

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3314

Jeffrey B. Austin,

Appellant,

v.

United States of America,

Appellee.

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Appeal from the United States
District Court for the
Western District of Missouri.
[UNPUBLISHED]

Submitted: December 7, 2007
Filed: December 13, 2007

Before WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

PER CURIAM.

Jeffrey Austin is serving a federal sentence of 108 months in prison imposed after he was convicted of being a felon and unlawful user of controlled substances in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(1), (3) and 924(a)(2). After affirmance on direct appeal, see United States v. Austin, 98 Fed. Appx. 573 (8th Cir. 2004) (unpublished per curiam), Austin filed the instant proceeding under 28 U.S.C. § 2255, claiming that his waiver during his sentencing hearing of a fact issue underlying a Guidelines offense-level calculation was not voluntary, and that his counsel was relatedly ineffective for relieving the government of its burden of proof in exchange for a recommendation of a sentence at the low end of the Guidelines

range. The district court¹ denied relief, but granted a certificate of appealability (COA) on these issues. Following careful review, we agree with the district court that the record does not support Austin's contention that his waiver was involuntary--although it is questionable whether voluntariness is relevant, see New York v. Hill, 528 U.S. 110, 114-15 (2000) (for certain fundamental rights, defendant must personally make informed waiver, but waiver may be effected by action of counsel as to trial decisions, such as what evidentiary objections to raise, and defendant is deemed bound by acts of counsel). We also agree that Austin failed to establish prejudice or deficient performance by his counsel. See Rodriguez v. United States, 17 F.3d 225, 226 (8th Cir. 1994) (per curiam) (counsel not ineffective for failing to raise meritless challenge).

Accordingly, we affirm. See 8th Cir. R. 47B. Austin's motion to expand the COA is denied.

¹The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.