct Sentence by a Person in Federal Custody (“Defendant’s Affidavit”) (Docket No. 18), ¶¶ 3-16.

A section 2255 motion may be dismissed without an evidentiary hearing if “(1) the motion 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) (internal quotation marks and citation omitted). In this instance, each of the defendant's allegations meets one or more of these criteria and I accordingly recommend that the motion be denied without an evidentiary hearing.

I. Background

The defendant waived indictment and pleaded guilty to two counts set forth in an information. Transcript of Proceedings, Waiver and Plea, June 15, 1998 (hereinafter "Tr.") (Docket No. 17), at 2, 5-9, 10, 26. He acknowledged his signature on, and his understanding of, a written plea agreement with the government (Docket No. 4), *id.* at 20-23, and stated that the Prosecution Version (Docket No. 3) of the alleged crimes was correct, *id.* at 17-19. He took no appeal from the sentence imposed. Docket. The sentence was imposed on December 21, 1998. Judgment at 1.

On May 17, 1999 the defendant filed a motion for reconsideration and reduction of his sentence in the form of an affidavit. Docket No. 15. The motion was denied because no such remedy was available under Fed. R. Crim. P. 35 at that time. Endorsement, *id.* at [3]. The instant motion was filed on November 12, 1999. Docket.

II. Discussion

The defendant lists the following grounds for relief in an affidavit attached to his petition: (i) his retained attorney during the proceedings that culminated with this sentencing, who is not the local counsel or the New York attorney representing him in connection with this petition, failed to inform him that he had served as a United States attorney prior to entering private practice and that "he had a more than casual relationship with his successor, [the assistant United States attorney] who

prosecuted this case,” and that he would have sought different counsel if he had been aware of these facts; (ii) the defendant did not mail the letters at issue, did not have any knowledge that the letters would be mailed, and did not intend to harm the victim; (iii) the defendant cooperated with the prosecutor and allowed himself to be recorded while speaking with his alleged co-conspirator by telephone because he was promised that he would be charged with two misdemeanors and receive a sentence of two weeks; and (iv) his attorney “coerced [him] into accepting a felony plea, despite [his] making the case against” his co-defendant by telling him that the prosecutor “didn’t lose cases” and that he had better not refuse the offer, presumably of a plea to the two felony charges. Defendant’s Affidavit ¶¶ 3, 5-6, 8-11, 13-14. In a “motion” attached to the petition, the defendant’s local counsel asserts that the basis for the petition is that “[t]he plea of guilty was unlawfully induced, was not made willingly and knowingly, was not made voluntarily with adequate counsel representation,” that “Movant was not fully apprised of the charge or of the serious consequences of his plea,” and that the defendant’s rights against self-incrimination and to due process of law were violated. Motion Under 28 USC, Section 2255, etc. (Docket No. 18) at 1.

A. The Plea

Most of the specific ways in which the defendant’s guilty plea was allegedly flawed are presented in the “motion” drafted by the defendant’s local counsel and are without support in the defendant’s affidavit. The motion is not sworn. Indeed, the defendant’s local counsel gives no indication of his basis for the factual allegations included in his motion; he was not involved in representing the defendant during the time at issue. When the ground for relief asserted in a petition under section 2255 amounts to “mere ‘bald’ assertions without sufficiently particular and supportive allegations of fact,” the petition is subject to dismissal. *Barrett v. United States*, 965 F.2d 1184,

1186 (1st Cir. 1992). The court need not give weight to conclusory allegations, *United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993), and, with the exception of the allegations in his affidavit, that is all that the defendant has presented on this point.

To the extent that the defendant claims that his plea was induced by the promise of a reduction of the charges to misdemeanors and a sentence of two weeks, that claim is belied by the record. The defendant signed an agreement to plead guilty to two counts of aiding and abetting the mailing of threatening communications, Agreement to Plead Guilty and Cooperate (Docket No. 4) at 1, which is the felony charge upon which he was sentenced. The Agreement makes clear that (i) the maximum statutory penalties for that charge are a term of imprisonment of not more than five years, a fine not to exceed \$250,000, or both; an order of restitution; and a period of supervised release of not more than three years following completion of any term of imprisonment; (ii) each party could recommend to the court the sentence that it contended was warranted, and that the court had the discretion to impose any lawful sentence; and (iii) no promises or agreements other than those in the agreement were made by the United States. *Id.* at 2-4. The defendant states in his affidavit that “the U.S. attorney withdrew the offer of misdemeanors,” clearly before he tendered his plea. Defendant’s Affidavit ¶ 13. When he tendered his plea, the defendant stated that he understood that each of the charges was “a serious criminal charge, a felony offense,” Tr. at 5-6; that he pleaded guilty because he was in fact guilty of those charges, *id.* at 10; that his attorney had explained to him to his satisfaction the nature and elements of the charges and the potential penalties upon conviction, *id.* at 11; that he understood the nature of the charges, and that he would be subject upon conviction to the imposition of a sentence of up to 5 years, a fine of not more than \$40,000 or a combination of the two, and a period of supervised release of up to 3 years, *id.* at 15-16; that no

one had forced him or induced him in any way to tender pleas of guilty, *id.* at 20; that he fully understood the plea agreement, *id.* at 22; that the appropriate sentence would be determined by the court, *id.* at 23; that he could not withdraw the plea if the sentence were more severe than he expected or liked, *id.* at 25; and that no one had made a promise to him as to what sentence would be imposed, *id.*

A defendant's responses to the court's inquiries at a plea hearing are presumed to be truthful. *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). The defendant has presented no credible reasons for disbelieving the responses he made at the time. *See also United States v. Martinez-Molina*, 64 F.3d 719, 733 (1st Cir. 1995). Under the circumstances, the defendant, a senior in college, Tr. 4, could not have reasonably believed that he was pleading to misdemeanors rather than felonies or that the court would impose a sentence of only two weeks imprisonment.

To the extent that the defendant contends that his plea was involuntary due to coercion by his counsel, a statement that the prosecutor "didn't lose cases" and advice that the defendant had "better not refuse" the offered plea agreement and that pleading to the charges "was the right thing to do," Defendant's Affidavit ¶¶ 11, 13, which is all that the defendant offers to support this allegation, are insufficient. First, the defendant does not state that he would not have pleaded guilty but for the "coercion," a necessary element of such a claim. *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). Even if his protestations of innocence, Defendant's Affidavit ¶ 5, could be generously interpreted to imply the conclusion that he would not have pleaded guilty but for his counsel's coercive conduct,¹ an indulgence not usually extended to represented defendants, the

¹ The defendant's statements that he did not mail the letters himself, Defendant's Affidavit ¶ 5, and that he never intended to harm the victim, *id.* ¶ 6, are not elements of the crime with which
(continued...)

defendant's argument fails. His claims of promises and coercion are belied by the record, *e.g.*, Tr. at 10 (guilty plea), 14 (defendant's responses must be true and will be taken as true), 15-16 (possible penalties have been explained to defendant), 20 (no one had threatened defendant or attempted to force or induce him to plead guilty); 24 (defendant's attorney has explained likely application of sentencing guidelines to this case); 25 (defendant understands that court is not bound by sentencing recommendations of either side, no one has made a promise in an effort to induce defendant to plead guilty, no one has promised defendant a particular sentence). Again, the defendant offers no reason to disbelieve the statements he made at the plea hearing, and accordingly those statements may be credited by the court. *United States v. Marrero-Rivera*, 124 F.3d 342, 349 (1st Cir. 1997). *See also United States v. Isom*, 85 F.3d 831, 835-36 (1st Cir. 1996) (describing Rule 11 colloquy adequate

¹(...continued)

he was charged. Section 876 of Title 18 of the United States Code provides, in pertinent part:

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any . . . threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.

The defendant's statement that he had no knowledge that the letters would be mailed, Defendant's Affidavit ¶ 5, is contradicted repeatedly by his grand jury testimony. *E.g.*, Grand Jury Proceedings April 15, 1998, Exh. B to Government's Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 ("Government's Response") (Docket No. 21), at 12 (co-defendant licked a stamp and put it on one of the envelopes), 16 (co-defendant asked defendant to write letters because victim would recognize co-defendant's handwriting), 19 (co-defendant mailed first letter before second was written), 22 (defendant bought self-adhesive stamp for one of the letters). The defendant pleaded guilty to aiding and abetting the crime set forth in section 876. This crime is also governed by 18 U.S.C § 2(a), which provides:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

to refute contention that plea was not made knowingly). In addition, the specific statements by his trial counsel reported by the defendant are not sufficient to have overborne his will and forced him to plead guilty when he would not otherwise have done so. *See, e.g., Dean v. Superintendent, Clinton Correctional Facility*, 93 F.3d 58, 62 (2d Cir. 1996) (defendant alleging coercion by his own counsel as basis for relief on collateral review must show that he objected to coerced action at the time and that his will was overborne by his counsel); *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C.Cir. 1992) (practice is coercive so as to render plea involuntary only if it creates improper pressure likely to overbear will of some innocent persons and cause them to plead guilty; listing physical harm, threats of harassment, misrepresentation, or bribes as such practices); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976) (“Advice[,] even strong urging by [accused’s counsel and sister], based on the strength of the State’s case and the weakness of the defense, does not constitute undue coercion.”). *See generally Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993).

The defendant is not entitled to relief on the basis of invalidity of his plea.

B. Assistance of Counsel

The defendant contends that his counsel provided him with constitutionally insufficient assistance in connection with his plea and sentencing. Again, to the extent that the petition is based on allegations concerning the failings of that counsel that are presented only in the defendant’s local counsel’s unsworn, two-page memorandum, they are without support in the record and will not be considered. *Barrett*, 965 F.2d at 1186. The only allegations properly supported by the defendant’s affidavit are that trial counsel failed to reveal to the defendant his “more than casual relationship” with his “successor,” the prosecutor, and that trial counsel coerced his plea. As I have already noted,

the allegation of coercion is contradicted by the defendant's own statements at the plea hearing, and he has submitted nothing here to suggest to the court that those statements should not be presumed to have been truthful.

The defendant's allegation that his trial counsel was "succeeded" by the prosecutor in the United States Attorney's Office is incorrect. That office has represented in its opposition to the petition that the defendant's trial counsel was never employed by the United States Attorney's Office in Maine, Government's Response at 24 n.5, and I know of no reason to doubt that representation. Further, the fact that the defendant's trial counsel may have served as an assistant United States attorney in New Jersey in the past, *see Walker v. Commissioner of Internal Revenue*, 1992 WL 12242 (U.S. Tax Court Jan. 29, 1992), at [2], does not mean that he and the prosecutor in this case had "a more than casual relationship." In the absence of anything other than this allegation itself, the petition presents only the conclusory allegations that the First Circuit has found to be insufficient to justify relief under section 2255.

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 Sixth Amendment right to counsel has been violated. First, the defendant must show that his 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.* This standard also applies to cases in which the defendant pleaded guilty. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The court need not consider the two elements in any particular order; failure to establish either element means that the

defendant is not entitled to relief. 466 U.S. at 697. The “prejudice” element of the test presents the defendant with a high hurdle. He must show more than a possibility that counsel’s errors had some conceivable effect on the outcome of the proceeding. Rather, he must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel’s errors. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996).

The defendant’s presentation does not even begin to meet either prong of the *Strickland* standard. He is not entitled to relief under section 2255 on the basis of his allegations concerning his trial counsel.

C. Protestations of Innocence

“Because conviction on a guilty plea is based solely on the plea, not on the evidence, there is no point in examining the evidence unless it coerced the plea or made it involuntary.” *Gioiosa v. United States*, 684 F.2d 176, 180 (1st Cir. 1982). I have already discussed the defendant’s claims of coercion and involuntariness. There is no reason to consider his assertion of innocence separately, but even if there were the court would be entitled to credit both the defendant’s assertions at the plea hearing that he understood the nature of the charges to which he was pleading guilty, Tr. at 15, 19, and that there was nothing in the Prosecution Version that was untrue or incorrect, *id.* at 19. The prosecution version states, *inter alia*, that the defendant wrote the first of the two letters at his co-defendant’s behest, addressed its envelope, and wore gloves when he handled the letter; and that he wrote the second letter and envelope. Prosecution Version at 2-3. Nothing further was required to establish the defendant’s guilt, and he offers no reason why the court should accept any claims to the contrary at this time.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's petition be **DISMISSED** 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 this 16th day of February, 2000.

*David M. Cohen
United States Magistrate Judge*