

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>V.</b>	)	<b>Criminal No. 98-38-P-C</b>
	)	<b>(Civil No. 00-132-P-C)</b>
<b>RALPH WINCHENBACH, JR.,</b>	)	
	)	
<b>Defendant</b>	)	

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

The defendant, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The defendant was convicted by a jury of distributing cocaine and aiding and abetting the distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 and sentenced to a term of 37 months. Judgment (Docket No. 31) at 1-2. He now contends that he received constitutionally insufficient assistance of counsel. [Amended] Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Motion”) (Docket No. 40) at 5.

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 essential underlying facts may be gleaned from the First Circuit's opinion on the defendant's direct appeal:

Over a period of approximately five months in mid-1997, the Maine Drug Enforcement Agency (MDEA), working in concert with a confidential informant named James Holmes, fomented a series of "controlled" drug transactions. The first occurred in April. Acting on the MDEA's instructions, Holmes gave Wendy Spinney (a target of the probe) \$250 in exchange for Spinney's promise to deliver cocaine. Although Spinney told Holmes that she would procure the cocaine in Rockland, agents followed her to the Ralph Wink Road, a dead-end street in Waldoboro. She disappeared for a brief interval, but the agents then spied her returning from the Ralph Wink Road and trailed her to a motel (where she delivered the cocaine to Holmes).

On May 30, Holmes called Spinney to arrange another purchase. He then went to her abode and gave her \$250. Although Spinney again told Holmes that she would go to Rockland to obtain drugs, agents followed her to Duck Puddle Road (a street leading to Genter Road, which accesses the Ralph Wink Road). A short time later, the agents spotted her coming from the direction of the Ralph Wink Road. Upon returning home, Spinney called Holmes and informed him that she could not get any cocaine.

On June 5, Holmes again called Spinney and arranged to buy an "eight-ball" of cocaine. He then visited her residence . . . and in the ensuing conversation, Spinney identified her supplier as "Junior" and specified that he was based in Waldoboro. This time, the agents tracked Spinney to a trailer on the Ralph Wink Road in which defendant-appellant Ralph Winchenbach, Jr. resided with his quondam paramour, Arlene Jones (formerly Arlene Winchenbach, by virtue of her earlier marriage to one of the appellant's brothers). Spinney spent nearly ten minutes inside the trailer and then returned directly to her home. When Holmes arrived, she gave him the promised eight-ball of cocaine.

On September 3, the MDEA again set Holmes into motion. On this occasion, he gave Spinney \$250 at her dwelling. She said that she would go "to Duck Puddle" to retrieve the cocaine and that her supplier was waiting for her "at Junior's house." Agents followed Spinney and a companion . . . to Duck Puddle Road. They were last seen heading in the direction of the Ralph Wink Road. After a ten-minute interval, an agent observed the pair traveling from the direction of the Ralph Wink Road. At that point, the officers arrested . . . Spinney . . . Spinney had cocaine in her purse.

Upon interrogation, Spinney told the agents that she bought the cocaine for \$200 from “Junior” just prior to her arrest and that “Junior” lived in a trailer on the Ralph Wink Road. She added that she had purchased cocaine from “Junior” at his trailer on about 30 occasions and referred to him at one point as “Junior Winchenbach.” When asked whether “Junior” was Ralph Winchenbach, Jr., Spinney replied that she thought so.

The MDEA promptly applied for a warrant to search, inter alia, “[t]he Ralph Winchenbach Jr and Arlene Winchenbach residence in Waldoboro, located on the Ralph Wink [R]oad box # 277” as well as “[a]ny and all people present and arriving at the residence at the time of the search, including but not limited to Ralph Winchenbach Jr and Arlene Winchenbach.” . . . A state magistrate granted the application and issued a warrant that authorized a search of the premises.

The same evening, a team of officers went to the appellant’s trailer on the Ralph Wink Road to execute the search warrant. When the appellant opened the door, the officers immediately entered the trailer, arrested him, brought him outside, and searched him. They discovered over \$1,000 on his person, including \$80 of the “buy money” that the MDEA had given to Holmes earlier that day.

A federal grand jury indicted the appellant for distribution of cocaine. *See* 21 U.S.C. § 841(a)(1). The district court denied his motion to suppress the evidence obtained as a result of the arrest and the ensuing search of his person, noting that the officers had probable cause to effect an arrest and that they were lawfully present in the appellant’s home. . . . A petit jury subsequently found the appellant guilty.

*United States v. Winchenbach*, 197 F.3d 548, 551-52 (1st Cir. 1999). The First Circuit denied the appeal. *Id.* at 560.

## **II. Discussion**

The defendant contends that his court-appointed trial counsel provided assistance that fell below the standard required by the Sixth Amendment in the following ways: she failed to communicate with him, failed to question defense witnesses as to who actually sold the drugs to Spinney, failed to challenge the sufficiency of the search warrant and failed to challenge Spinney’s “uncorroborated,” “unreliable and untested” testimony. Memorandum of Law Submitted in Support of Petitioner’s §2255 Motion (“Defendant’s Memorandum”), attached to Petitioner’s Motion for Post-Judgment Relief

Pursuant to 28 U.S.C. §2255, etc. (“Original Motion”) (Docket No. 38), incorporated by reference in Motion, at 7.

### **A. Applicable Legal Standard**

*Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable legal 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.* 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. *Id.* 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).

### **B. The Merits**

#### *1. Failure to communicate.*

The defendant contends that he “received no meaningful communications from his lawyer following her appointment” and that “the lawyer failed to respond to petitioner’s attempts to meet with her thereafter to review the issues in the case.” Defendant’s Memorandum at 8-9. However, in the only sworn statement provided by the defendant, he says only that “[i]n the weeks preceeding [sic] my trial, I made repeated and increasingly frequent efforts to meet with my attorney so we could prepare

for the event.” Petitioner’s Affidavit in Support of Application (“Defendant’s Aff.”), attached to Original Motion, ¶ 17. For all that appears in the affidavit, the lawyer met with the defendant several times. *Id.* ¶¶ 13-14, 17. The First Circuit has stated that

[t]he 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) (emphasis in original) (quoting *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C.Cir. 1973)). If counsel demonstrated reasonable competence at trial and the record is devoid of evidence that she lacked significant information, this standard cannot be met. *Id.* The brevity of time spend by a lawyer in consultation with his client, without more, does not establish that counsel was ineffective. *Jones v. Estelle*, 622 F.2d 124, 127 (5th Cir. 1980) (only one meeting before trial). *See also United States v. Reed*, 756 F.2d 654, 657 (8th Cir. 1985) (only two-hour meeting on day before trial).

Here, the gravamen of the defendant’s complaint appears to be that his lawyer did not use the information he made available to her, rather than that she lacked significant information. *See, e.g.*, Defendant’s Aff. ¶¶ 13, 15, 19-20. The trial transcript makes clear that the defendant’s lawyer demonstrated reasonable competence at trial. Most significantly, the defendant does not even begin to suggest how the outcome of the trial would have been different if the lawyer had communicated with him more often. The defendant is not entitled to relief on this ground.

## 2. Failure to question defense witnesses.

The defendant contends that his lawyer should have questioned an unidentified defense witness about the identity of the person who “in fact made the alleged sale of drugs” with which the defendant was charged after that witness testified that the defendant was not present at the time. Defendant’s Motion at 7, 13; Defendant’s Aff. ¶¶ 14, 15. This argument fails for several reasons. First, if the witness had already testified that the defendant was not present when the sale took place, any testimony concerning the identity of the person who did make the sale would be cumulative at best, and probably irrelevant; it would not make acquittal any more likely. *See, e.g., Fisher v. Lee*, \_\_\_ F.3d \_\_\_, 2000 WL 779055 (4th Cir. June 19, 2000), at \*12; *Motley v. Collins*, 18 F.3d 1223, 1228 (5th Cir. 1994). The Sixth Amendment does not require trial counsel to engage in a futile exercise. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir.), *vacated on other grounds* 522 U.S. 964 (1997). Next, the defendant’s failure to identify this witness makes it impossible for the court to grant relief on this basis. *United States v. Herrera-Rivera*, 25 F.3d 491, 497 (7th Cir. 1994); *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989). Finally, the defense theory was that, if any drug transaction took place on the day in question, Spinney bought the cocaine somewhere other than at the trailer which the government contended was the defendant’s residence and which the defendant admitted, Defendant’s Aff. ¶¶ 3-5,<sup>1</sup> he visited frequently after ceasing to be a resident in December 1996. Trial Transcript (Docket No. 33) at 288-89, 292, 294. Asking a defense witness who actually sold the cocaine to Spinney in the trailer that day would be inconsistent with this strategy, which might well be considered a sound one, and accordingly the failure to ask such a question cannot amount to ineffective assistance of counsel. *Argencourt*, 78 F.3d at 16.

---

<sup>1</sup> See also the testimony of Arlene Jones, a defense witness, that the defendant kept clothing, personal belongings, and three cars at the (continued...)

The defendant is not entitled to relief on this ground.

3. *Failure to challenge sufficiency of search warrant.*

The defendant asserts that his lawyer “was unconcerned with any of the facts underlying the insufficiency of the search warrant.” Defendant’s Memorandum at 10. He characterizes this as a failure to conduct research. *Id.* Specifically, he contends that his lawyer failed to assert that he did not reside in the trailer that was the object of the search warrant, “nor did he have any proprietary interest in the residence to which the search warrant issued,” and that she failed to challenge the warrant on the ground that it did not include a physical description of the defendant. Defendant’s Memorandum at 10-11.

The first assertion is incorrect. The defendant’s counsel provided evidence at the detention hearing and again at trial that he did not live in the trailer. Transcript of Detention Hearing at 11, 13, 25; Trial Transcript at 175-78, 231, 247. Even if that were not the case, however, if the defendant did not live in the trailer or own it, he had no expectation of privacy in its contents and accordingly lacked standing to seek to suppress the evidence gathered, *United States v. Lewis*, 40 F.3d 1325, 1333 (1st Cir. 1994), or, in the terms used by the defendant, to challenge the sufficiency of the search warrant, *see Franks v. Delaware*, 438 U.S. 154, 155-56, 164-65 (1978) (attack on affidavit underlying search warrant is brought under Fourth Amendment). The defendant’s lawyer could only attack the search warrant by taking the position that he lived in the trailer, which she did at the suppression hearing. Transcript of Proceedings [Suppression Hearing] (“Suppression Transcript”) (Docket No. 34) at 12-18. Accordingly, the conduct of the defendant’s lawyer could not have fallen below constitutional standards if she had not offered this evidence.

---

trailer. Transcript of Detention Hearing (Docket No. 20) at 17-18, 21-22.

The second assertion is irrelevant. The search warrant at issue granted authority to search only the trailer. Exhibit A to Stipulation (Docket No. 13), at 1. It addressed neither a search of the person of the defendant nor his arrest. Accordingly, there was no need for the warrant to include a physical description of the defendant. *See also United States v. Higgins*, 995 F.2d 1, 2 n.2 (1st Cir. 1993) (affidavit supporting search warrant only invalid if allegedly false or omitted statement is necessary to finding of probable cause). Thus the defendant's lawyer's failure to make this argument could not have affected the outcome of the trial and could not constitute constitutionally ineffective assistance.

4. *Failure to challenge information provided by Spinney.*

The defendant contends that his attorney failed to challenge the reliability of "the uncorroborated information provided by" Spinney in connection with the search warrant and that the search warrant<sup>2</sup> gave "no indication of the honesty and prior reliability of the informant." Defendant's Memorandum at 11. Because the defendant, by the terms of his own sworn affidavit, lacks standing to contest the search warrant, any discussion of Spinney's credibility is academic at best. However, it is clear that the defendant's lawyer did contest the validity of the information provided by Spinney in connection with the motion to suppress the evidence taken from the trailer that she filed on the defendant's behalf. *See, e.g., United States v. Winchenbach*, 31 F.Supp.2d 159, 164-65 (D. Me. 1998); Suppression Transcript at 23-32. Accordingly, because the defendant's assertions are contradicted by the record, he is not entitled to relief on this basis.

If the defendant means to suggest as well that his attorney failed to attack Spinney's credibility during trial, that assertion is also belied by the record. The attorney conducted a vigorous cross-examination of Spinney, Trial Transcript at 111-25, and contended as the cornerstone of her closing argument that Spinney was not telling the truth, *id.* at 281, 283-92.

---

<sup>2</sup> Presumably the defendant means the affidavit presented in support of the application for the search warrant.

5. *Failure to conduct research.*

The defendant contends that his attorney “failed to perform rudimentary research necessary for required determination.” Defendant’s Memorandum at 7. The only explication of this conclusory premise provided by the defendant is a statement that this alleged failure is tied to the search warrant, *id.* at 10, which, as noted, he lacked standing to challenge if he was not a resident of the trailer and had no ownership interest in it; an assertion that his lawyer “conducted no research into the facts,” Defendant’s Aff. ¶ 19; and a repeated allegation that she “conducted no research,” Defendant’s Memorandum at 13. Even if these allegations could reasonably be interpreted to refer to something other than the circumstances surrounding the search warrant, they remain conclusory. In the absence of any indication of what such “research” would have revealed and how that information would have resulted in an acquittal, the court need not give any weight to these allegations. *United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993).

**IV. 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.*

Date this 30th day of June, 2000.

---

David M. Cohen  
United States Magistrate Judge