

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

<u>UNITED STATES OF AMERICA,</u>	:	
	:	CRIMINAL ACTION NO. 09-281
v.	:	
	:	CIVIL ACTION NO. 12-5046
<u>HYMAN GARCIA,</u>	:	
	:	

MEMORANDUM OPINION

Rufe, J.

January 6, 2015

Before the Court is Defendant Hyman Garcia’s Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255, and the Government’s Motion to Dismiss in Part and Deny in Part Defendant’s Petition, to which Garcia did not file a response. For the reasons that follow, Garcia’s Motion will be denied and the Government’s Motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 10, 2011, Garcia pled guilty to three counts of distribution of crack cocaine, and possession of a firearm by a convicted felon, pursuant to a plea agreement made under Fed. R. Crim. P. 11(c)(1)(C). He had made three sales of crack cocaine to a confidential informant working with the Allentown police department, in controlled transactions. After these three sales, Detective Diehl obtained a search warrant for Garcia’s residence, where police found a loaded firearm and products related to the drug trade. Because Garcia was a convicted felon at the time, he was prohibited from possessing that firearm. The plea agreement provided for dismissal of one count which carried a 60-month mandatory sentence to be imposed consecutively to other sentences, and dismissal of an information which would have required a recidivist enhancement under 21 U.S.C. § 841(b) be imposed. The government and Garcia agreed to seek the imposition of a sentence of 57 months imprisonment, a sentence well below the bottom of the applicable

sentencing guidelines range (151 to 188 months). When Garcia was sentenced on September 12, 2011, the Court accepted the terms of the Rule 11(c)(1)(C) plea agreement, and imposed the agreed-upon sentence of 57 months imprisonment.

II. DISCUSSION

As part of his guilty plea, Garcia waived his appellate rights, including his right to collateral review. Garcia did not appeal his conviction, but instead filed this request for collateral review. As explained to him at the plea colloquy, the waiver he signed strictly limits the types of claims he may bring in his § 2255 motion.

The claims he raises in his petition are: 1) counsel¹ was ineffective for advising him to plead guilty and for failing to properly advise him of the appellate rights he would waive by pleading guilty; and 2) counsel did not effectively cross-examine the detective at the hearing on the motion to suppress and failed to request a *Franks* hearing despite evidence that the detective was lying.² The Government acknowledges that the first claim is cognizable despite the waiver, but asks the Court to deny the claim on the merits. The Government filed a Motion to Dismiss the second claim, arguing that it is barred by the waiver provisions in the plea agreement.

A. Ineffective Assistance with Regard to Appellate Waiver in the Guilty Plea Agreement

The Sixth Amendment guarantees effective assistance of counsel.³ To state a claim for ineffective assistance of counsel, “the defendant must show that counsel’s performance was

¹ Garcia was represented by two attorneys from the Federal Community Defender Office for the Eastern District of Pennsylvania at the time of his plea.

² The Government reads the petition as containing a third claim, that Garcia’s attorneys were ineffective for failing to have the quantity of drugs properly measured before presentment of the case to the grand jury. However, this is not set forth as a claim for relief in the petition; rather, Garcia’s motion to dismiss the indictment on this basis is listed in his summary of pretrial motions filed. Doc. No. 96, ¶ 11. Garcia’s two grounds for relief are set forth in ¶ 12.

³ *McCann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970).

deficient,” meaning “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the attorney’s deficient performance prejudiced the defense.”⁴

Garcia argues that his counsel were ineffective, in that they did not adequately explain what constitutional rights he was waiving by agreeing to the plea agreement, although he specifically asked counsel to explain the phrase “this waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.” Counsel indicated that it meant he was not waiving his right to appeal constitutional claims, which Garcia says he interpreted to include his fourth and sixth amendment rights. Thus, Garcia argues, he misunderstood the appellate waiver to which he was agreeing.

At the plea agreement hearing, the Court reiterated the precise waiver language of the plea agreement, and asked Garcia if he understood. Garcia indicated that he did, and that he had no questions for his counsel. Without probing further, the Court concluded that defendant’s waiver was knowing and voluntary, as required by *United States v. Mabry*.⁵

Prior to sentencing, Garcia sent a letter to the Court, *pro se*, although he was represented by counsel, asking to withdraw his guilty plea. His counsel did not adopt this or file a counselled motion to withdraw the plea. The Court addressed Garcia’s letter at sentencing. The Government told the Court: “[Garcia] is essentially asking for a better deal. He is also asking that Your Honor reconsider your denial of his motion to suppress and his request for a Franks hearing. He wants to preserve those arguments on appeal, but he has already pled pursuant to a plea agreement, and there he is only entitled to the rights under that agreement. . . . So he has not advanced any

⁴ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁵ 536 F.3d 231, 237-38 (3d Cir. 2008).

grounds for a withdrawal of the plea. . .”⁶

After hearing from Garcia’s lawyer, the Court noted for the record that Garcia’s counsel did not adopt the motions. Although the Court then stated that it would not entertain the *pro se* request,⁷ the Court asked Garcia whether he was raising either actual innocence or other miscarriage of justice, as those issues could provide a basis for withdrawing a guilty plea.⁸ Garcia did not address this inquiry, but instead asked whether there was any way he could enter the plea but preserve his right to appeal the Court’s ruling on his motion to suppress. The Court responded that: “part of the terms of that plea agreement were that you do not appeal pretrial rulings.”⁹ The Court also pointed out that, during the plea colloquy, Garcia had admitted he was guilty of the charges contained in the superseding indictment, and the Court believed those admissions.¹⁰ Garcia was then given time to confer with his counsel.

After a recess, counsel advised the Court that Garcia was voluntarily withdrawing his request to withdraw his plea, and was ready to proceed with sentencing, pursuant to the agreement. At that point, the Court was satisfied that Garcia fully understood that certain claims he had previously wished to raise on appeal, including an appeal of the Court’s pretrial ruling on his suppression motion, had been waived upon entering his plea of guilty.¹¹ The plea colloquy was not marred by error. Through the efforts of both counsel and the Court, Garcia clearly understood what rights he was waiving by accepting a guilty plea. In addition, the Court noted that Garcia was receiving a significant benefit under the plea agreement, including the

⁶ Sentencing Tr. at 13.

⁷ Sentencing Tr. at 14.

⁸ Sentencing Tr. at 23.

⁹ *Id.*

¹⁰ Sentencing Tr. at 24, 25; see also Change of Plea Tr. at 39.

¹¹ Change of Plea Tr. pages 12-28.

withdrawal of a count and information each of which would have greatly increased his sentence, and an agreed-upon sentence of 57 months imprisonment, well below the bottom of the guidelines range. The record demonstrates that Garcia knowingly and voluntarily agreed to waive his appellate rights. He has not demonstrated a reasonable probability that, but for counsel's explanation of the waiver provision, he would have proceeded to trial rather than pleading guilty,¹² given the discussion of the waiver provision at sentencing, and benefits he received by entering into the plea agreement. Thus, the Court cannot find that counsel was ineffective, nor that Garcia was prejudiced by counsel's explanation of the appellate waiver.

B. Ineffective Assistance with Regard to Police Affidavit and Testimony at Suppression Hearing

Next, Garcia argues that counsel was ineffective in failing to adequately challenge the affidavit and testimony of a police officer who Garcia believes gave inconsistent and false statements about Garcia in an affidavit for a search warrant and at Garcia's suppression hearing.

The appellate waiver in the plea agreement precludes Garcia from challenging the court's earlier ruling on his motion to suppress and the *Franks* issue, and Garcia was specifically advised that the appellate waiver in his plea agreement would preclude him from challenging this ruling. To the extent that he is challenging his counsel's effectiveness in litigating these pre-trial issues, such a claim is also barred by the waiver, unless he can demonstrate that enforcing the waiver would work a miscarriage of justice.¹³

Here, no miscarriage of justice or manifest injustice will result if the Court enforces the waiver,¹⁴ which, as discussed above, was entered into knowingly and voluntarily. The sentence imposed was not in excess of the maximum penalty provided by law, nor was it based upon some

¹² *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994).

¹³ *Id.*

¹⁴ *United States v. Gwinnett*, 483 F.3d 200, 206 (3d Cir. 2007).

constitutionally impermissible factor. In fact, Garcia's negotiated sentence was far lower than the maximum sentence he could have received had he been found guilty on all counts at trial, far lower than the mandatory consecutive sentence he could have received, and even far lower than the bottom of the advisory sentencing guidelines range.

Moreover, even if the Court reached the merits of Garcia's argument, it would deny the motion, as it cannot find that counsel was ineffective in litigating these issues. On July 16, 2010, Garcia's counsel filed a motion to suppress all physical evidence found in Garcia's apartment (i.e. the firearm, drugs, digital scales, glass jars containing a white, powdery substance, etc.) and requested a *Franks* hearing. In that motion, counsel argued: "Detective Diehl's warrant affidavit failed to allege sufficient facts to establish probable cause. A review of the four-corners of the affidavit reveals: (a) an insufficient nexus between apartment #2 and the criminal activity Detective Diehl set out in the affidavit; and (b) a failure to demonstrate any connection between Mr. Garcia and apartment #2 or between Mr. Garcia and any of the criminal activity that occurred there. [] In addition, on information and belief, Detective Diehl included false statements in the affidavit, which he made with reckless disregard for the truth or that he knew were false."¹⁵ The matter was fully briefed and the Court held a hearing before denying these pretrial motions. Counsel did raise and litigate these issues competently, albeit unsuccessfully, before Garcia entered into his plea agreement.

III. CONCLUSION

For the reasons set forth herein, Garcia's motion will be denied and the Government's motion to dismiss will be granted. No certificate of appealability will issue.

¹⁵ Doc. No. 27 at 4.

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Order

AND NOW, this 6th day of January 2015, upon consideration of Petitioner's Motion to Vacate, Set Aside, or Correct his sentence [Doc. No. 96], and the government's responsive Motion to Dismiss in Part and Deny in Part [Doc. No. 101], and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that the Petitioner's Motion is **DENIED** and Defendant's Motion is **GRANTED** in its entirety.

The Clerk of Court is **DIRECTED** to close this case.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.