

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Docket No. 98-332-P-H
)	(Criminal No. 96-47-P-H)
JOHN R. COLLINS,)	
)	
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. A sentence of 160 months was imposed after he pleaded guilty to an information charging him with conspiracy to possess with intent to distribute cocaine, a violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. Judgment (Docket No. 28) at 1-2. Following an unsuccessful appeal, the defendant now contends that he received ineffective assistance from his trial and appellate lawyers in violation of his rights under the Sixth Amendment to the United States Constitution.

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) (citations omitted). Finding that the defendant’s allegations cannot be accepted as true and that, even if accepted as true, they would not entitle him to relief, I recommend that the motion be denied without an evidentiary hearing.

Discussion

The defendant's motion was filed on a printed form, accompanied by a document entitled Defendant Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Memorandum"). Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 34). The motion lists four grounds for relief, all of which begin "Ineffective assistance of counsel." Motion at 5-6. Ground one is further presented as "Failure to argue the quantity of drugs involved in the offense," Ground two as "Failure to argue the crack enhancement," Ground three as "Failure to argue or object to the history category points,"¹ and Ground four as "failure to argue proper issue on direct appeal." *Id.* In the space on the form for supporting facts following each ground, the defendant has entered "Please follow attached brief." *Id.* The defendant has signed the motion "under penalty of perjury." *Id.* at [7]. His signature on the memorandum is not notarized, and there is no statement concerning perjury on the signature page. Memorandum at 21.

The government argues that the motion must be dismissed because none of the factual bases for the legal claims is made under oath. Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence and Supporting Memorandum of Law ("Government Memorandum") (Docket No. 38) at 23. The situation presented in this case is essentially the same as that before the court in *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), *rev'd on other grounds*, 137 L.Ed.2d 1001 (1997). In that case, the defendant's sworn petition "contained nothing more than the bare statement that he received ineffective assistance of counsel." *Id.* at 1413. The First Circuit held that "[a] habeas application must rest on a foundation of factual allegations presented under oath, either in a

¹ The defendant has withdrawn this claim. Petitioner Reply Brief in Opposition to the Government Memorandum of Law ("Defendant's Reply") (Docket No. 39) at 5.

verified petition or supporting affidavits.” *Id.* “Facts alluded to in an unsworn memorandum will not suffice.” *Id.* A presentation like that of the defendant here, with all relevant factual allegations in an unsworn document, is a “fatal shortcoming.” *Id.* The defendant has filed a reply brief which is executed under pain of perjury. Defendant’s Reply at 7. However, even after being put on notice of the deficiency in his earlier filing by the government memorandum, the defendant has made no effort to provide the necessary oath for his earlier factual submission. Contrary to the defendant’s argument, the court may not overlook the fatal shortcoming in his submission because he appears *pro se*. See *Sanchez v. United States*, 921 F. Supp. 56, 60 (D.P.R. 1996) (extending this requirement of *LaBonte* to *pro se* section 2255 petitioner).

Even if the court were not required to dismiss the defendant’s motion for this reason, he is not entitled to relief on the merits. *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.* 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. In the First Circuit, courts “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. 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*, 78 F.3d at 16.

A. Appellate Counsel

The defendant argues that the assistance provided by his appellate counsel fell below the constitutional standard because that lawyer raised the issue of ineffective assistance by his trial counsel on direct appeal. Contrary to the defendant’s representation, that issue was not the only one raised by his counsel on appeal. *United States v. Collins*, 1997 WL 704425 (1st Cir. Nov. 12, 1997) at *1 (“The Anders brief *also* asserted that trial counsel had represented Collins ineffectively.”) (unpublished opinion, per curiam; emphasis added). The First Circuit will not consider claims of ineffective assistance of trial counsel on direct appeal, absent circumstances not ordinarily present. *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993). However, the fact that the defendant’s trial counsel attempted to raise such an issue caused no prejudice to him, because, as the First Circuit noted, he was free to bring that claim in a proceeding under section 2255, 1997 WL 704425 at *1, as he has now done. The defendant relies on case law in which no appeal was filed at all, Memorandum at 19, and that authority is inapposite. Here, an appeal was filed. The defendant has shown no prejudice within the meaning of *Strickland*.

B. Drug Quantity

The defendant challenges the performance of his trial counsel on the ground that he did not object (i) to the calculation of drug quantity used to determine the range of sentence applicable to him under the United States Sentencing Commission Guidelines (“U.S.S.G.”) and (ii) to the drug

quantity calculation on the basis that “the alleged transaction did not constitute relevant conduct.” Memorandum at 9. According to the defendant, if the drug quantity had been correctly calculated, the amount would have been 15.2 grams, his base offense level would have been 22 and his sentencing range not more than 60 months.² Reply Memorandum at 4.

The drug quantity calculation is set forth in the Revised Presentence Investigation Report (“PSI”) at pages 6-7. It includes 4.0 grams purchased by a cooperating individual in an apartment where the defendant was present, 9.1 grams seized from the apartment at the time the defendant was arrested, and 340.2 grams estimated as the amount the defendant sold over a period of twelve weeks, based on the amount described by a codefendant and other government cooperating witnesses. The First Circuit has held that a sentencing court may estimate the quantity of cocaine involved in an offense from the amount of cash seized, so long as the earlier sales were part of the same course of conduct as the offense of conviction, *United States v. Gerante*, 891 F.2d 364, 369 (1st Cir. 1989); from the number of bundles seen by a witness before they were destroyed by fire, when one bundle had been retrieved and its contents analyzed, *United States v. Hilton*, 894 F.2d 485, 486-88 (1st Cir. 1990); and from evidence that the defendant received 12 similar packages, although the contents of only one had been analyzed, *United States v. Sklar*, 920 F.2d 107, 111-13 (1st Cir. 1990). The evidence from which the estimate was made in this case, statements from others with knowledge of the defendant’s own drug sales activity, is sufficient as well.

Relevant conduct is a factor that is applied in determining base offense level and adjustments thereto under the sentencing guidelines. Section 1B1.3(a) of the guidelines provides, in relevant part:

² In fact, the base offense level for 24.3 grams of cocaine base is 28, not 22. U.S.S.G. § 2D1.1(c)(6). The base offense level for 353.3 grams of cocaine would be 22, U.S.S.G. § 2D1.1(c)(9), but that is not the distinction raised by the defendant in this claim.

Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, on in the course of attempting to avoid detection or responsibility for that offense.

Application Note 2 to this section of the guidelines provides, in relevant part:

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

As the First Circuit has noted, “[r]elevant conduct increases a defendant’s sentence, sometimes very significantly, despite the fact that it was not charged in an indictment, and even despite the fact that a jury may have acquitted the defendant for that precise conduct.” *United States v. Carrozza*, 4 F.3d 70, 80 (1st Cir. 1993) (citations omitted).

Here, the defendant seems to contend, albeit in conclusory fashion, that there is no evidence to support a finding that the 340.2 grams of cocaine base which was added to the drug calculation for purposes of sentencing was known to him or reasonably foreseeable. Memorandum at 10; Reply Memorandum at 3. To the contrary, the evidence presented in the PSI is that the defendant himself

“had been purchasing and distributing two ounces of crack per week over a three to four month period.” PSI at 6. It is difficult to imagine any evidence more probative of a defendant’s actual knowledge, let alone reasonable foreseeability. The defendant’s contention that the use of these amounts in calculating his sentence was unfair to him has been rejected by the First Circuit. *Carrozza*, 4 F.3d at 81. In addition, the defendant admitted that this information was true when he told the court at his Rule 11 hearing that he did not disagree with the prosecution version.³ Transcript of Proceedings (Docket No. 31) at 12. He may not now rely on his contention to the contrary as the basis for a claim of ineffective assistance of counsel. *See United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984) (defendant should not be relieved of statements made at change-of-plea proceeding in absence of showing credible, valid reasons to overcome presumption of truthfulness).

The defendant is not entitled to relief on the basis of the alleged failure of his trial counsel to challenge the calculation of the drug quantity used to determine his sentence.⁴

C. “Crack” Cocaine

The defendant argues that his trial counsel provided constitutionally defective assistance by advising him that cocaine base was crack cocaine, “thus causing petitioner to plead guilty to avoid possibility of enhanced sentence,” and by failing to object to the sentencing of the defendant on the

³ Specifically, the prosecution version provides: “[A certain named witness] would testify that : (1) she observed the Defendant purchase and distribute 1-2 ounces of crack cocaine on a weekly basis over a 3-4 month period preceding the . . . arrests; and (2) during the several months . . . she delivered crack cocaine at his direction to a number of customers.” Prosecution Version (Docket No. 24) at 3.

⁴ The defendant contends for the first time in his reply memorandum that his trial counsel should have argued that the “John” mentioned in a section of the PSI was not necessarily the defendant, and that two Johns may have been involved. Reply Memorandum at 3. This issue was not raised in the initial motion and therefore will not be considered. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

basis of crack cocaine rather than “mere cocaine base.” Memorandum at 11. He relies on *United States v. James*, 78 F.3d 851 (3d Cir. 1996), to support his argument.⁵

However, the defendant’s trial counsel did raise such an objection. PSI, Addendum, Objection No. 1, at 16. In addition, this issue was raised by the defendant on appeal and decided against him. *United States v. Collins*, 1997 WL 704425 at *1. Failure of trial counsel to engage in a futile exercise cannot constitute a Sixth Amendment violation. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir.), *vacated on other grounds* 118 S.Ct. 409 (1997). Further, the defendant did not contest the prosecution version, which clearly states that the substance involved was crack cocaine. Prosecution Version at 1-3. *See United States v. Washington*, 115 F.3d 1008, 1010-11 (D.C.Cir. 1997) (distinguishing *James* on this basis). Finally, the First Circuit has stated that a finding by chemical analysis that the substance at issue is cocaine base, coupled with other evidence that the cocaine base is in fact crack cocaine, the circumstances present here, is sufficient for purposes of sentencing upon conviction under section 841(a)(1), *United States v. Robinson*, 144 F.3d 104, 108-09 (1st Cir. 1998), and *James* does not provide binding precedent in the First Circuit, *see United States v. Fulton*, 960 F. Supp. 479, 494 (D. Mass. 1997) (court not persuaded that the First Circuit would follow *James*).

For all of these reasons, the defendant is not entitled to relief on this ground.

⁵ In his reply memorandum, the defendant argues that he “pled guilty to cocaine not crack.” Reply Memorandum at 4. This is not the issue presented in *James*, nor does it appear to be the issue presented in the defendant’s initial motion, both of which dealt only with the alleged distinction between cocaine base and crack. To the extent that the defendant’s initial motion might be construed to contend that his sentence should have been based on possession of powder cocaine rather than cocaine base, his adoption of the prosecution version at his plea hearing forecloses section 2255 relief on this basis, for the reason set forth in the text that follows.

Conclusion

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 23rd day of November, 1998.

*David M. Cohen
United States Magistrate Judge*