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

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal Action
	)	No. 07-cr-00203
JOEL MICHAEL TYSON,	)	
	)	
Defendant	)	

* * *

APPEARANCES:

RICHARD KORNYLAK, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

JOEL MICHAEL TYSON
Defendant Pro Se

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed November 8, 2010, and the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed May 2, 2011, both filed pro se by defendant Joel Michael Tyson.[1] On July 22, 2011, the

[1] On November 8, 2010, defendant originally filed his habeas corpus motion on the incorrect form. Pursuant to my Order dated April 5, 2011 directing that defendant be provided with the proper form, he executed his motion on the correct form on May 2, 2011. However, because the grounds raised on both forms are not identical, I jointly consider defendant's arguments made in both documents.

(Footnote 1 continued):

Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 was filed.

For the following reasons, I dismiss both of defendant's motions to vacate, set aside or correct the sentence in the nature of petitions for a writ of habeas corpus without a hearing, and I deny a certificate of appealability.

PROCEDURAL HISTORY

On July 29, 2009, defendant entered an open guilty plea to a charge of convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Previously on February 25, 2007, defendant was arrested for the same conduct in Berks County, Pennsylvania, and was held in state custody until March 3, 2007, when defendant was released on bail.[2]

On April 17, 2007, defendant was indicted on the within federal charges, and the prosecution was adopted by the federal

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(Continuation of footnote 1):

Further, although the docket entries reflect that the habeas corpus motion was filed November 29, 2010, defendant indicated above his signature that he executed the motion on November 8, 2010. (Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Petition"), filed November 8, 2010, page 13.) Pursuant to the prison mailbox rule, this court will consider the date of filing as November 8, 2010. The prison mailbox rule deems a motion to have been filed on the date the petitioner delivered his Petition to prison officials to mail. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997).

[2] Notes of Testimony of the hearing conducted before me on November 10, 2009 in Allentown, Pennsylvania, styled "Sentencing - Day 2 Before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T."), pages 18-19.

government.[3] A federal detainer for the defendant was lodged with the Berks County Prison on April 23, 2007.[4] The state charges were formally nolle prossed on May 1, 2007.[5] On May 14, 2007 defendant was formally arrested by federal authorities on the within charges.[6]

Following defendant's release on bail on March 3, 2007, defendant was again arrested by the Reading, Pennsylvania, Police Department and placed in state custody in the Berks County Prison on March 9, 2007 for unrelated state offenses.[7] Following his March 9, 2007 arrest, defendant remained in the Berks County Prison - which houses both state and federal detainees - until his November 10, 2009 sentence on the within charges.[8]

Following a two-day sentencing hearing conducted on November 9 and 10, 2009, I sentenced defendant to 96 months imprisonment, 3 years supervised release, a $1,000.00 fine and a $100.00 special assessment. At defendant's request, I

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[3] N.T., page 20.

[4] N.T., pages 32-33.

[5] N.T., page 21.

[6] N.T., pages 19-20.

[7] N.T., page 19. See Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, page 2. The Presentence Investigation Report dated September 22, 2009 and revised October 20, 2009, prepared by Senior United States Probation Officer Alexander T. Posey indicates that the Berks County charges include the illegal possession and use of a firearm and false identification to law enforcement authorities (¶¶ 55-58).

[8] N.T., pages 19-20.

recommended to the Federal Bureau of Prisons, an agency of the United States Department of Justice ("Bureau of Prisons"), that defendant receive administrative credit for all time served between February 25, 2007 and March 3, 2007 while he was in state custody on state charges for the identical acts which the federal government adopted on April 17, 2007. Further, I also recommended that defendant receive credit for all time served in federal custody from April 17, 2007 through November 10, 2009, the date of sentencing.

Defendant did not file a direct appeal. As described above, defendant filed the within habeas Petitions on November 8, 2010 and May 2, 2011. The government responded on July 22, 2011.

CONTENTIONS OF THE PARTIES

Defendant's Contentions

Defendant raises two grounds of ineffective assistance of counsel in his habeas Petitions. First, defendant contends that his court-appointed counsel, William J. Honig, Esquire, was ineffective because he guaranteed defendant that he would receive credit toward his federal sentence for his time served in state and federal custody. Specifically, defendant asserts that counsel guaranteed defendant that he would receive credit for his time served in state custody from February 25, 2007 through March 3, 2007, and for his time served in federal custody from April 17, 2007 through November 10, 2009, the date of his

sentencing. Defendant avers that he was entitled to credit for time served, and that the Federal Bureau of Prisons failed to give him such credit for the time from April 17, 2007 through April 2009.

In addition, defendant contends that Attorney Honig failed to advise him of the advantages and disadvantages of filing a direct appeal pursuant to Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Defendant also contends that had counsel explained the benefits of filing of a direct appeal, he would have requested counsel to file such an appeal on his behalf.

Contentions of the Government

The government contends that the record of defendant's sentence hearing refutes defendant's contention that his counsel guaranteed that he would receive credit for his time served in state and federal custody. The government argues that both defense counsel and the court made clear at sentencing that defense counsel was requesting only that the court make a *recommendation* to the Federal Bureau of Prisons for credit for time served because the court lacks the authority to grant defendant such credit. Further, the government avers that defendant acknowledged the same on the record, including the fact that this court's recommendation may be rejected by the Bureau of Prisons.

The government also contends that defendant's second ground for relief lacks merit because, even if counsel had failed to consult with defendant regarding the filing of a direct appeal, counsel can only be ineffective for such failure where there are non-frivolous grounds for appeal. The government asserts that competent counsel would not have advised defendant that he could challenge on direct appeal the failure of the Bureau of Prisons to give defendant sentence credit for time served. Therefore, the government argues, defense counsel was not ineffective in that regard.

Because defendant raises no other grounds for appeal, the government contends that defendant cannot maintain an ineffective assistance of counsel claim for counsel's alleged failure to consult with him regarding a direct appeal.

Finally, the government avers that to the extent defendant challenges the Federal Bureau of Prisons' decision not to follow this court's sentence recommendation in full, this court is without jurisdiction to hear the claim. The government argues that because defendant challenges the execution of his sentence, the proper procedure is for defendant to file a motion pursuant to 28 U.S.C. § 2241 in the district of his confinement. The government contends that defendant is confined in the Northern District of West Virginia. The government also contends that because defendant has not filed a section 2241 motion, and

because he is not confined in this judicial district, this court must dismiss his claim.

STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

A motion to vacate sentence under section 2255 "is addressed to the sound discretion of the district court". United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A petitioner may prevail on a section 2255 habeas claim only by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or an "omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

DISCUSSION

Credit for Time Served

Title 18 United States Code, section 3585(b) provides:

> **(b) Credit for prior custody.--**A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--
>
> > **(1)** as a result of the offense for which the sentence was imposed; or
> >
> > **(2)** as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b).

The Federal Bureau of Prisons - and not the sentencing court - has the authority to calculate this credit after defendant is sentenced. United States v. Wilson, 503 U.S. 329, 332-335, 112 S.Ct. 1351, 1353-1355, 117 L.Ed.2d 593, 599-601 (1992).

Accordingly, at defendant's sentence hearing, Attorney Honig asked this court to recommend to the Bureau of Prisons that defendant receive credit for his time served in state and federal custody.[9] Because I concluded that such recommendation was appropriate, I recommended to the Federal Bureau of Prisons that

[9] N.T., pages 17-18 and 22-29.

defendant receive credit for time served in state custody from February 3, 2007 through March 3, 2007, and credit for his time served in federal custody from April 17, 2007 until November 10, 2009.[10]

Defendant contends in his first ground for habeas relief that the Bureau of Prisons did not follow my recommendation in full, and that Attorney Honig was ineffective for guaranteeing defendant that he would receive credit toward his federal sentence for his time served in state and federal custody prior to sentencing.

A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was constitutionally deficient and that counsel's errors prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). There is a "strong presumption that counsel's conduct falls 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". Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotation omitted).

Defendant's claim that Attorney Honig guaranteed him credit for time served is belied by the record of the sentence

[10] N.T., page 39.

hearing. The record indicates that both Attorney Honig and this court made clear that I could only recommend that defendant receive credit for time served in state and federal custody, and that I cannot order or guarantee defendant such credit.[11] Thus, Attorney Honig's performance was not deficient because the record reveals that Attorney Honig never suggested that defendant would definitely receive credit for time served.

Further, defendant specifically acknowledged that he understood that I may only make a recommendation to the Bureau of Prisons that it credit defendant's federal sentence with his time served:

> THE COURT: Now, do you understand, Mr. Tyson, that the recommendation for designation to the closest prison to Reading and the recommendation for credit for time served, and the recommendation that you be permitted to participate in the Prison Work Program, are all just recommendations, because I don't have the power to command or order or direct the Bureau of Prisons to do any of those things, even though I'm a Judge, I can't make them do it?
>
> THE DEFENDANT: Yes, your honor.
>
> THE COURT: But I can recommend to them that they do it, and I think they are all appropriate recommendations, so I am recommending it, and they will consider my recommendation, but the

[11] N.T., pages 17-18, 21, 23, 25-27, 29, 39, and 44.

decision will be theirs.
Do you understand that?

THE DEFENDANT: Yes, sir.[12]

Thus, defendant's contention that Attorney Honig advised him that he was guaranteed credit for time served is not supported by the record. Further, even assuming that Attorney Honig did guarantee that defendant would receive credit for time served, defendant was not prejudiced because I clarified defendant's alleged misunderstanding by explaining that I do not have the power to guarantee defendant such result.

Moreover, Attorney Honig secured the best possible outcome for defendant in this case: a recommendation from this court to the Federal Bureau of Prisons that defendant receive credit for time served in state and federal custody. Because the sentencing court only has the authority to recommend that the Bureau of Prisons credit defendant's sentence for time served, defendant cannot show prejudice where counsel in fact obtained this result. See 18 U.S.C. § 3585(b); see also Wilson, 503 U.S. at 332-335, 112 S.Ct. at 1353-1355, 117 L.Ed.2d at 599-601. Accordingly, I dismiss defendant's first ground for habeas relief.

[12] N.T., page 44 (emphasis added).

Execution of Sentence

To the extent that defendant additionally challenges the decision by the Bureau of Prisons not to follow this court's recommendation regarding crediting defendant's sentence for time served, I further dismiss defendant's claim.[13] I conclude that any challenge to the Bureau of Prisons' denial of credit for time served must be made pursuant to 28 U.S.C. § 2241 in the jurisdiction in which defendant is confined. See Edmonds v. United States, 427 Fed.Appx. 79, 81 n.1 (3d Cir. 2011); United States v. Figueroa, 349 Fed.Appx. 727, 729-730 (3d Cir. 2009); Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 241-244 (3d Cir. 2005).

Section 2241, rather than section 2255, "confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence." Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001). Further, jurisdiction for section 2241 purposes "lies in only one district: the district of confinement." Rumsfeld v. Padilla,

[13] Although defendant's May 2, 2011 Petition sets forth the first ground for habeas relief as an ineffective assistance of counsel claim, (see Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 2, 2011, page 4), defendant's initial November 8, 2010 Petition presents the first ground for habeas relief strictly as a claim challenging the Federal Bureau of Prisons' failure to properly credit his time served in state and federal custody. (See November 8, 2010 Petition, page 4.) Considering both Petitions together, it appears that defendant may additionally be asserting a claim based upon the alleged improper execution of his sentence by the Federal Bureau of Prisons.

542 U.S. 426, 443, 124 S.Ct. 2711, 2722, 159 L.Ed.2d 513, 533 (2004).

Defendant appears to acknowledge the necessity of filing a section 2241 petition because he contends that "I am filing a contemporaneous action under 28 U.S.C. 2241."[14] However, defendant has not filed a section 2241 petition in this judicial district, nor would one be appropriate because he is not confined in this judicial district.[15] Accordingly, to the extent that defendant seeks relief from the decision of the Bureau of Prisons in the within section 2255 motion, I dismiss defendant's claim.

Direct Appeal Advice

Defendant alleges in his second ground for habeas relief that counsel was ineffective for failing to consult with him regarding whether to file a direct appeal. Defendant seeks to have his direct appeal rights reinstated.

Counsel is ineffective for failing to consult with a client regarding filing an appeal where either (1) a rational defendant would have wanted to appeal because there were non-frivolous grounds for appeal; or (2) defendant reasonably demonstrated to counsel that he was interested in appealing. Roe, 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d at 997.

[14] May 2, 2011 Petition, page 4.

[15] Defendant's petitions indicate that he is incarcerated at the United States Penitentiary-Hazelton in Bruceton Mills, West Virginia.

Further, defendant "must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Roe, 528 U.S. at 484, 120 S.Ct. at 1038, 145 L.Ed.2d at 999.

In his second ground for habeas relief, defendant does not specify what he seeks to raise on direct appeal.[16] Because defendant contends in his first ground for habeas relief that the Bureau of Prisons did not properly credit his time served in state and federal custody against his federal sentence, I assume that this is also the ground that defendant seeks to raise on direct appeal.[17]

As described above, the Bureau of Prisons - and not the sentencing court - has authority to credit defendant's sentence for time served pursuant to 18 U.S.C. § 3585(b). Defendant's challenge to the execution of his sentence must be made, after exhausting his administrative remedies through the Bureau of Prisons, by filing a section 2241 petition, and not by filing a direct appeal. See Woodall, 432 F.3d at 238-239 & n.2; see also Gambino v. Morris, 134 F.3d 156, 171 (3d Cir. 1998).

Thus, even assuming that counsel failed to consult with defendant regarding an appeal, counsel was not ineffective because a rational defendant would not have wanted to file a

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[16] See November 8, 2010 and May 2, 2011 Petitions, page 5.

[17] See November 8, 2010 and May 2, 2011 Petitions, page 4.

direct appeal where such appeal constitutes an inappropriate vehicle to challenge the decision of the Federal Bureau of Prisons.

Defendant has not raised any non-frivolous grounds for direct appeal in his petition, nor are any such grounds evident. Accordingly, pursuant to Roe, counsel cannot be ineffective for failing to consult with defendant regarding a frivolous ground for appeal. 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d at 997.

Further, defendant has not showed that he reasonably demonstrated to counsel that he was interested in appealing. Defendant pled guilty, which may "indicate that the defendant seeks an end to judicial proceedings." Roe, 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d at 997. In addition, at his sentence hearing, although he was informed of his appellate rights by this court,[18] defendant failed to express any desire to appeal.[19] Roe, 528 U.S. at 479-480, 120 S.Ct. at 1036, 145 L.Ed.2d at 996. The record neither indicates that defendant contested any factual findings nor reveals any grounds that defendant might want to appeal. See United States v. Shedrick, 493 F.3d 292, 301 (3d Cir. 2007).

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[18] N.T., pages 58-60.

[19] N.T., pages 60 and 61.

Moreover, defendant acknowledged at his sentence hearing that this court could only recommend a course of action to the Bureau of Prisons, and defendant did not contest this recommendation or this court's explanation of its limited authority in this regard.[20] Further, defendant does not allege that he approached counsel regarding an appeal or expressed any desire to appeal.

Thus, defendant has not established that he reasonably demonstrated to counsel his desire to appeal. Accordingly, defendant has not shown that Attorney Honig's alleged failure to consult with him constitutes deficient performance.

In addition, for the same reasons, defendant has not demonstrated that there is a reasonable probability that he would have appealed if Attorney Honig had consulted with him. See Roe, 528 U.S. at 485-486, 120 S.Ct. at 1039, 145 L.Ed.2d at 1000. Therefore, defendant has not satisfied the test set forth in Roe, and I dismiss defendant's second, and final, ground for habeas relief.

Evidentiary Hearing

I further dismiss the petition without holding an evidentiary hearing. "[T]o merit a hearing, a claim for ineffective assistance of counsel, accepting the veracity of [defendant's] allegations, must satisfy both prongs of the

[20] See N.T., page 44.

Strickland test, deficient counsel and prejudice to the defense." Wells v. Petsock, 941 F.2d 253, 260 (3d Cir. 1991).

A district court "must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that [defendant] is not entitled to relief." Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). The question of whether to order a hearing is committed to the sound discretion of the district court. Id.

Accepting the veracity of defendant's allegations, as discussed above, I conclude that defendant cannot establish deficient performance on either of the two grounds identified in his habeas petition. Accordingly, I conclude that he fails on both grounds to satisfy Strickland, and therefore an evidentiary hearing is not required.

Certificate of Appealability

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, I conclude that jurists of reason would not debate the conclusion that defendant's Petitions fail to state a valid claim of the denial of a constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542, 554 (2000). Accordingly, a certificate of appealability is denied.

CONCLUSION

For all the foregoing reasons, I dismiss both of defendant's motions in the nature of Petitions for a writ of habeas corpus. Moreover, a certificate of appealability is denied.

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

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal Action
	)	No. 07-cr-00203
JOEL MICHAEL TYSON,	)	
	)	
Defendant	)	

O R D E R

NOW, this 26th day of March, 2012, upon consideration of the following documents:

(1) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, which motion was filed by defendant Joel Michael Tyson pro se pursuant to the prison mailbox rule on November 8, 2010 (Document 81);

(2) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, which motion was filed by defendant pro se on May 2, 2011 (Document 84); and

(3) Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, which response was filed July 22, 2011 (Document 86);

upon consideration of the pleadings, exhibits, and record papers;

and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that the motions to vacate, set aside, or correct the sentence in the nature of petitions for a writ of habeas corpus are each dismissed without a hearing.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall mark these two matters closed for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER

James Knoll Gardner

United States District Judge