

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION**

ERNEST E. LEWIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 10-3044
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**OPINION**

This matter comes before the Court on Petitioner Ernest E. Lewis’ Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (d/e 1) (Petition). For the reasons set forth below, the Petition is denied.

**STATEMENT OF FACTS**

On November 2, 2007, law enforcement officers observed Lewis and his pregnant fiancé Andrea Jenkins driving in a rural wooded area in Adams County, Illinois. The officers knew that Lewis had been arrested for manufacturing methamphetamine in the past. Lewis pulled his vehicle to the side of the road and stopped. The officers approached Lewis’ vehicle and asked if he needed assistance. The officers could smell anhydrous ammonia coming from the vehicle. Anhydrous ammonia is used in the manufacture of methamphetamine. Lewis said that he did not need assistance and drove off. Law enforcement officers followed Lewis and made

a traffic stop for failing to signal when Lewis pulled into a driveway. Lewis denies that he failed to signal. Answer of Respondent (d/e 4) (Answer), Exhibit 1, Criminal Complaint, attached Affidavit of Matt McElfresh (McElfresh Affidavit), ¶ 4; Answer, Exhibit 5, Transcript of Proceedings on December 30, 2008 (Motion Transcript), at 46.

Upon stopping the vehicle, the officers smelled anhydrous ammonia. The officers asked for permission to search the vehicle, but permission was denied. A drug sniffing dog was brought to the scene. The dog alerted on the vehicle. The officers searched the vehicle and found material used in manufacturing methamphetamine. The officers arrested Lewis and searched him. They found a bag in his pocket that contained a white substance that field-tested positive for methamphetamine. McElfresh Affidavit, ¶ 4.

On November 2, 2007, Lewis waived his Miranda rights and admitted owning the items found in the vehicle and admitted that he intended to manufacture methamphetamine with the items. The officers also interviewed Jenkins on November 2, 2007. She admitted purchasing pseudoephedrine pills for Lewis to be used in the manufacture of methamphetamine. She also admitted helping Lewis manufacture methamphetamine. Adams County drug store records showed that Lewis purchased pseudoephedrine pills from April 2007 to November 2007. McElfresh Affidavit, ¶¶ 5-7.

Lewis was arrested on state charges. An Adams County public defender was

appointed to represent him. The Adams County public defender told Lewis that she believed he had a basis to seek to suppress the evidence found at the traffic stop. Motion Transcript, at 6-7. She never filed the motion, however, because federal prosecutors decided to pursue an indictment in federal court against Lewis based on these events. The state case was dropped at that time.

On April 1, 2008, a federal grand jury indicted Lewis, charging him with possession of a listed chemical with the intent to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(1). Assistant Federal Public Defender Robert J. Scherschligt was appointed to defend Lewis.

Scherschligt met with Lewis several times. During these conversations, Scherschligt recommended that Lewis cooperate. At one point, Scherschligt presented Lewis with a cooperation agreement. Motion Transcript, at 9-10. Lewis asked about moving to suppress the evidence. Lewis believed that the traffic stop was illegal because he, in fact, used his turn signal. Scherschligt advised against filing a motion because Scherschligt thought that the motion was meritless. Scherschligt believed that the officers had probable cause to search the vehicle when they smelled anhydrous ammonia the first time, or at least probable cause to detain him until the drug sniffing dog could be brought to the scene to search around the vehicle. Motion Transcript, at 67, 75. Scherschligt also was concerned because the prosecutor might refuse to allow Lewis to cooperate if he filed a meritless motion. Motion Transcript, at 38, 70.

Lewis asked Scherschligt to interview Jenkins. Motion Transcript, at 21.

Lewis believed that Jenkins would change the story that she told the officers on November 2, 2007. Jenkins had indicated to Lewis and others that she did not tell the complete truth in the interview. Scherschligt listened to the recording of the interview conducted by law enforcement officials, but did not speak to Jenkins directly. Motion Transcript, at 80, 87.

Scherschligt also told Lewis that Scherschligt estimated the low end of the applicable Sentencing Guideline range to be 151 months imprisonment. Scherschligt told Lewis that there was no guarantee that this would be the range. Motion Transcript, at 88-89. Scherschligt also told Lewis that if he cooperated with the Government, the sentence could be reduced below that range.

On May 5, 2008, Scherschligt told Lewis that the Government offered a plea agreement that required Lewis to waive his appeal rights. Lewis told Scherschligt that he did not want to waive his appeal rights. Scherschligt was also unhappy with the proposed agreement. Motion Transcript, at 12, 31-32. Scherschligt wanted to negotiate an open plea in which the Government would still allow Lewis to cooperate. Scherschligt believed this was the best option because Lewis could reap the benefit of cooperating, but retain his appeal rights. Motion Transcript, at 61-62. Lewis did not sign the agreement. According to Scherschligt, Lewis then directed Scherschligt to set a hearing in which Lewis could enter a guilty plea. Motion Transcript, at 66. Lewis denies that he told Scherschligt to set such a hearing. According to Lewis, Scherschligt was going back to the Government to try to negotiate a different plea

agreement. Motion Transcript, at 13.

Scherschligt filed a motion for a change of plea hearing. Lewis appeared at the hearing before United States Magistrate Judge Byron G. Cudmore on May 13, 2008. Lewis claims that before the hearing began, he asked Scherschligt what the sentence would be. Lewis claims that Scherschligt told him that the sentence would be 150 months, but also that the sentence could be reduced by any downward departure for Lewis' cooperation. Lewis claims that the prosecutor, Assistant United States Attorney Gregory K. Harris, was standing next to Scherschligt at the time of this conversation. Lewis believed that he had an agreement with the Government regarding the sentence. Lewis stated:

I assumed when I pled guilty, and Mr. Scherschligt and I sat at the table, he wrote down on a yellow legal pad 150 months. And Mr. Harris was standing right there when he said it. And he said this is where we downward depart from, go ahead and plead guilty. So that's what I was assuming what the deal was. But that's just not how it worked out.

Motion Transcript, at 47-48. Scherschligt denies that he promised Lewis that Lewis would receive a particular sentence or implied that the Government had agreed to any particular sentence. Answer, Exhibit 10, Affidavit of Robert J. Scherschligt, ¶¶ 4-5.

Lewis then entered an open plea to the charge. During the hearing Judge Cudmore asked Lewis several questions to confirm that he was making a knowing and voluntary plea. Judge Cudmore's colloquy with Lewis included the following:

The Court: Mr. Lewis, have you had enough time to discuss your case with your attorney?

Mr. Lewis: Yes, sir.

The Court: Are you satisfied with your lawyer's efforts on your behalf?

Mr. Lewis: Yes, sir.

....

The Court: Mr. Lewis, do you understand the maximum penalty?

Mr. Lewis: Yes, sir.

The Court: If you receive the maximum amount of jail time, how many years is it?

Mr. Lewis: Twenty.

....

The Court: Very well. Do you have any questions at all, Mr. Lewis, about what the maximum possible penalty you're facing?

Mr. Lewis: No, sir.

....

The Court: Do you understand that Judge Scott, the judge that will sentence you, is going to be using certain advisory sentencing guidelines to give her a range of where your sentence should fall? Understood?

Mr. Lewis: Yes, sir.

The Court: Do you understand Judge Scott has discretion to move above or below those advisory ranges for reasons she finds appropriate?

Mr. Lewis: Yes, sir.

The Court: Has anyone threatened you, threatened anyone else, forced you in any way to plead guilty?

Mr. Lewis: No, sir.

....

The Court: Has anyone, including your lawyer, promised you what your sentence is going to be if you plead guilty?

Mr. Lewis: No, sir.

The Court: I'm confident you have been given certain estimates and opinions based upon the advisory guidelines, correct?

Mr. Lewis: Yes, sir.

The Court: Do you understand those are simply opinions of your lawyer and don't bind the Court?

Mr. Lewis: Yes, sir.

....

The Court: Are you pleading guilty because you are guilty?

Mr. Lewis: Yes, sir

.

The Court: Are you pleading guilty of your own free will?

Mr. Lewis: Yes, sir.

United States v. Lewis, C.D.Ill. Case No. 08-30020, Transcript of Proceedings on May 13, 2008 (d/e 17) (Guilty Plea Transcript), at 7-8, 15-18, 20.

On July 30, 2008, the Probation Office issued a Presentence Investigation Report (PSR) for Lewis. Answer, Exhibit 3, PSR dated July 30, 2008 (2008 PSR). According to the 2008 PSR, Lewis' offense level and criminal history calculation put the sentencing range at 262 months to 327 months, but because the statutory

maximum for the charge was 20 years, the sentencing range was reduced to 240 months. The Probation Office calculation differed from Scherschligt's estimate because the Probation Office added a two-level enhancement in the offense level for unlawfully releasing hazardous or toxic substances into the environment and a three-level enhancement for endangering the life of Jenkins and her unborn child. See U.S.S.G. §§ 2D1.1(b)(10)(A) and 2D1.1(b)(10)(C)(ii). 2008 PSR, ¶¶ 25-26, 101. Scherschligt missed these enhancements when he made his estimate of 151 months. Motion Transcript, at 88.

Scherschligt discussed the 2008 PSR with the Probation Officer. Scherschligt told the Probation Officer that applying both enhancements was improper. Scherschligt said that the two enhancements came from § 2D1.1(b)(10) of the Guidelines, and that § 2D1.1(b)(10) provided that only the highest applicable enhancement from subsection (b)(10) should be applied, so applying two enhancements from that subsection was improper. The Probation officer agreed that the section said to apply only the highest applicable enhancement from that subsection. The Probation Officer agreed to remove the two-level enhancement for releasing hazardous or toxic material into the environment. Motion Transcript, at 98.

On August 14, 2008, Lewis filed a pro se Motion to Remove Counsel Due to Ineffective Assistance of Counsel. United States District Judge Jeanne E. Scott held a hearing on the Motion on August 18, 2008. At the hearing, Scherschligt stated that he secured the removal of one of the enhancements from the sentencing calculations



and intended to file an objection to the remaining enhancement for endangering the lives of others. According to Lewis, Scherschligt previously showed the proposed objection to Lewis. At the end of the hearing, Judge Scott removed Scherschligt as Lewis' counsel and appointed attorney John Madonia.

On December 3, 2008, Lewis filed a Motion to Withdraw his guilty plea. Answer, Exhibit 4, Motion to Withdraw Plea of Guilty. Judge Scott held a hearing on the Motion on December 30, 2008. Lewis and Scherschligt testified at the hearing. At the conclusion of the hearing, Judge Scott denied the Motion. Judge Scott stated that attorney Scherschligt had provided Lewis with sound advice and counsel. With respect to the decision not to file the motion to suppress evidence, Judge Scott stated:

He has explained that the defendant raised the issue of filing a motion to suppress with Mr. Scherschligt, but after Mr. Scherschligt explained reasons not to do so the defendant did not direct that he file it.

And Mr. Scherschligt's explanations make sense and are certainly not deficient from the prospective of reasonable advice of counsel.

It is true that sometimes the Government takes the position that if you frivolously contest something you're not in a position to gain acceptance of responsibility because they do not find you to be credible. And you would risk giving up the benefit of cooperating by filing such a motion.

Also, Mr. Scherschligt's analysis that even if you won the motion there is evidence for the Government to go forward with the charge that has been filed, and probably gain a conviction based on the records from the pharmacies and Ms. Jenkins' testimony; which if she did change her testimony, the Government would clearly be able to impeach her with the recorded statement she gave to the contrary and make her look like a liar who was a girlfriend trying to protect a boyfriend.

So the totality of the advice given by Mr. Scherschligt seems to have been very, very competent and very good advice.

Motion Transcript, at 107-08.

The Probation Office prepared a revised PSR on February 11, 2009. Answer, Exhibit 6, Revised PSR dated February 11, 2009 (2009 PSR). The Probation Office removed the two-level enhancement for releasing hazardous chemicals into the environment, but kept the three-level enhancement for endangering the lives of others. Lewis did not file an objection to the enhancement. The 2009 PSR stated that the Sentencing Guideline range was 210 months to 240 months imprisonment.

The sentencing hearing occurred on February 23, 2009. The Government stated that Lewis should not be entitled to any reduction in his sentence due to cooperation.

Assistant U.S. Attorney Harris stated:

The Government is not making a recommendation for a sentence below the guideline range because of the defendant's inconsistent testimony at his hearing to withdraw his guilty plea. He contradicted his statements that he made in his proffer, and of course, as far as a witness to the Government, he diminished his assistance to the Government. His credibility was seriously undermined by his testimony.

United States v. Lewis, C.D.Ill. Case No. 08-30020, Transcript of Proceedings on February 23, 2009 (d/e 35) (Sentencing Transcript), at 9-10.

Attorney Madonia urged Judge Scott to reduce Lewis' sentence based on cooperation. Madonia said that Lewis provided information on his friends and associates involved in drugs, specifically a man named Joe Hedges. Madonia also noted that Lewis provided information in a state homicide investigation and was

scheduled to testify in the homicide proceeding. Madonia concluded:

And the Government stands here now and says that he should not get the benefit of any cooperation. I have no idea how that's going to impact my client now in his decision to cooperate in the future. I hope it doesn't have any bearing. I hope he understands he can still earn if he cooperates.

But Judge, I believe he deserves some credit. And I understand that the Government is upset with his position that he took with his motion to withdraw his guilty plea, but he is receiving a very significant sentence; basically 30 months from the maximum is what they are recommending; which is a very minor benefit in the grand scheme of things for a man of his age and the time he is going to spend in prison sorting this matter out.

Judge, we would ask for you to treat those guidelines as advisory, recognize the 210 months as a starting point, but to actually use that simply as advisory.

I was hopeful for a 25 percent reduction from that sentence today, which would put him at approximately 158 month sentence. And I don't think that's out of the realm of reasonableness under the light of the circumstances, Your Honor.

Sentencing Transcript, at 13.

Judge Scott agreed with attorney Madonia that Lewis deserved some credit for his cooperation. Judge Scott sentenced Lewis below the Guideline range to 198 months imprisonment based on his cooperation, other than the cooperation for the homicide case. Judge Scott stated that she believed that if he testified, the Government should give him some additional benefit through a Rule 35 motion to reduce sentence. Id., at 20-21; see Fed. R. Crim. P. 35. The Government subsequently filed a Rule 35 motion to reduce his sentence further. Lewis' sentence

was reduced to 168 months. Lewis filed this Petition on February 19, 2010.

### ANALYSIS

Lewis claims that he received ineffective assistance of counsel because: (1) attorney Scherschligt failed to interview Jenkins; (2) attorney Scherschligt failed to move to suppress the evidence found as a result of the traffic stop; (3) attorney Scherschligt improperly promised that he would be sentenced to 151 months or less if he pleaded guilty; (4) attorney Scherschligt erroneously calculated the applicable Sentencing Guideline range; (5) attorneys Scherschligt and Madonia failed to file an objection to the three-level sentencing enhancement for endangering the lives of others; (6) attorney Madonia did not object to the Court's ruling on his Motion to Withdraw his guilty plea; and (7) attorney Madonia did not object to the Government's opinion that Lewis should not receive anything at the time of sentencing for his cooperation.

To prevail on a claim of ineffective assistance, Lewis must show: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance resulted in prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). In order to receive an evidentiary hearing on his claims, Lewis must present actual proof of a meritorious claim. Galbraith v. United States, 313 F.3d 1001, 1009 (7<sup>th</sup> Cir. 2002); see Section 2255 Rule 8(a). Lewis has failed to meet his burden. The Court will address each ground in order.

1. Failure to Interview Jenkins

Lewis has failed to show that attorney Scherschligt's performance fell below an objective standard of reasonableness in deciding not to interview Jenkins. Scherschligt listened to the recording so he knew what she told law enforcement. Scherschligt believed that Jenkins' testimony was not important to the validity of the search of Lewis' vehicle. Scherschligt believed that the officers had probable cause to search the vehicle based on the odor of anhydrous ammonia and Lewis' criminal record. Scherschligt believed that, at a minimum, the officers had a sufficient basis to detain the vehicle to bring in a drug sniffing dog to search the area around the vehicle. This was a reasonable conclusion. See e.g., United States v. Sweeney, 688 F.2d 1131, 1137 (7<sup>th</sup> Cir. 1982) (odor of chemicals used in drug manufacturing coming from a car provided probable cause to search the car). Thus, even if Jenkins' revised statement somehow disputed the validity of the traffic stop, the evidence found in the vehicle and Lewis' confession would still be admissible. Scherschligt made a reasonable strategic decision that, at the early stage of the case, an interview would be unnecessary. This strategic decision met the standard of reasonableness. See United States v. Cieslowski, 410 F.3d 353, 360 (7<sup>th</sup> Cir. 2005).

Furthermore, Lewis has failed to show any prejudice from attorney Scherschligt's decision not to interview Jenkins. Lewis has presented evidence that Jenkins would deny some of the statements she made in her interview with law enforcement officials, but he has presented no evidence of the content of Jenkins'

revised statement. Lewis, therefore, has failed to show that her new story would have benefitted him. See Robinson v. United States, 196 F.3d 748, 752 (7<sup>th</sup> Cir. 1999). Lewis has failed to show that he suffered any prejudice from Scherschligt's decision not to interview Jenkins.

2. Failure to File Motion to Suppress

Lewis has failed to present evidence that attorney Scherschligt fell below the objective standard of reasonableness in his decision not to file a motion to suppress. Lewis claimed that the traffic stop was improper because he used his turn signal when he turned into the driveway. As explained above, attorney Scherschligt reasonably concluded that the officers already had probable cause to search the vehicle based on the odor of anhydrous ammonia, so the validity of the stop was not material. Moreover, attorney Scherschligt made a strategic decision that Lewis did not want to risk any downward departure by filing a meritless motion. This strategic decision has clearly benefitted Lewis. Lewis has received a 42-month reduction off the low end of the Guideline range for cooperation, from 210 months to 168 months imprisonment. Scherschligt properly advised Lewis not to risk three and one-half years of his life on a motion that had little or no merit. The decision met the standard of reasonableness. See Cieslowski, 410 F.3d at 360.

3. Improper Promise of 151 Months Sentence

Lewis has failed to present any evidence of any promise or agreement that he would receive a sentence of 151 months. Attorney Scherschligt erroneously opined

that the low end of the Guideline range would be 151 months, but he told Lewis that he could not guarantee that opinion. Lewis claims that Scherschligt told him the sentence would be 150 months or less, and Harris was present at the time of the conversation and did not dispute Scherschligt's statement. Lewis' testimony is not evidence of an agreement. At best, Lewis presented evidence that Harris also erroneously estimated the sentence to be 151 months. Lewis, himself, told Judge Cudmore under oath that no one promised him any particular sentence. Given the lack of evidence, and Lewis' statements under oath in open court, there is no basis for the claim that anyone promised Lewis a particular sentence.

4. Erroneous Calculation of the Guideline Range

Attorney Scherschligt rendered an erroneous opinion that the low end of Lewis' sentencing range would be 151 months. Rendering an erroneous opinion on a Guideline calculation, however, does not establish ineffective assistance of counsel. United States v. Martinez, 169 F.3d 1049, 1053 (7<sup>th</sup> Cir. 1999); United States v. Arvanitis, 902 F.2d 489, 494 (7<sup>th</sup> Cir. 1990). Attorney Scherschligt properly advised Lewis that he could not guarantee that estimate. Lewis stated in open court that he understood that the Court could sentence him to an amount of time that was different from any estimate he may have received from his counsel. Given the overwhelming evidence found in Lewis' vehicle and his own confession, attorney Scherschligt clearly gave Lewis the best advice to cooperate and plead guilty. Lewis reaped the benefits of that advice with a sentence below the Guideline range. The erroneous

estimate, therefore, did not prejudice Lewis. There is no basis for a finding of ineffectiveness of counsel.

5. Failure to File Objection to Sentencing Enhancement

Lewis complains that Scherschligt failed to file an objection to the enhancement for endangering the life of Jenkins and her unborn child. Lewis moved to dismiss attorney Scherschligt from the case before objections were due. Thus, Lewis' new attorney Madonia had ample time to file any such objection. The fact that attorney Scherschligt did not file the objection was not ineffective assistance. Lewis complains Scherschligt showed Lewis a draft of the objection, but did not turn the draft over to attorney Madonia. Even if true, Lewis suffered no prejudice. Attorney Madonia had ample time to research and prepare any objection.

Lewis also complains that attorney Madonia should have filed an objection to the enhancement for endangering the lives of others. Lewis has failed to present any evidence to show that a basis existed to challenge the Probation Office's position. The relevant Guideline states that the enhancement applies if the offense created a substantial risk of harm to human life. U.S.S.G. § 2D1.1(b)(10)(C)(ii). Lewis was driving his pregnant fiancé around in a vehicle that reeked of anhydrous ammonia. He was clearly endangering her life and the life of her unborn child. Madonia met the standard of reasonableness in not objecting to this enhancement.

6. Failure to Object to the Court's Ruling

Lewis complains that attorney Madonia should have objected to some of Judge



Scott's comments at the hearing on his Motion to Withdraw Guilty Plea. Lewis argues Judge Scott erroneously stated in her decision from the bench that the Government could have used Jenkins' statement and the records from the Adams County drug stores to convict Lewis of the charge of buying pseudoephedrine with the intent to manufacture methamphetamine even if the search of the vehicle was illegal. He claims that Madonia should have filed an objection to this part of Judge Scott's comments and argued that all of this evidence would have been excluded. Lewis appears to believe that all of this evidence would have been excluded as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471 (1963).

Attorney Madonia met the standard of reasonableness in deciding not to ask Judge Scott to reconsider. As explained above, Lewis' attorney could reasonably conclude that the odor of anhydrous ammonia in the car provided sufficient probable cause to search the vehicle or, at least, to allow the officers to detain Lewis to conduct a drug sniffing dog search around the car. Sweeney, 688 F.2d at 1137. Thus, the validity of the traffic stop was not material. Attorney Madonia properly decided not to attempt to rehash Judge Scott's comments in dicta about the hypothetical situation in which the search was not valid. Attorney Madonia met the standard of reasonableness in deciding not to ask Judge Scott to reconsider.

#### 7. Failure to Seek Reduction for Cooperation at Sentencing

Lewis complains that attorney Madonia failed to object to the Government's position at sentencing that Lewis should not receive any benefit for cooperation.

Lewis is incorrect. As quoted above, attorney Madonia argued that Lewis cooperated by giving information about his associates and by assisting the state in a homicide case. Judge Scott agreed with Madonia and sentenced Lewis twelve months below the Guideline range because of his cooperation with respect to his associates. Madonia sought and secured a reduction for cooperation. Lewis is mistaken. There was no ineffective assistance.

Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, the Court now considers whether it should issue a Certificate of Appealability (COA). A federal district court should 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). A § 2255 petitioner must demonstrate that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Rule 11 allows a court to have the parties “submit arguments on whether a certificate should issue.” See Rules Governing Section 2255 Cases, Rule 11(a). In this case, the Court finds that such a step is unnecessary. No reasonable jurist would contend that Lewis received ineffective assistance of counsel. Lewis has not met his burden, and accordingly, the Court denies Petitioner Lewis a COA.

THEREFORE, Petitioner Ernest E. Lewis’ Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (d/e 1) is

DENIED. The Court further determines that no certificate of appealability should be issued. All pending motions are denied as moot. This case is closed.

ENTERED this \_\_19th\_\_ day of October, 2010

**s/ Michael P. McCuskey**  
MICHAEL P. McCUSKEY  
CHIEF U.S. DISTRICT JUDGE