

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
		NO. 98-5548
vs.	:	
ANTHONY RICHARDSON	:	CRIM. NO. 96-0005-1

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 3rd day of May, 1998, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 66, filed Oct. 20, 1998), the Government's Motion to Dismiss Defendant's Motion Under 28 U.S.C. § 2255 (Doc. No. 68, filed Nov. 10, 1998), defendant's Supplement Motion in Response to Government's Motion to Dismiss Defendant's Motion Under 28 U.S.C. § 2255 [sic] (Doc. No. 70, filed Dec. 15, 1998), and the Government's Response to Richardson's Supplement to his Section 2255 Motion (Doc. No. 72, filed Dec. 21, 1998), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is **DENIED**.

MEMORANDUM

Defendant Anthony F. Richardson was convicted by a jury of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 110 months imprisonment, 3 years supervised release, and a special assessment of \$50.00. Following

sentencing, defendant appealed to the United States Court of Appeals for the Third Circuit, which affirmed his conviction without an opinion. United States v. Richardson, 118 F.3d 1597 (3d Cir. 1997), cert. denied, 118 S.Ct. 391 (1997). Defendant has now filed a timely motion under 28 U.S.C. § 2255, asking that this Court vacate his sentence, grant a new trial and/or conduct an evidentiary hearing, based on defendant's allegations of ineffectiveness on the part of his trial counsel.¹

Defendant asserts the following grounds in his § 2255 motion: 1) his trial attorney was ineffective because she failed to object to aspects of Dr. Edward B. Guy's testimony which utilized psychiatric evidence and other information to conclude that the defendant was competent; 2) his trial attorney was ineffective because she failed to hire an independent psychiatrist to evaluate his competence; and 3) his trial attorney was ineffective because she failed to hire a fingerprint expert to prove that his fingerprints were not on the firearm.

1. Background

On November 3, 1995, three Philadelphia police officers on foot patrol saw the defendant standing on a street corner, a bulge visible under the right side of his jacket. When the officers called to him, the defendant pulled out a gun and fled. The officers pursued and apprehended the defendant, arresting him and recovering a .357 Smith & Wesson revolver. While the officers

¹Defendant's sentence did not become final until the Supreme Court denied his petition for certiorari on November 3, 1997. His § 2255 Motion, which was placed in the prison mail on October 17, 1998, was therefore timely filed within the one year statute of limitations provided for in the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2255.

were processing the defendant at the stationhouse and asking him routine identity questions, the defendant blurted out, “Dammit my 357 . . . I loved that gun.”

On January 4, 1996, a federal grand jury indicted defendant on a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On the basis of defendant’s history of drug abuse and his behavior while in custody, the government asked for a determination of defendant’s competence pursuant to 18 U.S.C. § 4241.² Magistrate Judge Charles B. Smith directed that defendant be evaluated by Edward B. Guy, M.D., a forensic psychiatrist who regularly evaluates the competence of criminal defendants in the Eastern District of Pennsylvania. Dr. Guy evaluated the defendant on January 17, 1996 and concluded that, despite defendant’s history of drug abuse and a provisional diagnosis of “Antisocial Personality Disorder,” the defendant was able to understand the nature and consequences of the proceedings against him and to assist properly in his defense and thus was competent. In light of this evaluation, at defendant’s arraignment on January 19, 1996, Magistrate Judge Diane M. Welsh ruled that Richardson was competent to proceed to trial.

²18 U.S.C. § 4241 provides, in pertinent part:

(a) Motion to determine competency of defendant. -- At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court.

The Court conducted a hearing on pre-trial motions on March 15, 1996. The trial began on March 19, 1996. The government had no fingerprint evidence to tie the defendant to the .357 revolver, and therefore relied on the testimony of the Philadelphia police officers who apprehended the defendant to establish his possession of the weapon. On March 21, 1996, the jury returned a verdict of guilty.

Before sentencing, the Probation Officer assigned to the case, Carmen Vasquez-Ongay, recommended in light of defendant's long history of drug addiction that the Probation Office perform a drug evaluation on the defendant. Neither the government nor defense counsel objected, and the drug evaluation was conducted on May 23, 1996 by David W. Wilson, a drug abuse specialist and licensed psychologist employed by the United States Probation Office. The drug evaluation contained a detailed history of defendant's long-term drug abuse, as well as an assessment that the defendant appeared "seriously disturbed," and evinced "bizarre speech patterns," "strange head tics," and "ongoing auditory and visual hallucinations." These observations led Mr. Wilson to conclude that defendant exhibited "psychotic symptoms" which were probably caused by "his multi-year, daily, heavy, phencyclidine [PCP] abuse coupled with other substance abuse," but which could also be evidence of either an underlying "psychotic disorder" or else, less probably, a brain tumor.

In light of Mr. Wilson's report, the government filed a Motion for a Finding of Competency of Defendant Under 18 U.S.C. § 4241. At a competency hearing on June 12, 1996, defendant's counsel stated that she believed the defendant was able to understand the

proceedings and assist in his own defense, but admitted that she had no medical expertise. The Court then heard Mr. Wilson who testified that during the May 23 interview defendant appeared to be hallucinating and listening to nonexistent conversations, although he was able to compose himself to some degree and focus on the substance of Mr. Wilson's questions. Mr. Wilson also stated that the defendant was able to focus on the circumstances of his case and was coherent when discussing the offense. When asked whether defendant met the legal standard for competence, Mr. Wilson replied that the defendant met the standard because, notwithstanding the hallucinatory and related symptoms, defendant was able to assist his attorney in his own defense and understood the nature of the legal proceedings and the charges against him.

At the conclusion of the hearing on June 12, 1996, by Order of that date, the Court directed that defendant be re-evaluated by Dr. Guy for a determination as to (a) defendant's competency and, to the extent an assessment could be made during such an evaluation, (b) his mental problems, if any, and the appropriate course of treatment for any such mental problems. The Order directed that Dr. Guy be provided, *inter alia*, with copies of David Wilson's drug evaluation report of June 6, 1996, and a transcript of Mr. Wilson's testimony on June 12, 1996.

On June 24, 1996, Dr. Guy re-evaluated the defendant and submitted a second report dated June 25, 1996. According to that report, at the June 24th evaluation, defendant lucidly discussed his sentencing, which he felt to be unjust, and discounted the symptoms cited by Mr. Wilson's drug evaluation, denying that he hallucinated or had other visions. However, defendant did state that on occasion he had "audible" conversations with himself and had experienced PCP

flashbacks in the past.

Dr. Guy opined in his June 25, 1996 report that the defendant evinced no serious memory or cognitive defects, was “alert, friendly, and cooperative” and gave “no indication of any sensory distortions in the form of hallucinations.” Regarding his first report Dr. Guy said “I did not find anything in the history which was obtained today that would cause me to revise, in any significant way, my previous impressions . . . my psychiatric diagnosis remains unchanged.” It was Dr. Guy's conclusion in the June 25th report that while defendant suffered from a “Character or Personality disorder,” he considered him “competent to proceed” and stated that “his principal needs for treatment involve his drug abuse problem.” On the basis of Dr. Guy's June 25, 1996 report, his initial report, the drug evaluation report and subsequent testimony of Mr. Wilson, and the comments of defense counsel on the record on June 12, 1996, the Court found the defendant competent.

On August 23, 1996, the Court sentenced defendant in accordance with the Sentencing Guidelines to 110 months imprisonment, to be followed by three years supervised release, and payment of a special assessment of \$50. Defendant exhausted the appeals process without success and on October 20, 1998 he filed this motion under 28 U.S.C. § 2255, claiming that ineffective assistance of counsel deprived him of his constitutional rights. After receiving the Government's Motion to Dismiss Defendant's Motion Under 28 U.S.C. § 2255, defendant filed a “Motion Requesting Extension of Time to File Traverse Motion” on December 11, 1998. This motion was granted by Order dated December 16, 1998, although defendant's supplement to his

motion under 18 U.S.C. § 2255 was received the day before. The government thereafter filed its response to defendant's supplement to his motion.

2. Discussion

Defendant alleges in his 28 U.S.C. § 2255 motion and supplementary filings that ineffective assistance of counsel at his trial deprived him of his “Fifth Amendment, Sixth Amendment, and Fourteenth Amendment” rights. Defendant alleges three grounds for his claim of ineffective assistance of counsel on the part of his trial counsel: 1) his trial attorney was ineffective because she failed to object to aspects of Dr. Edward B. Guy’s testimony which utilized psychiatric evidence and other information to conclude that the defendant was competent; 2) his trial attorney was ineffective because she failed to hire an independent psychiatrist to evaluate his competence; and 3) his trial attorney was ineffective because she failed to hire a fingerprint expert to prove that his fingerprints were not on the firearm.

In order to prove ineffective assistance of counsel, a defendant must meet the requirements of both prongs of the test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must first show that his attorney's actions fell below “an objective standard of reasonableness” so that he was not “functioning as the counsel guaranteed by the Sixth Amendment.” Id. at 687-88. Second, petitioner must show prejudice from his attorney's errors: a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability

means a probability “sufficient to undermine confidence in the outcome.” Id. The proven errors must be so serious that the defendant was deprived of “a trial whose result is reliable.” Lockhart v. Fretwell, 506 U.S. 364, 368-69 (1993). Vague and general allegations do not justify a hearing when an ample record exists before the Court. Mayberry v. Petsock, 821 F.2d 179, 187 (3d Cir. 1987.)

Under these standards, defendant has failed to show any error by counsel which either fell below a standard of reasonableness or resulted in any prejudice whatsoever. None of defendant’s claims of ineffective assistance of counsel undermine the reliability of the verdict, which was supported by substantial and credible evidence. Because defendant’s claims are meritless on their face and in light of the clear record before this Court, his petition will be dismissed without a hearing. See Zettlemyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991) (holding that no evidentiary hearing is necessary absent the identification of some facts that would support a contention of ineffectiveness) (citing Strickland, 466 U.S. at 690).

A. The Psychiatric Evaluations

Defendant first contends that his trial counsel was ineffective for failing to object to Dr. Edward B. Guy’s first psychiatric evaluation on the ground that it was a “dual evaluation” which “[addressed] Psychiatric, Competency and Sanity [sic] in the same examination.” Although the basis of the objection is unclear, it seems to stem from a misunderstanding of the nature of expert testimony. Dr. Guy performed two psychiatric evaluations of the defendant to determine his

competence to proceed. With respect to the second evaluation, he was asked to opine on defendant's mental problems, if any, and the appropriate treatment for any such problems to the extent he could do so in connection with a determination as to competency. These evaluations relied solely on the doctor's own observations, the drug and psychological history supplied by the defendant, and the drug evaluation of defendant by Mr. Wilson. Psychiatrists like Dr. Guy performing competency evaluations routinely obtain the type of information obtained by Dr. Guy, that is, information about defendant's psychiatric history and drug abuse, and rely upon such information in forming their opinions. Thus, no objection could have properly been made to Dr. Guy's reports, and counsel was not ineffective for failing to make such an objection. See Sistrunk v. Vaughn, 96 F.3d 666, 671 (3d Cir. 1996) (counsel not obliged to make a meritless argument); United States v. Javino, 960 F.2d 1137, 1145 (2d Cir. 1992) ("failure" to make a meritless argument is not ineffectiveness of counsel).

B. The Independent Psychiatric Expert

Defendant next argues that his counsel was ineffective for failing to obtain an independent psychiatric evaluation of his competence. Defendant's competence was evaluated both before and after his trial by an independent psychiatrist appointed by the Court, Dr. Edward Guy. He was never evaluated by a government psychiatrist. As previously stated, on the basis of two separate evaluations, Dr. Guy found the defendant competent. Psychologist David Wilson reached the same conclusion in connection with his drug evaluation of defendant.

There is absolutely no evidence of any departure from the appropriate standard of care by defense counsel with respect to the psychiatric aspects of this case. Counsel's decision not to request another psychiatric evaluation was a strategic one, and no ineffectiveness may be found from that decision absent evidence that a reasonable attorney would have sought such evidence. See, e.g., Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993) (decision whether or not to hire experts is a part of trial strategy); Earl v. Israel, 765 F.2d 91, 93 (7th Cir. 1985) (attorney not required to investigate if not doing so is reasonable under the circumstances).

Moreover, defendant has offered no evidence in support of his motion that an additional evaluation would have led another expert to a different conclusion. Without any showing of error in the evaluations by Dr. Guy and Mr. Wilson, and no evidence that another expert would have concluded differently, no prejudice has been shown and no hearing is necessary on this issue. See, e.g., Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) (speculation about what an expert would have said is not enough to establish prejudice to defendant); Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995) (defendant must prove that the expert evidence sought would have made a difference). In reaching this conclusion the Court notes that neither defendant nor his counsel have ever claimed that defendant was unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

C. The Fingerprint Expert

Lastly, defendant claims that his counsel was ineffective for failing to retain a fingerprint

expert to show that his fingerprints were not on the .357 revolver. Once again, defendant fails to show that such an expert would have been of any benefit to his defense. Cf. Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (trial judge's denial of defendant's unelaborated request for a fingerprint expert was not a denial of due process.) As a preliminary matter, as noted above, the decision of whether or not to call a particular expert witness is generally a matter of trial tactics within the range of a reasonable attorney's performance. See United States v. Kirsh, 54 F.3d 1062, 1072 (2d Cir. 1995) (whether to use a fingerprint expert is a tactical decision, and failure to do so does not constitute ineffective assistance of counsel.)

More importantly, the government never produced evidence that defendant's fingerprints were on the firearm, relying instead on eyewitness accounts to connect the defendant and the weapon. Even had the defendant's expert testified that his fingerprints were not on the revolver, it would have accomplished absolutely nothing. Defendant's trial counsel relied on the absence of fingerprint evidence in an attempt to convince the jury that reasonable doubt existed as to defendant's guilt. Counsel also used the absence of fingerprint evidence in her cross-examination of the government's firearms expert to imply that the revolver could have taken defendant's fingerprint, and that the absence of such evidence was therefore exculpatory. The most that defendant could hope for is that a fingerprint expert would have found that his fingerprints were not on the gun, a fact already admitted at trial. Under those circumstances, there can be no argument that defense counsel was ineffective in failing to obtain the services of a fingerprint expert.

3. Conclusion

Defendant has failed to show that his attorney's actions fell below “an objective standard of reasonableness” so that she was not “functioning as the counsel guaranteed by the Sixth Amendment,” or that prejudice from his attorney's claimed errors led to a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 687, 694. When it appears on the face of a petition that a defendant’s claim for relief is without merit, no hearing is necessary. Zettlemyer v. Fulcomer, 923 F.2d 284, 301-02 (3d Cir. 1991). Based on the record, the Court concludes that defendant’s claims are without merit, and thus no hearing will be required.

For all of the foregoing reasons, the Court denies defendant’s Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255.

BY THE COURT:

JAN E. DUBOIS, J.