UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:98 CR 94 (CFD)
	:	Civil No. 3:01 CV 1013 (CFD)
MICHAEL F. WATTS	:	

RULING

Pending are the petitioner Michael Watts's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, Motion for Appointment of Counsel, and Motion for an Evidentiary Hearing. For the following reasons, the Motions are DENIED.

I. Background

On September 29, 1998, the petitioner, Michael Watts ("Watts"), pled guilty to Count One of an indictment charging him with conspiring to distribute at least 50 grams of a mixture and substance containing a detectable amount of cocaine base, in violation of section 846 of Title 21 of the United States Code. As part of his plea, Watts agreed that the offense and relevant conduct involved more than 1.5 kilograms of crack cocaine. On February 23, 1999, Watts was sentenced to 212 months' imprisonment.[1]

On March 3, 1999, Watts filed a notice of appeal with the United States Court of Appeals for the Second Circuit. Watts's counsel, C. Thomas Furniss ("Furniss"), who represented Watts in the lower court proceedings as well as on appeal, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals affirmed the conviction by summary order on March 16, 2000.

[1]His guideline range was 210 to 262 months' imprisonment.

Watts did not seek review of his conviction through a petition for certiorari by the United States Supreme Court.

Pending is Watts's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #187], dated June 5, 2001, as amended on January 16, 2002 by Doc. #193-1. Watts's petition raises claims based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and ineffective assistance of counsel.[2] Also pending are Watts's motion for appointment of counsel and motion for an evidentiary hearing, as set forth in Doc. # 193-1.

II. Discussion

A. Motion for Appointment of Counsel

A § 2255 petitioner does not have a constitutional right to the assistance of counsel. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."). See also United States v. Doe, 2004 WL 842605, *4 (2d Cir. 2004). However, where the interests of justice so require, the Court may appoint counsel for any financially eligible person who is seeking relief under § 2255. 18 U.S.C. § 3006A(a)(2)(B). "In this

---

[2]While Watts's amended petition [Doc. #193-1] does not set forth his claims based on Apprendi, the Court will address those claims as they were raised in Watt's original petition [Doc. #187]. Also, the original petition contained a claim that the Court did not make "particularized findings" that the quantity of crack cocaine - more than 1.5 kilograms - constituted relevant conduct for guidelines purposes. However, the Court adopted the factual statements in the Presentence Investigation Report ("PSR") (which included this amount as relevant conduct) and also accepted the plea agreement (which contained a stipulation as to this quantity) at sentencing. There was no objection by Watts to the Court adopting that portion of the PSR or to accepting the plea agreement.

circuit, appointment is not made without consideration of the merits of the case, the complexity of the legal issues raised, and the ability of the petitioner to investigate and present the case." Saldina v. Thornburgh, 775 F. Supp. 507 (D. Conn. 1991) (citing Shaird v. Scully, 610 F. Supp. 442, 444 (S.D.N.Y. 1985)).

The Court concludes that the interests of justice do not require the appointment of counsel in this case. As explained below, Watts's Apprendi claim fails because Apprendi cannot be applied retroactively to his conviction or sentence and even if it were applied retroactively, it provides Watts no relief in light of (1) the sentence received by Watts and (2) Watts's stipulation to drug quantity. In addition, Watts's ineffective assistance of counsel claims fail. At the guilty plea phase, Watts's counsel's conduct did not fall below the objective standard of reasonableness. Also, there has been no showing that, on appeal, there was an actual conflict of interest, that any alleged conflict adversely affected Watts's counsel's performance, or that but for Watts's counsel's failure to file a merits brief, Watts would have prevailed on his appeal. Thus, the merits of the case, as well as the application of the other factors, indicate that the interests of justice do not require appointment of counsel, particularly in light of the expanded record as discussed below. Accordingly, the motion to appoint counsel is DENIED.

B. Motion for an Evidentiary Hearing

In addition, Watts's motion for an evidentiary hearing is DENIED. The Court has before it Watts's petition and amended petition, the affidavit attached to his initial petition, transcripts of the guilty plea and sentencing proceedings, and all other documents contained in the Court file for the underlying criminal case. Also, on July 8, 2003, the Court ordered Thomas Furniss, Watts's trial and appellate

counsel, to file an affidavit responding to Watts's allegations in his petition and amended petition and indicating specifically whether he explained to Watts the 1.5 kilogram drug stipulation contained within the plea agreement and its implications for sentencing guidelines calculations [Doc. #203]. Subsequently, the record was supplemented by a detailed, credible affidavit from Furniss, describing his communications with Watts. On October 10, 2003, the Court directed the Clerk to mail a copy of Furniss's affidavit to Watts [Doc. #207].

In compliance with the practice recommended by the Second Circuit, this Court gave separate notices to Watts on July 8, 2003 [Doc. #203] and October 10, 2003 [Doc. #207] that he may supplement his petition with any additional evidence to support his arguments and reminded Watts to submit "particularized factual allegations if he submits this evidence in the form of an affidavit." See Pham v. United States, 317 F.3d 178, 187 (2d Cir. 2003) (Sotomayor, J., concurring) (encouraging district courts to inform pro se petitioners "of the importance of factual specificity in any affidavits or other written materials included in their reply."). Even though Watts was invited to supplement his petition with any additional evidence and to respond to Furniss's affidavit and the Government's proposed findings of fact and conclusions of law, Watts has not come forward with any factual materials, affidavits, or potential witnesses.

The Court concludes that an evidentiary hearing is not warranted in this case. The testimony of Watts and Furniss "would add little or nothing to the written submissions," nor would a hearing "offer any reasonable chance of altering [the Court's] view of the facts." Chang v. United States, 250 F.3d 79, 86 (2d Cir. 2001). In Chang, the Second Circuit held that the district court was not required to hold an evidentiary hearing where the record had been supplemented by an affidavit from trial counsel

addressing the petitioner's ineffective assistance of counsel claim. 250 F.3d at 85-86 ("It was, therefore, within the district court's discretion to choose a middle road that avoided the delay, the needless expenditure of judicial resources, the burden on trial counsel and the government, and perhaps the encouragement of other prisoners to make similar baseless claims that would have resulted from a full testimonial hearing."). See also Pham, 317 F.3d at 184 ("Our precedent disapproves of summary dismissal of petitions where factual issues exists [sic], but it permits a 'middle road' of deciding disputed facts on the basis of written submissions.") (citing Chang, 250 F.3d at 86). Although there may very well be circumstances where an evidentiary hearing may still be needed even when such an attorney affidavit has been filed, the record in this case, including Furniss's affidavit, is sufficient to resolve the factual issues presented by Watts. In addition, Watts has been provided opportunities to supplement the record, but has not done so. Accordingly, Watts's motion for an evidentiary hearing is DENIED.

C. Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence

1. Apprendi claims

In Apprendi, the Supreme Court held that any element of an offense that increases the statutory maximum penalty for the crime of conviction must be submitted to the jury and proven by the government beyond a reasonable doubt. 530 U.S. at 490. Apprendi includes the quantities of drugs charged in an indictment, as elements of an offense under 21 U.S.C. §§ 841 and 846, because the quantity of drugs charged affects the statutory maximum penalties for an offense under these statutes. See United States v. Thomas, 274 F.3d 655, 663-64 (2d Cir. 2001).

The Second Circuit has held that Apprendi "does not apply retroactively to initial section 2255 motions for habeas relief." Coleman v. United States, 329 F.3d 77, 82 (2d Cir. 2003). Watts's

petition is an initial section 2255 motion. Thus, Apprendi cannot be applied retroactively to his conviction or sentence. However, even if Apprendi were applied retroactively, it would provide Watts no relief here in light of (1) the sentence received by Watts, and (2) Watts's stipulation to drug quantity.

a. Maximum Term of Imprisonment

As the Second Circuit explained in Thomas, "[t]he constitutional rule of Apprendi does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction." 274 F.3d at 664. In this case, Watts's sentence of 212 months' incarceration for a violation of 21 U.S.C. § 846 does not exceed the statutory maximum that could be applied even if no specific quantity of drugs was alleged or proven. Under 21 U.S.C. § 841(b)(1)(C), Watts could have been sentenced for up to twenty years' incarceration for his involvement in the conspiracy. See 21 U.S.C. §§ 846, 841(b)(1)(C). Accordingly, even if Apprendi did apply retroactively to Watts's petition, because the sentence imposed by the Court for Count One did not exceed the applicable statutory maximum, Apprendi imposes no requirement that a jury determine the quantity of cocaine base, or that Watts should have been advised of that at his guilty plea proceeding.

b. Stipulation to Drug Quantity

Watts's Apprendi claim fails for another reason. The Second Circuit has held that, where a petitioner stipulates to a drug quantity and type, he cannot raise a claim under Apprendi that the sentencing court improperly arrogated to itself the task of determining the drug quantity. See United States v. White, 240 F.3d 127, 134-35 (2d Cir. 2001); United States v. Champion, 234 F.3d 106, 109-10 (2d Cir. 2000). Under such circumstances, any claim of error is harmless. White, 240 F.3d at

134; Champion, 234 F.3d at 110.

Here Watts stipulated as part of his plea agreement that the offense conduct involved more than 1.5 kilograms of crack cocaine. In addition, that particular stipulation was pointed out to Watts during his guilty plea proceeding. Thus, the Court did not commit any error by sentencing Watts consistent with that stipulation and agreement and Watts cannot obtain relief under Apprendi.

2. Ineffective Assistance of Counsel

The United States Supreme Court has established a two-prong test for evaluating claims of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To obtain relief, a defendant must show that his lawyer's performance fell below an objective standard of reasonableness and that, but for his lawyer's errors, the result of the proceeding probably would have been different. See McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999); Boria v. Keane, 99 F.3d 492 (2d Cir. 1996) (habeas petition granted based on trial counsel's failure to provide defendant with constitutionally required advice concerning advisability of accepting offered plea rather than going to trial). Counsel is afforded wide latitude in executing litigation strategy. See Strickland, 466 U.S. at 689. The United States Supreme Court has recognized that "there are countless ways to provide effective assistance in any given case" and has cautioned against post hoc criticisms of counsel's strategy. See id.

a. Plea Agreement

Watts argues that his counsel stipulated to the drug amount indicated within the plea agreement (more than 1.5 kilograms), despite Watts's refusal to agree to that amount. Watts also claims that he was not told that at sentencing he would be responsible for the amount agreed to in the plea agreement.

In support of these arguments, Watts submitted an affidavit attached to his initial petition. However, these claims are not supported by the expanded record.

In the plea agreement (which Watts signed), Watts stipulated that the offense and relevant conduct involved more than 1.5 kilograms of crack cocaine. During the plea proceeding, the Government explicitly pointed out that the plea agreement contained the stipulation to more than 1.5 kilograms of crack cocaine. Watts then affirmed on the record that he had reviewed the plea agreement with his attorney and that the plea agreement fully and accurately reflected his agreement with the Government. At the plea proceeding the Government also described the factual basis for the plea. Watts raised certain objections to portions of the Government's description, but did not raise any dispute as to the amount of drugs involved in the conspiracy or as agreed to in the plea agreement as relevant conduct.[3] Nor did Watts contest the stipulated amount at any other time during the plea proceeding. Moreover, Watts stated on the record that he was entering the plea voluntarily, knowingly, and of his own free will. The affidavit submitted as part of this § 2255 proceeding by Thomas Furniss, Watts's attorney, indicates that Furniss and Watts discussed extensively the stipulated drug quantity and its implications for sentencing guidelines calculations before the plea was entered. Finally, Watts did not object to the Presentence Investigation Report as to quantity of drugs or raise this issue before or during the sentencing hearing.[4] See ¶ 28 of PSR. Thus, there is no indication from the record that

---

[3]Watts clarified the particulars of a sale of crack cocaine on May 4, 1998, which related to Count Seven of the indictment, as well as Count One, the conspiracy count. Watts specified that he did not participate in a hand-to-hand sale on that occasion, but rather, only assisted with the delivery of drugs which were placed in a vehicle.

[4]Prior to the Court imposing sentence, it inquired specifically of Watts as to whether he had reviewed the PSR, and he indicated that he had. In addition, at sentencing, Watts stated "Basically,

Watts was compelled to enter into the drug amount stipulation by his attorney, disagreed with the stipulated drug amount, or did not understand its implications.

Additionally, Watts received significant benefits from the plea agreement. Through the agreement, and its adoption by the Court, Watts received the benefit of the Government's recommendation of a three-level downward adjustment for acceptance of responsibility, as well as the Government's decision not to file a notice of his prior drug convictions, seek an upward adjustment for role, or seek an adjustment for obstruction of justice.

As the Court finds that Watts knowingly and voluntarily entered into the drug amount stipulation, that Watts's counsel's negotiation of the plea agreement conferred a significant benefit on Watts, and that Furniss adequately explained the drug stipulation to Watts, the Court concludes that counsel's conduct did not fall below the objective standard of reasonableness.

b. Appeal

Watts also argues that Furniss provided ineffective assistance of counsel in Watts's appeal to the Second Circuit by filing an Anders brief, particularly since he had raised an ineffective assistance of counsel claim against Furniss prior to the filing of the Anders brief.[5]

---

also, I know it's the law, but I don't really feel that it's right that as far as the conspiracy goes that I got to be charged with the whole conspiracy, even though I knew they were doing or was aware what they was doing . . . ." Tr. at 27-28.

[5]On March 3, 1999, Watts filed a Motion for Leave to Withdraw Guilty Plea or (in the alternative) to Vacate Guilty Plea Based on Ineffective Assistance of Counsel [Doc. #145], which the Court denied because it was filed after Watts's sentencing had occurred and judgment had entered. On that same day, Furniss also filed a Motion for Leave to Withdraw Appearance and for Appointment of Successor Counsel [Doc. #144], which the Court denied, without prejudice, in light of the pending direct appeal before the Second Circuit Court of Appeals.

The United States Supreme Court has held that the standard for evaluating a petitioner's claim that appellate counsel was ineffective by failing to file a merits brief is the same standard as that announced in Strickland. Smith v. Robbins, 528 U.S. 259, 285-86 (2000). In order to satisfy the first prong of the Strickland test, that petitioner's counsel was objectively unreasonable, a petitioner need only show "that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief." Robbins, 528 U.S. at 288. If petitioner succeeds in such a showing, "he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." Id. at 285.

However, prejudice is presumed "when counsel is burdened by an actual conflict of interest, although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance." Id. at 287 (internal quotations omitted). See also Tueros v. Greiner, 343 F.3d 587, 591-92 (2d Cir. 2003). The Second Circuit has set forth a three-prong test for determining whether a defendant has established an ineffective assistance of counsel claim based on a conflict of interest with the defendant: (1) the defendant must establish that an actual conflict of interest existed - that the attorney's and defendant's interests diverged with respect to a material factual or legal issue or to a course of action; (2) the defendant must establish an actual lapse in representation - that there was some "plausible alternative defense strategy" not taken up by counsel; and (3) the defendant must show causation - that an alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. United States v. Moree, 220 F.3d 65, 69 (2d Cir. 2000) (internal citations and quotations omitted).

i. Conflict of Interest

Watts appears to claim that his counsel was burdened by an actual conflict of interest at the time of the filing of the Anders brief because Watts had already raised an ineffective assistance of counsel claim against Furniss when he filed the Motion for Leave to Withdraw Guilty Plea or (in the alternative) to Vacate Guilty Plea Based on Ineffective Assistance of Counsel.[6] However, Watts' statements that (1) his counsel stipulated to the drug amount indicated within the plea agreement despite Watts's refusal to agree to that amount and (2) Watts was not told that at sentencing he would be responsible for the amount agreed to in the plea agreement are not sufficient to create a conflict of interest. See United States v. Davis, 239 F.3d 283, 286 (2d Cir. 2001) (clarifying that Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995) "should not be read as holding that the mere accusation of coercion, without more, is sufficient to create a conflict of interest."); United States v. Jones, 900 F.2d 512, 519 (2d Cir.) (mere allegations of facts which, if true, would amount to conflict of interest insufficient to demonstrate actual conflict), cert. denied, 498 U.S. 846 (1990). Furniss's affidavit indicates that Furniss and Watts discussed extensively the stipulated drug quantity and its implications for sentencing guidelines calculations. In addition, Furniss's affidavit indicates that Watts agreed that there were more than 1.5 kilograms involved in the conspiracy. Watts has not filed a response to Furniss's affidavit. Apart from the affidavit attached to Watts's initial petition, Watts has not come forward with any

---

[6]Furniss filed the motion on behalf of Watts and stated that "Defendant apparently feels that his guilty plea was not made knowingly and intelligently under all the circumstances, and may also feel that counsel did not give him effective assistance." Furniss added a footnote after the word "apparently" explaining that "'apparently' is used because of the difficult position counsel is in, which should be obvious but should probably be stated anyway - existing counsel clearly would not have allowed Defendant to enter into a plea agreement stipulating to more than 1.5 kg unless he felt Defendant understood what he was doing and agreed with it."

relevant factual materials, affidavits, or potential witnesses to support his allegations or dispute the information contained in Furniss's affidavit. In addition, Watts's statements at the plea proceeding, his failure to object to the portions of the presentence report based on the agreed-upon drug quantity, and to otherwise object at his sentencing to that amount (or the guidelines calculations produced by it) establish that Watts agreed with the stipulated drug amount and fully understood its implications at all times.

Even if the Court assumes that an actual conflict of interest existed, Watts cannot establish that there was an actual lapse in representation. Watts fails to show that there was a "plausible alternative defense strategy" not taken up by Furniss. Filing a merits brief instead of filing an Anders brief was not a viable alternative in this case as Watts does not point to one nonfrivolous issue warranting a merits brief on appeal. Since there is no indication that any alleged conflict adversely affected Watts's counsel's performance, Watts has failed to demonstrate that his counsel had a conflict of interest in the appeal to the Second Circuit. Watts's claim is one of ineffective assistance of counsel and is assessed under the Strickland standard.

ii. Strickland test

First, Watts does not point to one nonfrivolous issue warranting a merits brief on appeal. Nor can Watts satisfy the second prong of the Strickland test. There has been no showing that, but for Furniss's failure to file a merits brief, Watts would have prevailed on his appeal. Accordingly, Watts's ineffective assistance of counsel claim fails as to Furniss's role in his appeal.

III. Conclusion

For the preceding reasons, Watts's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or

Correct Sentence, Motion for Appointment of Counsel, and Motion for an Evidentiary Hearing are DENIED. The Clerk is directed to close the case. No certificate of appealability will issue as there has been no "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

SO ORDERED this 10th day of May 2004, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE