

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

vs.

SHAFF RANDOLPH

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CRIMINAL ACTION

NO. 06-720

DuBois, J.

July 19, 2013

MEMORANDUM

I. INTRODUCTION

After a three-day jury trial, petitioner Shaff Randolph was convicted on November 15, 2007 of conspiracy to distribute cocaine, attempted possession of cocaine, and possession of a firearm in relation to a drug trafficking crime. Presently before the Court is Randolph's motion under 28 U.S.C. § 2255. Randolph has withdrawn all claims presented in his motion except one: that he was never told of a plea offer that had been made by the Government to his trial counsel. Because the record did not conclusively show that Randolph was not entitled to relief, the Court held an evidentiary hearing on June 21, 2013. For the reasons set forth below, Randolph's § 2255 motion is denied.

II. BACKGROUND

The facts of this case are set forth in the Third Circuit decision, United States v. Randolph, 425 F. App'x 181 (3d Cir. 2011), which affirmed Randolph's convictions. Accordingly, the Court recites in this Memorandum only those facts necessary to explain the Court's ruling on Randolph's motion.

By Superseding Indictment, Randolph was charged with (1) conspiracy with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846, (2) attempted possession

with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1), and (3) possession of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). These charges arose out of the discovery by United Parcel Service (“UPS”) of a package containing three one-kilogram bricks of cocaine. Id. at 182. Upon removing most of the cocaine, law enforcement officers conducted a controlled delivery of the package. Id. Shortly after the package was delivered to a house in Philadelphia, Randolph arrived and then exited the house with the unopened package. Id. When Randolph saw uniformed officers approaching, he threw the package onto the lawn. Id. The officers arrested Randolph and removed a loaded nine-millimeter handgun from his waistband. Id. At the June 21, 2013 hearing, Randolph claimed that this was the first time he had been arrested and that this was the first “experience [he] had with an arrest” (Hearing Transcript, June 21, 2013 (“Hearing”), at 74, 83.)

Randolph privately retained counsel (“trial counsel”) in connection with the charges in this case. (Id. at 5.) Initially, Randolph was prosecuted by the Philadelphia District Attorney’s office after his arrest in February of 2006. (Id. at 6.) However, in January 2007 the Federal Government adopted the case, and the state case was closed. (Id. at 9-10.) A Superseding Indictment was filed in February of 2007. The trial was continued three times on motions by defendant and the Government. (Docs. 7, 9, 13, 19.) The second such motion for continuance states that, “the government and the defendant are presently engaged in negotiations in this case and are discussing a possible pre-indictment disposition of this charge.” (Doc. 13, at 2.)

The parties agree that the Government made an initial oral plea offer to defense counsel which did not specify any charges to be dropped but was contingent on Randolph’s cooperation

with the Government. (Hearing at 23-24, 54-55.) This offer was relayed to Randolph by trial counsel, and Randolph rejected it because it required his cooperation. (Id. at 54, 93.) The parties also agree that some time between May 2007 and the trial date in November 2007, the Government informed trial counsel of a second plea offer under which defendant would plead guilty to the drug charges and the § 924(c)(1) gun possession charge would be dismissed. (Id. at 27, 55, 122.)¹ This second plea offer did not require cooperation by Randolph. (Id. at 52.)

Randolph's trial counsel testified at the hearing on June 21, 2013 that he specifically recalled the second plea offer because he was informed by Government counsel, John Gallagher, that an undercover informant was involved in Randolph's case and the informant was still working on other matters. (Id. at 24.) According to trial counsel, Gallagher explained that he "didn't want to burn the informant out and that [Gallagher] was willing to drop the 924(c) in exchange for a plea to the [drug counts]." (Id.) It was trial counsel's understanding that the second plea offer "would disappear . . . if at any point [the Government] had to disclose the identity of the confidential source[.]" (Id. at 52.) Trial counsel also testified that he found it unusual for the Government to be willing to drop the § 924(c)(1) charge, particularly in a situation where the defendant was unwilling to cooperate. (Id. at 52-53.)

During the June 21, 2013 hearing trial counsel stated that he informed Randolph of the Government's second plea offer and told him it would be withdrawn if the Government had to disclose the identity of the confidential source. (Id. at 59, 61.) Trial counsel testified that he told Randolph that the second plea offer was "favorable," but added that "ultimately I leave the decision up to the defendant, I don't make anyone do anything." (Id. at 59.) Trial counsel

¹ The § 924(c)(1) charge carried a mandatory sentence of 60 months to run consecutive to any other sentence imposed in the case. See 18 U.S.C. §924(d)(ii).

further said in a letter to the Court dated August 9, 2012, that it was his “opinion and recommendation that [Randolph] should accept this offer . . . I discussed this offer and my recommendation at length with Mr. Randolph.” (Letter of Trial Counsel, dated August 9, 2012, at 1.) Nevertheless as trial counsel testified, Randolph rejected the second plea offer. (Hearing at 30.)

According to trial counsel, Randolph declined the second plea offer because he refused to believe that a confidential witness with knowledge of his drug activity would testify at trial. (Id.) Trial counsel further testified that at one pretrial hearing, either Government counsel or an agent told Randolph that “they weren’t . . . bluffing, that they had someone that was close to him” who was willing to testify at trial, but that Randolph continued to believe that no such person would testify against him. (Id. at 31.)

Randolph disputes the assertions of his trial counsel. Randolph testified at the hearing that he was never informed of the Government’s second plea offer to drop the §924(c)(1) gun possession count in exchange for a guilty plea on the drug counts. (Id. at 79.) According to Randolph, trial counsel only told him about the Government’s first plea offer which required his cooperation, and he refused to cooperate. (Id. at 82.) Further, as the case progressed to trial, Randolph said he believed that he could “fight” the gun charge because he was licensed to carry the handgun that was recovered. (Id. at 84.) Randolph testified that if he had been informed of the Government’s second plea offer, he would have accepted it. (Id. at 90-91.)

Trial counsel testified that he and Randolph did not discover the identity of the confidential informant, a good friend of Randolph, until the first day of trial, when the informant took the stand to testify. (Id. at 35, 61.) Trial counsel claimed that once Randolph learned the identity of the

confidential informant, Randolph asked if the second plea offer was still a possibility. In response, trial counsel conferred with Gallagher and was told that the offer “was no longer on the table because the informant was exposed.” (Id.) By contrast, Randolph testified that on the first day of trial, he went with trial counsel and Gallagher to the jury selection room, and before they entered Gallagher asked whether Randolph wanted to “cooperate.” (Id. at 89.) Randolph claims that he declined the offer, at which point Gallagher stated “here’s my smoking gun,” and handed trial counsel a paper which identified the confidential informant. (Id. at 88.) When Randolph learned the identity of the informant, he claims he asked his trial counsel, “see if you can get me a deal.” (Id.) On cross-examination, Randolph reiterated that he was not willing to cooperate with the Government, and that when he discovered the informant’s identity, he sought a plea deal that “[did] not involve cooperation[,]” but the Government refused. (Id. at 95.)

Defendant proceeded to trial and was convicted on all three counts in the Superseding Indictment. At sentencing on February 8, 2008, the sentencing guideline range was determined to be 138-157 months. (Judgment, at 7; PSR, at ¶68; Hearing, at 123.) The sentencing judge imposed a sentence below the guideline range, 120 months’ imprisonment–60 months on the two drug charges plus a mandatory 60 months on the §924(c)(1) gun charge. (Hearing, at 104.)

III. LEGAL STANDARD

Randolph claims that his trial counsel was ineffective for failing to inform him of the Government’s second plea offer. “Strickland v. Washington supplies the standard for addressing a claim of ineffective assistance of counsel.” United States v. Smack, 347 F.3d 533, 537 (3d Cir. 2003) (citing Strickland, 466 U.S. 668, 687 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686.

This standard requires a two-part inquiry. “First, the defendant must show that counsel’s performance was deficient,” that is, “that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-88. The measure for counsel’s performance under the first prong of Strickland is “whether counsel’s assistance was reasonable considering all the circumstances” including “prevailing professional norms.” Id. at 687-88. “Second, the defendant must show that [counsel’s] deficient performance prejudiced the defense.” Id. at 687. To establish prejudice, the defendant must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012). Accordingly, where defense counsel does not communicate such formal offers to defendant and the offers lapse, that constitutes “deficient performance” Id. at 1409. “To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.” Id.

IV. DISCUSSION

In accordance with Frye, the Court must determine whether Randolph's trial counsel failed to inform him of the Government's second plea offer. If Randolph has not made such a showing, he cannot establish deficient performance under Frye.

There is little evidence on this issue apart from the testimony of Randolph and his trial counsel at the June 21, 2013 hearing. Certain of the motions and orders for trial continuances discuss the fact that plea negotiations between the parties were ongoing prior to trial. However, these documents do not disclose the content of such negotiations, or what Randolph knew about the Government's plea offers. The Court's review of the trial and pretrial conference transcripts reveals no discussion on the record concerning plea negotiations or Randolph's knowledge of the Government's plea offers. As such, in considering Randolph's claim that he was not told of the Government's second plea offer, the Court is left only with the testimony of Randolph and his trial counsel.

During the June 21, 2013 hearing Randolph and his trial counsel asserted contradictory versions of the facts. Randolph claims that he was never told of the Government's second plea offer, while trial counsel avers that he informed Randolph of that offer, and Randolph refused to accept it. Randolph also claims that on the day of trial, when he discovered the identity of the confidential informant, he asked trial counsel if he could get a plea deal that did not involve cooperation. On this issue, trial counsel claims that when Randolph discovered the informant's identity, Randolph asked if trial counsel could still get him the Government's second plea offer. In short, Randolph and his trial counsel disagree entirely on whether Randolph was ever told about the Government's second plea offer.

The Court finds credible trial counsel's testimony that he discussed the Government's second plea offer with Randolph, and that Randolph refused the offer because he refused to believe that the Government's claimed confidential informant would testify against him. These statements are in accord with Randolph's own admission at the hearing that he found it "impossible" that a confidential informant with the claimed intimate knowledge of his drug activities would testify at trial. (Hearing at 108.) At the June 21, 2013 hearing, Randolph theorized that trial counsel failed to inform Randolph of the offer because he mistakenly believed that he could prevail at trial. (Id. at 125-27.) Such speculation does not undermine trial counsel's testimony in which he clearly recalled the reason why the Government made its second plea offer, its unusual nature, and the fact that he relayed this offer to Randolph.

In addition, several of the statements made by Randolph during the hearing were either inaccurate or illogical. For instance, as counsel for the Government pointed out in the hearing, Randolph's claim that he asked for a plea deal without cooperation on the day of trial lacks credibility. According to Randolph, the only plea offer of which he was aware involved cooperation for the Government. But Randolph stated that when the confidential informant was revealed just before jury selection, when the full strength of the Government's case was disclosed, he brought up for the first time the possibility of a plea offer that did not involve cooperation. (Id. at 95.) Randolph did not explain why he thought the Government might offer him such a generous deal, after the informant was disclosed on the first day of trial.

Further, Randolph claimed multiple times that he had not been arrested before this case. (Id. at 74, 83.) On cross-examination, however, Randolph admitted that such claims were untrue and that he had been arrested, in November of 1996. (Id. at 99.) Finally, Randolph claimed that

in one of his meetings with his trial counsel, he was shown a copy of an “indictment” which mentioned a confidential informant. (Id. at 105.) However, during the hearing on June 21, 2013, Randolph admitted that the Superseding Indictment in his case was not the document he read, and the Court notes that the initial Indictment similarly contains no reference to a confidential informant. (See Id. at 107.)

In sum, parts of Randolph’s testimony were untruthful, inconsistent, or reflected a misunderstanding of issues in his case. Apart from his testimony, Randolph offered no evidence to support his claim that he was never informed of the Government’s second plea offer. Randolph did not present any evidence that impeached trial counsel’s consistent testimony that he informed Randolph of the Government’s second plea offer, and that Randolph rejected it. The Court therefore concludes that Randolph has not carried his burden to show deficient performance on the part of his trial counsel. See United States v. Kelly, 2013 WL 3231631, at *5 (E.D. Pa. June 27, 2013) (finding Frye claim “meritless” where Government did not make a plea offer to defense counsel). Given that Randolph has not shown that counsel was deficient by failing to inform him of the Government’s second plea offer, the Court need not address Strickland’s prejudice prong. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (“[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.”). Randolph’s § 2255 motion is therefore denied.

V. CONCLUSION

For the foregoing reasons Randolph’s § 2255 motion is denied. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	NO. 06-720
SHAFF RANDOLPH	:	

ORDER

AND NOW, this 19th day of July, 2013, upon consideration of defendant’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 54, filed June 12, 2012), Government’s Response in Opposition to Defendant’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 58, filed August 9, 2012), Defendant’s Supplement to his Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence (Document No. 58, filed November 15, 2012), and the related filings of the parties,² following a hearing on June 21, 2013, for the reasons set forth in the Memorandum dated July 19, 2013, **IT IS ORDERED** as follows:

1. Defendant’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED**;
2. A certificate of appealability will not issue for any of defendant’s claims because reasonable jurists would not debate whether the motion states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2), see Slack v. McDaniel, 529 U.S.

² The related filings are: Government’s Supplemental Response in Opposition to Defendant’s Supplemental Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 65, filed November 20, 2012), Government’s Supplemental Response in Opposition to Defendant’s Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 69, filed January 22, 2013), Defendant’s Statement as to Each Issue Raised in Defendant’s Motion Under 28 U.S.C. § 2255 on Which Defendant Seeks an Evidentiary Hearing and His Motion for an Extension of Time Within Which to File His Affidavit in Support of His 2255 Motion (Document No. 70, filed February 3, 2013), Letter from Defense Counsel dated February 11, 2013, and Affidavit of Shaff Randolph in Support of his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Document No. 73, filed February 19, 2013).

473, 484 (2000); and

3. The Clerk of Court shall **MARK** the case **CLOSED**.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.