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

TERRANCE MANUEL,	:	CRIMINAL ACTION
	:	NO. 07-177
Petitioner,	:	
	:	CIVIL ACTION
v.	:	NO. 11-4134
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. AUGUST 13, 2012

Terrance Manuel ("Petitioner") is a federal prisoner incarcerated at U.S. Penitentiary-Canaan. Petitioner filed a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion") based on several claims that he received constitutionally ineffective assistance of counsel at the district and appellate court levels. For the reasons set forth below, the Court will deny and dismiss with prejudice the § 2255 Motion.

I. BACKGROUND

In September 2004, Petitioner was released on parole after completing a state prison sentence for a narcotics offense. Petitioner informed the state probation and parole office that he would reside at his mother's home at 730 George

Street, Norristown, Pennsylvania. Montgomery County Adult Probation and Parole Department Officer Samuel Dowling supervised Petitioner after his release.

In January 2006, Officer Dowling received an anonymous tip that Petitioner was living at 916 West Washington Street, Apartment B, Norristown, Pennsylvania ("Washington Street address"), where there were firearms and drugs. Officer Dowling and another probation officer visited the Washington Street address and observed the name "T. Manuel" on the mailbox. Officer Dowling took no further action. Later, Officer Dowling received another tip from the same anonymous informant that Petitioner was residing at the Washington Street address where there were firearms and drugs.

On February 24, 2006, Officer Dowling met Petitioner at a laundromat. Petitioner was handcuffed and Officer Dowling retrieved a set of keys from Petitioner's pocket. When Officer Dowling informed Petitioner that they were going to the Washington Street address, Officer Dowling observed Petitioner's eyes widen.

Upon arriving at the Washington Street address, Officer Dowling used the keys he retrieved from Petitioner's pocket to enter the apartment. Once inside, Officer Dowling smelled marijuana, searched the apartment, and discovered a firearm and packages of a white substance that appeared to be

cocaine. Officer Dowling thereafter called the Norristown Police Department, which obtained a search warrant and searched the apartment.

II. PROCEDURAL HISTORY

On April 3, 2007, a grand jury returned an Indictment that charged Petitioner with possession with intent to distribute five grams or more of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) (Count I), possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Count II), using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Count III), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count IV). On July 11, 2007, the U.S. Attorney for the Eastern District of Pennsylvania filed an Information that charged Petitioner with two prior felony, controlled-substances convictions.

On June 27, 2007, Petitioner, represented by Gerald B. Ingram, Esquire, moved to suppress certain evidence based on the probation officers' warrantless search of the Washington Street address. Following a suppression hearing, the Court denied Petitioner's motion to suppress. United States v. Manuel, No. 07-177, 2007 WL 2601079, *2-5 (E.D. Pa. Sept. 7, 2007).

On September 10, 2007, the Court granted Petitioner's oral motion for appointment of new counsel and appointed William Honig, Esquire, to represent Petitioner. Mr. Honig filed (among others) a motion in limine to exclude evidence of Officer Dowling's title as "probation officer." The Court denied the motion.

On January 3, 2008, a jury found Petitioner guilty of Counts 1 through 3. Petitioner waived his right to a jury trial as to Count 4. And the Court found Petitioner guilty of Count 4.

At the sentencing hearing, Mr. Honig objected to portions of the presentence investigation report that characterized Petitioner as a "career offender" under U.S. Sentencing Guidelines § 4B1.1(a). Sentencing Hr'g Tr. 4:15-11:18, July 9, 2008, ECF No. 115. After hearing counsel's argument, the Court overruled Mr. Honig's objection and held that Petitioner is a career offender under the Guidelines. Id. at 11:22-13:5. Accordingly, the Court concluded Petitioner's total offense level was thirty-seven and his criminal history category was VI. Id. at 13:18-19; see also U.S.S.G. § 4B1.1 (2007). The Guidelines recommended a sentence of imprisonment between 360 months to life. Sentencing Hr'g Tr. 13:21-23.

Following argument by counsel, the Court granted Petitioner's request for a variance from the Guidelines range. Starting from the minimum Guidelines range, the Court subtracted

twenty-nine months based on time Petitioner served in custody and another sixty months because the "100 to 1 crack cocaine relationship . . . overstate[d] the seriousness of the offense." Id. at 30:10-24. Thus, the Court sentenced Petitioner to 271 months of imprisonment, 8 years of supervised release, a $1,000 fine, and a $400 special assessment. Id. at 33:23-37:9.

Petitioner, still represented by Mr. Honig, appealed the Court's sentence to the Third Circuit. Petitioner argued that the Court erred in denying his motion to suppress evidence and abused its discretion by denying Petitioner's motion in limine to exclude evidence of Officer Dowling's title and admitting evidence of Petitioner's probation status. The Third Circuit heard argument on May 22, 2009, and thereafter affirmed this Court's decisions in a non-precedential opinion. United States v. Manuel, 342 F. App'x 844, 848 (3d Cir. 2009). And the U.S. Supreme Court denied further review. Manuel v. United States, 131 S. Ct. 258, 258 (2010) (mem.).

On June 6, 2011, Petitioner filed the instant § 2255 Motion. The Government responded. The Court reviewed the § 2255 Motion, the Government's Response, and the parties' supplemental briefing. The matter is now ripe for disposition.

III. LEGAL STANDARD

A federal prisoner in custody under the sentence of a federal court challenging his sentence based on a violation of the U.S. Constitution or laws of the United States may move the court that imposed the sentence to vacate, set aside, or correct the sentence. See 28 U.S.C. § 2255(a) (Supp. IV 2011). In a § 2255 motion, a federal prisoner may attack his sentence on any of the following grounds: (1) the judgment was rendered without jurisdiction; (2) the sentence imposed was not authorized by law or otherwise open to collateral attack; or (3) there has been such a denial of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. See id. § 2255(b).

A petitioner is entitled to an evidentiary hearing as to the merits of his claim unless it is clear from the record that he is not entitled to relief. Id. A prisoner's pro se briefing is construed liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32 (3d Cir. 2011).

IV. DISCUSSION

Petitioner raises five grounds of ineffective assistance of counsel.[1] The Sixth Amendment guarantees the right to effective assistance of counsel. E.g., Strickland v. Washington, 466 U.S. 668, 686 (1984). To warrant reversal of a conviction, a convicted defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced his defense. Id. at 687; Holland v. Horn, 519 F.3d 107, 120 (3d Cir. 2008). The principles governing ineffective assistance claims under the Sixth Amendment apply in collateral proceedings attacking a prisoner's sentence. See Strickland, 466 U.S. at 697-98.

To prove deficient performance, a convicted defendant must show that his "counsel's representation fell below an objective standard of reasonableness." Id. at 688. The Court will consider whether counsel's performance was reasonable under all the circumstances. Id. Furthermore, the Court's "scrutiny of

[1] In his § 2255 Motion, Petitioner lists four grounds of ineffective assistance of counsel. Petitioner supplemented his § 2255 Motion by adding a fifth ground of ineffective assistance of counsel relating to his direct appeal. See Pet'r's Supplemental Br. 3-4, ECF No. 137; Pet'r's Br. in Supp. of Ground Five, ECF No. 147. The Government responded to Petitioner's supplemental brief. Gov't's Resp. to Pet'r's Br. in Supp. of Ground Five, ECF No. 149. And Petitioner replied. Pet'r's Reply to Gov't's Resp., ECF No. 150. The Court considered all of the parties' briefing in disposing of Petitioner's § 2255 Motion.

counsel's performance must be highly deferential." See id. at 689. That is, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. In raising an ineffective assistance claim, the petitioner must first identify the acts or omissions alleged not to be the result of "reasonable professional judgment." Id. at 690. Next, the court must determine whether those acts or omissions fall outside of the "wide range of professionally competent assistance." Id.

To prove prejudice, a convicted defendant must affirmatively prove that the alleged attorney errors "actually had an adverse effect on the defense." Id. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

A. Grounds One and Two

In Ground One, Petitioner argues Mr. Honig rendered ineffective assistance of counsel because he failed to object at sentencing to the offense level determination in the presentence investigation report. Petitioner argues that, apparently based on the amount of cocaine base involved, his offense level should

have been thirty-four. Furthermore, in Ground Two, Petitioner argues Mr. Honig failed to submit this issue to the Third Circuit on appeal. Petitioner's arguments fail.

The presentence investigation report correctly identified, and the Court correctly concluded, that Petitioner's offense level was thirty-seven because he faced a statutory maximum of life imprisonment for the conviction under 18 U.S.C. § 924(c). See U.S.S.G. § 4B1.1(b)(A). And the court properly calculated Petitioner's Guidelines range based on the § 924(c) conviction. See id. § 4B1.1(c)(3). None of these Guidelines calculations was based on the amount of cocaine base involved. The argument Petitioner proposes Mr. Honig should have made at sentencing is meritless. Therefore, Mr. Honig's performance did not fall outside of the wide range of reasonable professional assistance, and Grounds One and Two fail.

B. Ground Three

In Ground Three, Petitioner argues that Mr. Ingram rendered ineffective assistance of counsel by failing to challenge Officer Dowling's warrantless arrest of Petitioner and search of his person on February 24, 2006, at the laundromat. Specifically, Petitioner points to Officer Dowling's testimony that he placed Petitioner in handcuffs at the laundromat. Petitioner's argument fails.

When Petitioner was released on parole, he initialed a Montgomery County Adult Probation and Parole Department form that provided as follows:

> 10. I understand the Adult Probation and Parole Department has the authority to search my person, place of residence or vehicle without a warrant, if he or she has reasonable suspicion.

§ 2255 Mot. Ex. B. And the Fourth Amendment does not require issuance of a warrant when the warrantless search is supported by reasonable suspicion and authorized by a condition of probation. United States v. Knights, 543 U.S. 112, 121 (2001) (unanimous) ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable."). This Court held that Officer Dowling had "reasonable suspicion" after Officer Dowling corroborated information that Petitioner resided at an address where there were drugs and firearms present. Manuel, 2007 WL 2601079, at *5. Although the Court considered Officer Dowling's "reasonable suspicion" vis-à-vis the search of the Washington Street address, the same reasonable suspicion supported Petitioner's detention and Officer Dowling's use of handcuffs to restrain Petitioner at the laundromat. See Terry v. Ohio, 392 U.S. 1, 24 (1968).

Furthermore, Mr. Ingram vigorously challenged Officer Dowling's warrantless search of the Washington Street address before this Court at the suppression hearing. Mr. Ingram's representation at the suppression hearing indicates a thoughtful strategy to secure the exclusion of certain evidence.[2] Mr. Ingram's performance did not fall outside of the wide range of reasonable professional assistance because he challenged the search of Petitioner's residence and not Petitioner's alleged "arrest." Therefore, Ground Three fails.

C. Ground Four

In Ground Four, Petitioner argues that Mr. Honig rendered ineffective assistance of counsel at the sentencing hearing because he failed to file a motion for a downward departure under U.S. Sentencing Guidelines §§ 4A1.3 and 5K2.0 because his criminal history category overstated the likelihood he would commit another crime. Petitioner also argues that Mr. Honig failed to obtain a psychological evaluation to show Petitioner had a "harsh and tattered life that the [Petitioner] has had to endure." § 2255 Mot. 10. Finally, Petitioner argues Mr. Honig failed to ask for a downward departure or variance

[2] Indeed, the Third Circuit imposed (and found satisfied) the more-demanding standard that Officer Dowling have probable cause to believe Petitioner resided at the Washington Street address before conducting the search of the residence. Manual, 342 F. App'x at 847.

based on the crack-cocaine sentence disparity. Pet'r's Supplemental Br. 2. Petitioner's arguments fail.

Petitioner fails to identify any grounds that would warrant a departure or variance that were not already brought to the Court's attention at sentencing. Furthermore, Petitioner's demand that Mr. Honig seek a variance under the crack-cocaine sentencing disparity is meritless. Petitioner's Guidelines range was essentially based on his career offender status and his § 924(c) conviction, not the amount of cocaine base involved. Nevertheless, the Court granted Petitioner a sixty-month variance from the minimum Guidelines range because, in this case, the crack-cocaine sentencing disparity overstated the seriousness of the offense. The sentencing transcript makes clear that the Court considered the presentence investigation report, counsel's arguments, and Petitioner's background in arriving at the sentence imposed. Petitioner fails to show Mr. Honig's performance fell outside of the wide range of reasonable professional assistance. Therefore, Ground Four fails.

D. Ground Five

In Ground Five, Petitioner argues Mr. Honig rendered ineffective assistance of counsel by failing to raise an argument on appeal pursuant to Spears v. United States, 555 U.S. 261 (2009) (per curiam). In Spears, the Supreme Court declared

that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines," and may replace the Guidelines ratio with a ratio of their own. 555 U.S. at 843-44. Petitioner's argument fails.

First, the Court did not categorically reject the crack-cocaine Guidelines ratio and replace it with a ratio of its own, as did the district court in Spears. In fact, the Court recognized that in Petitioner's case, after considering the relevant sentencing factors under 18 U.S.C. § 3553(a), the crack-cocaine Guidelines overstated the seriousness of the offense. Sentencing Hr'g Tr. 30:12-18. The Court did not categorically reject the crack-cocaine Guidelines. And Petitioner's career-offender status and § 924(c) conviction led to the Guidelines recommendation, not the amount of controlled substances involved. Thus, an argument on direct review based on Spears would have had little, if any, chance of success.

Second, Mr. Honig made a well-reasoned decision to present on appeal the issues on which he believed Petitioner had the best chance of success. The Sixth Amendment does not require appellate counsel to raise every non-frivolous claim on appeal; rather, counsel may assert only some claims to increase the likelihood of success on appeal. See, e.g., Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Sistrunk v. Vaughn, 96 F.3d 666, 670

(3d Cir. 1996). "'Generally, only when the ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Petitioner has not overcome the presumption that Mr. Honig's conduct on appeal fell within the wide range of reasonable professional assistance. Therefore, Ground Five fails.

V. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2255 motion, the Court must also decide whether to issue or deny a certificate of appealability ("COA"). See § 2255 R. 11(a). The Court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). In this case, the Court will not issue a certificate of appealability because Petitioner failed to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

VI. CONCLUSION

For the foregoing reasons, the Court will deny and dismiss with prejudice Petitioner's § 2255 Motion. The Court

will not issue a certificate of appealability. An appropriate order will follow.

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	:	NO. 07-177
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	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

O R D E R

AND NOW, this **13th** day of **August, 2012,** for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 134) is **DENIED** and **DISMISSED with prejudice** and a certificate of appealability shall not issue.

IT IS FURTHER ORDERED that the Clerk shall mark these actions closed.

AND IT IS SO ORDERED.

_s/Eduardo C. Robreno_____
EDUARDO C. ROBRENO, J.