

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
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 : NO. 97-160-1
DERRICK BROWN : (98-CV-3225)

ORDER – MEMORANDUM

AND NOW, this ___ day of August, 1998 defendant Derrick Brown's petition to vacate, set aside, or correct sentence, 28 U.S.C. § 2255 (1994), is denied.¹

On September 8, 1997 defendant pleaded guilty to one count of conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846 (Count I), one count of possession with intent to distribute cocaine base, and one count of distribution of cocaine base in violation of 21 U.S.C § 841 (a)(1) (Counts II and III). On October 30, 1997 he was sentenced to 140 months of custody.²

The petition asserts that defendant's counsel was ineffective at his sentencing for not challenging (1) the determination that the drugs involved were crack cocaine rather than cocaine powder; and (2) his ineligibility for the safety valve provisions, U.S.S.G. § 5C1.2. Petition, at 4.

¹ Probable cause does not appear to exist for a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (1994).

² In addition to custody, the sentence included five years of supervised release and a special assessment of \$300. Petitioner did not appeal his conviction or sentence.

An ineffective assistance claim requires -

First, the petitioner must show that his or her counsel's performance was deficient - that, under all the circumstances, the attorney's representation fell below an objective standard of reasonableness. . . . Claimants must identify specific errors by counsel, and we must indulge a strong presumption that counsel's conduct was reasonable.

Second, the petitioner must show prejudice. . . . [A] petitioner must demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different.

Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed.2d 746 (1993).

Petitioner has not shown that counsel's representation was deficient. At the trial of Brown's co-defendants - Cynthia Carolina and Eric Cauley - there was ample evidence that crack cocaine was the drug seized. The evidence included: (1) chemical analysis, government's response, exh. a; the testimony of (2) Larry Gillis, a cooperating co-defendant, tr. at 68-69, 72-73, Oct. 20, 1997; and of (3) police officer Wilbert Kane, a qualified drug expert, id. at 174-75. At petitioner's sentencing, the government proffered officer Kane's testimony on the issue of drug identification. Tr. at 3-4, Oct. 30, 1997. Petitioner has presented no evidence to contradict the conclusion that the drugs seized were crack cocaine.

Likewise, a requirement for application of the safety valve is that defendant "did not . . . possess a firearm or dangerous weapon . . . in connection with the offense." U.S.S.G. § 5C1.2(2). A defendant has the burden of showing the

applicability of § 5C1.2. See United States v. Wilson, 106 F.3d 1140, 1141 n.3 (3d Cir. 1997). At sentencing, a two-level enhancement was added under § 2D1.1(b)(1) for possession of firearms. Tr. at 10, Oct. 30, 1997. Evidence adduced at the trial of petitioner's co-defendants included five guns seized from a room from which petitioner emerged when police executed a search warrant, tr. at 31, 36-38, 43, Oct. 17, 1997. The house, which was in petitioner's control, was maintained by him to distribute crack cocaine. Petitioner was therefore ineligible under § 5C1.1(2) because of use of a firearm "in connection with the offense." Cf. United States v. Condren, 18 F.3d 1190, 1198 (5th Cir.) (physical proximity of firearm to drugs justifies enhancement under § 2K2.1(b)(5) for use of firearm "in connection with another felony offense"), cert. denied, 513 U.S. 856, 115 S. Ct. 161, 130 L. Ed.2d 99 (1994); United States v. Gomez-Arrellano, 5 F.3d 464, 467 (10th Cir. 1993) (same).

Given the evidence, it was not objectively unreasonable for counsel to fail to make either of petitioner's proposed arguments.

Accordingly, the petition must be rejected.

Edmund V. Ludwig, J.