

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 93-31-B
)	(Civil No. 95-91-B)
LYNN C. GROVER,)	
)	
Defendant)	

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

Lynn C. Grover moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Grover pled guilty to one count of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, and two counts of distribution of cocaine in violation of section 841(a)(1). He bases his motion on claims of a miscalculation of his sentence, prosecutorial misconduct and ineffective assistance of counsel.

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) (per curiam) (citation omitted). Because I find the Grover’s allegations to be either contradicted by the record, conclusory, or insufficient to justify relief if accepted as true, I conclude that no such hearing is necessary and recommend that his motion be dismissed.

I. Background

Grover, represented at all relevant times by court-appointed counsel, signed a plea agreement on September 2, 1993. Agreement to Plead Guilty and Cooperate (“Plea Agreement”) (Docket No. 13). In it he promised to cooperate fully with the government, and the government, in turn, promised to make known his cooperation to whomever he chose. *Id.* ¶¶ 8, 10. The agreement explained that the government made no promises other than those contained therein, and that it was not obligated to move for a downward departure under United States Sentencing Guideline § 5K1.1. *Id.* ¶ 11.

On October 4, 1993 Grover appeared with counsel to enter guilty pleas on the three counts charged. Transcript of Oct. 4, 1993 Proceedings (“Rule 11 T.”) (Docket No. 31) at 1, 10. When the court informed Grover of the mandatory minimum five-year sentence, there was some initial confusion. *Id.* at 12. Grover first stated that he “wasn’t aware of the minimum of five years.” *Id.* He then conferred with counsel. *Id.* at 12-13. In response to the court’s further inquiries, Grover unequivocally affirmed that he understood the sentence and still wished to plead guilty. *Id.* at 13-14.

Grover also confirmed that he had conferred with counsel regarding the plea agreement and fully understood her explanation. *Id.* at 22-23. He acknowledged that the court could not apply the sentencing guidelines until his presentence report was prepared, and that he would have a right to challenge the facts contained in the report. *Id.* at 25-26. Finally, he admitted that no one had made any promise to induce him to plead guilty. *Id.* at 27.

After signing the agreement, Grover provided the government with information on nine drug dealers. Petition, attached response to question 12 at 1. He also completed two monitored drug purchases. *Id.* But when the Assistant United States Attorney asked him to testify before a grand jury two days before his sentencing, he refused. *Id.*

Appearing with counsel at his March 17, 1994 sentencing hearing, Grover confirmed that he knew everything in the presentence report and understood it fully. Transcript of Mar. 17, 1994 Proceedings (“Sentencing T.”) (Docket No. 32) at 4. He stated that “there was a couple of changes that I wanted made [to the presentence report], and they did so, so I’m satisfied.” *Id.* When asked if his counsel had answered all of his questions concerning the report, he replied, “Yes, I was well advised.” *Id.* at 5.

The government recommended the mandatory minimum prison term of sixty months, as well as a three-year period of supervised release. *Id.* The court noted that the mandatory minimum sentence displaced the guideline sentencing range of forty-six to fifty-seven months. *Id.* at 13. Accordingly, the court imposed a sentence of sixty months imprisonment and three years of supervised release. *Id.* at 14. Grover did not appeal the sentence. Petition at 1-2.

II. Calculation of the Sentence

Grover first claims that he should have been sentenced under 21 U.S.C. § 841(b)(1)(C)¹ rather than § 841(b)(1)(B),² and that his base offense level was incorrectly calculated. The sentence, he argues, was based on an improper finding in the presentence report that he distributed more than 500 grams of cocaine.

“A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances.” *Knight v. United*

¹ Section 841(b)(1)(C) imposes no minimum sentence for violations involving less than 500 grams of cocaine.

² Section 841(b)(1)(B) imposes a five-year minimum sentence for violations involving 500 or more grams of cocaine.

States, 37 F.3d 769, 772 (1st Cir. 1994). Although advised of his right to appeal his sentence, Sentencing T. at 17, Grover did not appeal and cites no exceptional circumstances. Accordingly, Grover is barred from challenging the calculation of his sentence. *Knight*, 37 F.3d at 773 (erroneous finding of fact leading to misapplication of sentencing guidelines may not be raised for first time in § 2255 proceeding).

III. Prosecutorial Misconduct

Grover next alleges that the government negotiated the plea agreement in bad faith. Specifically, he claims that the government promised a sentence reduction in exchange for his cooperation, yet never intended to honor its promise. Assuming, *arguendo*, that Grover alleges exceptional circumstances that may be raised for the first time in this motion, his argument is without merit.

The plea agreement specifically disclaims any promise of a sentence reduction. Grover, however, may be alleging a promise separate from the agreement, although the motion is unclear on this point. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (*pro se* inmate's § 1983 complaint held to less stringent standard than pleadings drafted by counsel). If so, this allegation is clearly contradicted by his statements on the record that no one had made any promise to induce him to plead guilty, nor any promise as to what his sentence would be.³ Rule 11 T. at 27.

³ Even accepting *arguendo* his allegation that the government promised a sentence reduction in return for his cooperation, Grover fails to demonstrate any misconduct because, in fact, he did not cooperate fully. The plea agreement required Grover, *inter alia*, to “testify . . . at any and all grand juries . . . in which his testimony is requested,” Plea Agreement ¶ 3, and cautioned that if he “should fail in any way to cooperate fully . . . then the United States may be released from its commitments as set forth in this Agreement,” *id.* ¶ 8.

(continued...)

IV. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court articulated the now familiar ineffective-assistance-of-counsel standard. First, the defendant must show that counsel’s performance was deficient. *Id.* at 687. This requires a showing of errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Id.* A court reviewing a criminal-defense counsel’s performance “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” *Id.* at 689.

A criminal defendant who proves that counsel’s performance was deficient must also demonstrate that the deficiencies likely prejudiced his defense. *Id.* at 687. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

A. Plea Negotiations

Grover further alleges that his counsel was ineffective during plea negotiations in that she:
(1) “failed to obtain a commitment from the Government for a reduction of [his] sentence for [his]

³ (...continued)

Grover concedes that he did not comply with the government’s request that he testify before a grand jury. He claims his counsel informed him that he would receive no sentence reduction unless the target of the grand jury proceeding went to trial and Grover testified at trial. Petition, attached response to question 12 at 1. He refused to testify because he felt he “had been lied to by the Government.” *Id.* Grover’s motivation, however, is immaterial. By failing to cooperate fully, he forfeited any right to the reduced sentence he was allegedly promised. In any event, he received the minimum sentence mandated by law, obviating any possible prejudice.

cooperation”; (2) “failed to properly advise [him] during the course of [his] disclosure of information to the Government”; (3) failed to attend many conferences between him and the U.S. Attorney’s Office; and (4) assigned the case, during her leave of absence, to a young associate with insufficient experience. Petition, attached response to question 12 at 2. But for this ineffective assistance of counsel, he alleges, he “would have been able to negotiate a reduction of [his] sentence with the Government for [his] cooperation.”⁴ *Id.*

Grover cannot demonstrate a reasonable probability that, but for the alleged errors, he could have negotiated such a promise. In return for his full cooperation, the government agreed to make known his cooperation upon his request, but it did not agree to move for a sentence reduction. Grover, offering no evidence that *any* counsel could have convinced the government to make such a promise, fails to satisfy *Strickland*’s prejudice requirement.

Mindful of the disadvantage confronting *pro se* litigants, *see Haines*, 404 U.S. at 520, I recognize that the “failed to properly advise” claim may refer to an allegation detailed in Grover’s claim of prosecutorial misconduct. Counsel allegedly advised him that his grand jury testimony would be insufficient to merit a sentence reduction; the target of the grand jury investigation would have to go to trial, where Grover would have to testify again. This advice caused Grover to refuse to testify, and thus breach his plea agreement. The breach, however, caused no prejudice because of the mandatory minimum sentence under section 841(b)(1)(B). The district court had no choice but to impose the five-year sentence that Grover now challenges.

⁴ Because the United States Attorney’s Office lacks the power to grant a reduction in sentence, I understand Grover to mean that he could have negotiated a commitment to *move for* a reduction in sentence.

B. Sentencing

Grover also alleges that, although his counsel objected to the presentence report's calculation of his sentence, she did not submit an explanation of how properly to calculate it, nor did she object to the court's use of the improper calculation. To satisfy *Strickland*'s prejudice requirement, Grover must demonstrate a reasonable probability that an explanation or objection would have caused the court to find a violation involving less than 500 grams of cocaine.

According to Grover, the presentence report incorrectly found that he distributed a total of 1,952 grams of cocaine. This calculation arose from his admission in a confession that he "purchased" between one-half and one ounce of cocaine each week from July 1991 to June 1993. In fact, he claims, most of that cocaine was for his personal use, not for distribution. Yet, when asked at his sentencing hearing whether he had read the presentence report, he answered that he had and was satisfied with it. That statement clearly contradicts his present allegation that most of the 1,952 grams of cocaine were for his personal use. Accordingly, Grover fails to demonstrate any prejudice caused by counsel's alleged errors.

C. Post-Conviction Representation

Finally, Grover claims that his counsel failed to inform him of his right to counsel on appeal and improperly refused to handle his appeal. The record, however, demonstrates no conduct implicating the Sixth Amendment.

The day after the sentencing hearing, counsel wrote to Grover:

As the court informed you, you have 10 days to appeal the sentence if you wish to do so. *If you want to appeal, let me know immediately. I can file the notice for you but will not agree to represent you on the appeal.* I do not think there is an issue to be

appealed. Appeals are granted if there has been an error of law made by the judge or a clearly erroneous error of fact. I do not see that there has been. *You can request the court appoint another lawyer for you on the appeal.*

Exh. B to Petition at 1 (emphasis added). Grover argues that, although he knew he could ask to have a lawyer appointed, he did not know he was entitled to such an appointment. I find that counsel's explanation was sufficient to inform Grover of his right to have counsel appointed on appeal.

Grover is correct in suggesting that his counsel could not withdraw except by leave of court.⁵ Counsel, however, did not withdraw. Although she indicated that she would not represent him on appeal, she offered to file the notice of appeal. Had Grover accepted her offer, she would still have been acting as his counsel unless relieved by the court of appeals. Grover, having failed to avail himself of his trial counsel's offer to perfect an appeal on his behalf or to have otherwise done so, gains nothing from his claim that counsel improperly refused to represent him on appeal.⁶

V. Conclusion

⁵ Appointed counsel must represent the defendant at "every stage of the proceedings from his initial appointment through appeal" unless the appointment is terminated by the trial or appellate court. United States District Court for the District of Maine, *Plan for the Adequate Representation of Defendants Pursuant to the Criminal Justice Act of 1964, As Amended*, at 7 (adopted Jan. 18, 1971). Defendants who desire court-appointed counsel on appeal must make a request to the First Circuit. 1st Cir. R. 46.5(a). The First Circuit may appoint the counsel who represented the defendant in the district court or other counsel of its own choosing. 1st Cir. R. 46.5(b). Had she been requested by Grover and/or appointed by the court of appeals, Grover's trial counsel could have petitioned the First Circuit for relief from the appointment upon a showing of cause. *Id.* Furthermore, if she believed the appeal to be frivolous, she could have filed a motion to withdraw stating the reason therefor, accompanied by a brief following the procedure described in *Anders v. California*, 386 U.S. 738, 744 (1967) ("brief referring to anything in the record that might arguably support the appeal"). 1st Cir. R. 46.4(a)(4).

⁶ Grover also claims that counsel failed to inform him adequately of his right to appeal. Yet, he refutes his own claim by conceding that counsel "informed [him] of [his] right to appeal" in her letter. Petition, attached answer to question 12 at 3. Furthermore, the district court had already advised him of this right. Sentencing T. at 17.

For the foregoing reasons, I recommend that the petitioner'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 21st day of November, 1995.

*David M. Cohen
United States Magistrate Judge*