United States District Court
Northern District of Indiana
Hammond Division

UNITED STATES OF AMERICA

v.

DAVID FINLEY

(Under Seal)

Case No. 2:14-CV-295 JVB
(Arising out of 2:12-CR-133)

OPINION AND ORDER

David Finley, a federal prisoner, has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or amend his conviction (DE 114). The question before the Court is whether it must hold an evidentiary hearing on his motion, and, if no evidentiary hearing is required, whether Finley is entitled to any relief under § 2255.

A. Background

Finley was charged by indictment with: two counts of distributing cocaine (Counts 1 and 2); making a false statement during the purchase of a firearm (Count 3); sale of a firearm to a prohibited person (Count 4); distributing marijuana (Count 5); possession with intent to distribute cocaine (Count 6); and possession of a firearm in furtherance of a drug trafficking crime (Count 7). The Government dismissed all but Counts 3 and 5. Finley pleaded guilty to those Counts without the benefit of a plea agreement. He was sentenced to 30 months in prison.

Finley now claims that his guilty plea was involuntary because it was the result of ineffective assistance of counsel. While his motion does not clearly so state, the Court infers that Finley now wishes to withdraw his guilty plea and proceed to trial.

B. Legal Standards

Title 28 U.S.C. § 2255(b) provides that unless a § 2255 motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court must grant a hearing on the motion. A § 2255 petitioner is entitled to an evidentiary hearing if he alleges facts that, if proven, would entitle him to relief. *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002). However, an evidentiary hearing is not required when a petitioner's allegations are "vague, conclusory, or palpably incredible rather than detailed and specific." *Kafo v. United States*, 467 F.3d 1063, 1067 (7th Cir. 2006) (quoting *Bruce v. United States*, 256 F.3d 596, 597 (7th Cir. 2001)).

To prevail on a claim for ineffective assistance of counsel in the context of a guilty plea, a defendant must show that counsel's performance fell below an objective standard of reasonableness; and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have gone to trial, *Bethel v. United States*, 458 F.3d 711, 717 (7th Cir. 2006). In other words, the defendant must show that he suffered prejudice as a result of the alleged ineffective assistance. *Wyatt v. United States*, 574 F.3d 455, 457 (7th Cir. 2009). However, a mere allegation by a defendant that he would have insisted on going to trial is not sufficient to establish prejudice. *Bethel*, 458 F.3d at 718. Moreover, counsel's deficient performance must have been a decisive factor in the defendant's decision to enter a guilty plea. *Wyatt*, 574 F.3d at 458.

C. Ineffective Assistance of Counsel Claims

Finley claims that his counsel was ineffective because he failed to pursue an entrapment

defense. When the alleged error of counsel is the failure to advise the defendant of a potential defense to the crime charged, the resolution of the question of prejudice to the defendant depends largely on whether the defense likely would have succeeded at trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). But Finley does not allege in his § 2255 motion facts sufficient to show that he would have been permitted to present an entrapment defense to the jury if he had proceeded to trial. In order to present a jury question on an entrapment defense, there must be evidence of both government inducement and a lack of predisposition to commit the crime. *United States v. Haddad*, 462 F.3d 783, 790 (7th Cir. 2006).

The Seventh Circuit Court of Appeals has very recently clarified the inducement prong of an entrapment defense:

> We hold that inducement means more than mere government solicitation of the crime; the fact that government agents initiated contact with the defendant, suggested the crime, or furnished the ordinary opportunity to commit it is insufficient to show inducement. Instead, inducement means government solicitation of the crime *plus* some other government conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the government's efforts. The "other conduct" may be repeated attempts at persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward beyond that inherent in the customary execution of the crime, pleas based on need, sympathy, or friendship, or any other conduct by government agents that creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's efforts.

United States v. Mayfield, No.11-2439, 2014 WL 5861628, at *17 (7th Cir. Nov. 13, 2014).

With regard to inducement, Finley claims only that an acquaintance who, unbeknownst to him was a confidential informant (CI), asked him to help the CI's father buy a gun and to get marijuana for his mother, and that he did so. He claims no repeated attempts to convince him to engage in illegal conduct, no fraud, threats, coercion, harassment, promises of great reward or appeals to need, sympathy, or friendship. The government's agent did nothing more than solicit

the crimes. The government's conduct cannot be considered inducement so as to permit an entrapment defense. Thus, even assuming that Finley's counsel did not discuss a possible entrapment defense with him before he decided to plead guilty, he cannot show that he was prejudiced by the failure. No hearing is necessary on this issue.

Finley also claims that he is actually innocent of the crimes to which he pleaded guilty. However, in his plea colloquy as well as in his motion under § 2255, he admitted to facts that establish he is guilty of distributing marijuana. His claim that distribution of 2.3 grams of marijuana does not constitute a crime under 21 U.S.C. § 841(a)(1) is unfounded. The plain language of the statute makes it unlawful to distribute a controlled substance. Under 21 U.S.C. § 812(c)(10), "any material, compound, mixture, or preparation, which contains any quantity of . . . marijuana" is a controlled substance.

As for the offense of making a false statement during the sale of a firearm, he admitted in the plea colloquy that the CI gave him funds to buy a firearm and that, after he bought the firearm he handed it over to the CI, but filled out paperwork to the effect that he was buying the firearm for himself. In his § 2255 motion he does not retract the statements he made at his change of plea hearing, but suggests that, because he believed the ultimate recipient of the firearm was to be the CI's father instead of the CI himself, he committed no crime. The fact remains that he does not deny that he filled out paperwork stating that he was buying the firearm for himself, when he was not, which constitutes a violation of 18 U.S.C. § 922(a)(6).[1] *See*

[1]Form 4473 gives an example that clearly shows that a person in Finley's position is not the actual buyer of a firearm. "Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **"NO"** to question 11 a." ATF Form 4473 Revised April 2012, page 4. Finley suggests in his § 2255 motion that he was the actual buyer of the firearm because it was intended as a gift. On the basis of the facts Finley admitted to at his change of plea hearing and did not contravene in his § 2255 motion, any gift would have been from the CI to his

Abramski v. United States, 134 S.Ct. 2259 (2014) (a defendant's misstatement as to the actual buyer of a firearm violates 18 U.S.C. § 922(a)(6) even though the actual purchaser is eligible to own a firearm.) No hearing is necessary on this issue and his claims of actual innocence do not entitle him to any relief.

Finley further maintains that he pleaded guilty despite his belief in his innocence and desire to go to trial because he did not think his counsel was prepared for trial. He declares in the affidavit accompanying his § 2255 motion that he "wanted to go to trial, but not with Mr. Cantrell." (DE 114, § 2255 mot., at 27). The Court finds his claim palpably incredible. If Finley had truly wanted to go to trial, the solution that would be apparent to anyone in his circumstances would be not to plead guilty, but to fire his retained attorney and seek new counsel. Moreover, he stated under oath at his change of plea hearing that he had had enough time to discuss his case with his attorney and that he was fully satisfied with the services he had provided. No hearing is necessary on this issue and Finley is entitled to no relief.

Finley also contends that he gave his lawyer information regarding other crimes but that none of the information "made it into the intended hands for processing." (DE 114, § 2255 mot., at 5). How this could have impacted his decision to plead guilty is not clear. Furthermore, the Government points out in its response to Finley's motion that Finley did meet with the FBI and the assistant U.S. attorney assigned to the case to provide information about criminal activity. However, the information Finley provided was not useful to law enforcement. Even assuming his lawyer did not pass on to the Government or the Court all the information Finley gathered, Finley cannot show that the failure prejudiced him. It is not as if such information would have

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father, since the CI supplied the money for the purchase, which still does not make Finley the actual buyer of the firearm.

had any bearing on his guilt or innocence or would have provided any defense to the charges he pleaded guilty to. He offers no factual support for the notion that the Government or the Court would have treated him any differently if they had received the information. No hearing is necessary and Finley is entitled to no relief on this issue.

D. Certificate of Appealability

Rule 11 of the Rules Governing Section 2255 Proceedings requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to a petitioner on a § 2255 motion. A petitioner is entitled to a certificate of appealability only if he can present "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He must demonstrate that reasonable jurists would find this Court's assessment of his constitutional claims debatable or wrong. *See United States v. Fleming*, 676 F.3d 621, 635 (7th Cir. 2012). Finley has not demonstrated that reasonable jurists would debate or agree that the Court should have resolved his claims differently. Therefore, the Court declines to certify any issues for appeal.

E. Conclusion

For the foregoing reasons, the Court DENIES Finley's motion to vacate, set aside, or amend his conviction under 28 U.S.C. § 2255 (DE 114) and declines to certify any issues for appeal pursuant to 28 U.S.C. § 2253(c)(2).

SO ORDERED on December 15, 2014.

s/ Joseph S. Van Bokkelen
Joseph S. Van Bokkelen
United States District Judge