

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
	:	NO. 01-251
v.	:	
	:	
	:	
DERRICK ROBERTS	:	CIVIL ACTION
	:	NO. 04-2739

SURRICK, J.

AUGUST 12, 2005

MEMORANDUM & ORDER

Presently before the Court is Derrick Roberts’s (“Roberts”) pro se Motion Under 28 U.S.C. § 2255/Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. Nos. 47, 51), Government’s response thereto (Doc. No. 54), and Petitioner’s “Traverse [to] the Government’s (Govt.) Response to his motion pursuant to 28 U.S.C. § 2255” (Doc. No. 55). For the following reasons, Defendant’s Motion will be denied.

Derrick Roberts was indicted on May 9, 2001, on charges of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a) (Count 1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 21 U.S.C. § 924(c)(1)(A) (Count 2); being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 3); and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Count 4). On December 5, 2001, after Petitioner’s Motion To Suppress Physical Evidence was denied, Petitioner entered a plea of guilty to all Counts of the Indictment pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal from the ruling on his

suppression application. On January 6, 2003, Petitioner was sentenced to a total period of incarceration of 130 months, to be followed by a period of supervised release of 5 years.¹ Petitioner filed an appeal in the Third Circuit Court of Appeals, which affirmed the judgment of this Court on October 15, 2003. (Doc. No. 46.) The Supreme Court of the United States denied a petition for writ of certiorari on January 12, 2004.

Roberts filed the instant Motion on June 22, 2004,² alleging that trial counsel was ineffective for failing to argue that: (1) Roberts possessed cocaine base for his own personal use and not with the intent to distribute; and (2) the cocaine base that Petitioner possessed was not crack.³ One need only review the Memorandum and Order denying the Motion to Suppress (Doc. No. 26) and the transcript and record of the Guilty Plea Hearing to know that Roberts's Motion lacks merit.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test for evaluating a Sixth Amendment claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This

¹Roberts had an Offense Level of 23 after receiving a three point reduction for acceptance of responsibility. He was a Criminal History Category IV. The Guideline range was 70-87 months. Count I of the Indictment carried a mandatory minimum period of incarceration of 60 months. Count II carried a mandatory minimum consecutive sentence of 60 months.

²Petitioner did not use the proper form when filing this Motion with the Clerk of Court. On August 6, 2004, Petitioner refiled his Motion on the correct form. (Doc. No. 51.)

³Petitioner also argues that 21 U.S.C. § 841 is unconstitutional, both on its face and as applied to him, because the regulation of drug trafficking does not fall within the scope of Congress's power to regulate interstate commerce. This argument is completely devoid of merit. See *United States v. Orozco*, 98 F.3d 105, 107 (3d Cir. 1996). To the extent that Petitioner argues that his counsel improperly failed to raise this argument, his ineffective assistance claim fails. Trial counsel cannot be deemed ineffective for failing to raise a meritless claim. *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1999).

requires showing 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 deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Both the “performance” and “prejudice” prongs of the *Strickland* test must be satisfied to establish a Sixth Amendment violation. *Id.*

Roberts has failed to demonstrate that counsel’s performance was deficient in any respect. To demonstrate that counsel’s performance was deficient, Roberts must show that counsel’s representation fell below an “objective standard of reasonableness” based on the facts of the case, viewed at the time of counsel’s conduct. *Id.* at 688, 690. A strong presumption exists that counsel’s conduct falls within the wide range of reasonable professional assistance. *Id.* at 689; *see also id.* (“Judicial scrutiny of counsel’s performance must be highly deferential.”); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (“*Strickland*’s standard, although by no means insurmountable, is highly demanding. . . . Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . .”).

Before entering his guilty plea, Roberts entered into a Guilty Plea Agreement with the Government which was made a part of the record of the Guilty Plea Hearing. In that Agreement which was voluntarily and intelligently entered into, and which was signed by Roberts after consultation with counsel, Roberts stipulated “that the cocaine base involved in this case is ‘crack’ as defined in Guidelines Section 2D1.1, Note D.” Petitioner also stipulated that he “possessed with the intent to distribute 13.7 grams of cocaine base in the form of ‘crack’ cocaine . . .” Moreover, during the Court’s guilty plea colloquy, Petitioner admitted, while under oath,

that he possessed the crack cocaine referred to in the Indictment with the intent to distribute it. In addition, the Memorandum and Order denying Roberts's Motion to Suppress reflects that 13.7 grams of crack cocaine and firearms were found in a secret compartment in the trunk of Roberts's automobile, which was stopped by police as he was driving from New York to Pennsylvania. The suggestion that it would have been in Roberts's best interest to reject the Guilty Plea Agreement and go to trial in this matter is ludicrous. There is no indication in this record that Roberts was a drug addict.⁴ Moreover, there was no paraphernalia in Roberts's vehicle for using drugs. In addition, the volume of drugs, their appearance, and the presence of cutting agents strongly supports the conclusion that this was crack cocaine possessed by Roberts for the purpose of distribution. Roberts's argument that his attorney was ineffective for failing to argue that his possession of cocaine was for his own use and that it was not "crack" cocaine is without merit.⁵

An appropriate Order follows.

⁴In fact, Roberts told the Probation Office that he had not smoked marijuana since 1988, that he had never used crack cocaine and that he had only experimented with cocaine powder once at age 20. He was 36 at the time of this incident. (PSR ¶53).

⁵We note that the Government has indicated in its submissions that it would have been in a position to prove at trial that the cocaine was "crack" and that it was possessed "with the intent to distribute."

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ORDER

AND NOW, this 12th day of August, 2005, upon consideration of the Habeas Corpus Motion Under 28 U.S.C. § 2255/Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. Nos. 47, 51) and the Government's response thereto, it is ORDERED that the Motion is DENIED. A certificate of appealability is also DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge