UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOSE ARAMIS BRITO,

Petitioner,

16-cv-5585 (PKC)
13-cr-589 (PKC)

-against-

MEMORANDUM
AND ORDER

UNITED STATES OF AMERICA,

Respondent.
----------x

CASTEL, U.S.D.J.

Petitioner Jose Aramis Brito, moves to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. On December 13, 2013, a jury found Brito guilty of participating in a robbery conspiracy, in violation of 18 U.S.C. § 1951, and a conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A), 846. On July 17, 2014, Brito was sentenced principally to 144 months' imprisonment. Brito appealed his conviction and sentence raising various evidentiary issues. (Dkt. 89). The Second Circuit affirmed the judgment in a summary order on September 10, 2016. United States v. Brito, 615 F. App'x 701 (2d Cir. 2015), cert. denied, 136 S. Ct. 1219 (2016).

Brito was charged with participating in a five-member drug robbery crew. He and other members of the crew were arrested on July 18, 2013 during a Drug Enforcement Administration ("DEA") sting operation in which the robbery crew believed they were about to steal 50 kilograms of cocaine from a drug dealer's stash house. The evidence at trial included recordings of conversations between members of the robbery crew, including Brito, in which the

Mailed to Mr. Brito 7/24/2017

crew discussed plans for the robbery, testimony from several cooperating witnesses, and a stipulation regarding Brito's prior conviction for cocaine trafficking.

Brito, who proceeds pro se, attacks his conviction and sentence on several grounds arguing that (1) both his trial counsel and appellate counsel were ineffective, (2) he was entrapped by the government, (3) his sentence was disproportionately high as compared to his co-defendants, (4) and the sting operation that resulted in his arrest was racially biased, all in violation of his Fifth and Sixth Amendment rights.

DISCUSSION

I. Brito's Ineffective Assistance of Counsel Claims are Meritless.

Brito alleges numerous deficiencies in the performance of his attorneys in support of his ineffective assistance of counsel claim. Specifically, Brito alleges that his trial counsel: (1) failed to call him to testify at trial; (2) failed to call Felo, who Brito identifies as Pedro Torres, as a witness at trial; (3) failed to seek a Fatico hearing; (4) failed to adequately cross-examine Edy Pena, a cooperating witness; and (5) failed to argue a Brady or Giglio violation. (See Petition at 17-32). In addition, Brito claims that both his trial counsel and appellate counsel failed to raise an entrapment defense. (Reply at 14). For reasons to be explained, Brito does not make the required showing to succeed on an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984).

Brito did not assert any ineffective assistance claims on his direct appeal however, this failure "does not bar the claim from being brought in a later, appropriate proceeding under § 2255." Massaro v. United States, 538 U.S. 500, 509 (2003).

Strickland requires a two-part showing to establish ineffective assistance of counsel. First, a defendant must show that "counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. To be considered ineffective, the attorney's performance must fall below "an objective standard of reasonableness" under "prevailing professional norms." Id. at 687-88. "Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687. To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Moreover, "a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy . . . ." Massaro, 538 U.S. at 501.

A. Failure to Call Brito as a Witness.

Brito asserts that his trial counsel was ineffective because he failed to call Brito as a witness and advised Brito not to testify. (Petition at 18, Reply at 10). However, Brito does not claim that his trial counsel actually prevented him from testifying or failed to inform him of his right to do so. In fact, when defense counsel indicated his intention to rest at the close of the Government's case, the Court specifically advised Brito of his right to testify and confirmed that Brito understood that right, had discussed the pros and cons of testifying with his counsel, and was satisfied with his lawyer's representation of him. (Trial Tr. at 427-28).

As for the substance of his potential testimony, Brito claims only that he "could have testified that he withdrew from the conspiracy before any action to conspire took place" and that by failing to call Brito as a witness, defense counsel "'l[o]st" the option of having Brito testify that "he was innocent and never joined the conspiracy." (Petition at 18, 20). However,

defense counsel made the argument that Brito never joined the conspiracy at several different points during the trial. (Trial Tr. at 37 (Opening Statement), 436 (Rule 29 Motion for Judgment of Acquittal), 482-84 (Summation)). Brito fails to establish how his testimony could have changed the outcome of the trial when, on multiple occasions, his attorney made the same arguments Brito claims he would have made. Nor does Brito address the risks he would have faced from cross-examination had he chosen to testify. Accordingly, even if Brito could establish that his counsel's conduct was deficient, he has made no showing of prejudice.

B. Failure to Call Felo as a Witness.

Brito also faults his trial counsel for failing to call Felo as a defense witness. According to Brito, "Felo's testimony would have destroyed the government's theory of conspiracy" and "would have corroborated [Brito's] story that [Brito] never joined or at least withdrew from the conspiracy in question." (Petition at 18-19). In addition, Brito claims that Felo's testimony could have been used to impeach the testimony of government witnesses thereby "sway[ing] the jury." (Petition at 19; Reply at 11).

"The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987); see also Greiner v. Wells, 417 F.3d 305, 323 (2d Cir. 2005) ("Courts applying Strickland are especially deferential to defense attorneys' decisions concerning which witnesses to put before the jury."). Moreover, an attorney's decision "whether to call specific witnesses – even ones that might offer exculpatory evidence – is ordinarily not viewed as a lapse in professional representation." United States v. Best, 219 F.3d 192, 201 (2d Cir. 2000) (citations omitted). Brito does not elaborate on how Felo's testimony would have "destroyed the government's theory" or

corroborated Brito's claim that he never joined the conspiracy, nor does he identify which government witnesses Felo's testimony could have been used to contradict. Brito's vague and unsubstantiated allegations cannot overcome "the presumption that, under the circumstances, [his attorney's decision not to call Felo] might be considered sound trial strategy," Strickland, 466 U.S. at 689 (internal quotation marks and citations omitted).

Although not entirely clear from the Petition, it appears that Brito believes that Felo would have testified as to who was present in the different vehicles involved in the robbery scheme. (See Petition at 18 (listing the passengers of the taxi and the black Infiniti and describing a discrepancy between testimony of Eddie Alphonso Castro and Pena as to whether Felo or Juan Dominguez (a/k/a Manolo) was present in the taxi with Brito); Reply at 11-12 (citing testimony from Castro regarding who got in and out of the taxi and the black Infiniti as a reason why Felo should have been called as a trial witness)). To the extent that Brito intended to argue that Felo was in the taxi with Brito, Pena, and the Confidential Informant, and could therefore testify as to what Brito said in the taxi, Brito has failed to show he was prejudiced by the lack of such testimony. Not only had Pena testified as to the content of the conversations in the taxi, the recordings that Pena made of those conversations had also been introduced into evidence. (Trial Tr. at 223-55; Gov't Ex. 307T). Brito has not established what Felo's potential testimony would have added on this matter let alone how Felo's testimony would have altered the trial result.

Finally, to the extent that Brito intended to argue that testimony from Felo would have highlighted an alleged discrepancy between Castro's testimony and Pena's testimony as to whether Felo or Manolo was also present in the taxi with Brito, Pena, and the Confidential Informant, the Petition fails to establish prejudice. It is not clear how Felo's potential testimony

about such a minor point would have changed the outcome of the trial. See United States v. Vargas, 920 F.2d 167, 170 (2d Cir. 1990) (ineffective assistance claim based on counsel's failure to call defense witnesses rejected where proffered testimony related only to "collateral matters"). Additionally, Brito does not explain why the jury would have found Felo more credible than other witnesses or why his testimony would not have ultimately bolstered the government's case rather than Brito's defense. In sum, Brito has not established that his trial lawyer's decision not to call Felo as a witness fell below prevailing professional norms, or that he suffered prejudice due to the absence of such testimony.

C. Failure to Request a Fatico Hearing.

Brito also claims his trial counsel should have requested a Fatico hearing to contest the amount of drugs involved in the conspiracy. According to Brito, the "fake quantity" of drugs "increased [his] sentence by seven years." (Petition at 19). However, the failure to request a Fatico hearing can be a reasonable, strategic decision on the part of counsel. See United States v. Lee, 818 F.2d 1052, 1056 (2d Cir. 1987) (explaining that decision to forgo Fatico hearing may be tactical); United States v. Costa, 423 F. App'x 5, 8-9 (2d Cir. 2011) (summary order) (decision not to request a Fatico hearing fell "within the range of reasonable professional assistance"); Papetti v. United States, No. Civ. 09-3626, 2010 WL 3516245, at *6 (E.D.N.Y. Aug. 31, 2010) ("the decision to forego a Fatico hearing is a matter of strategy and [a court will] presume that such a strategy is sound absent a strong showing to the contrary.") (internal quotation marks and citations omitted).

In this case, the record contained evidence that Brito understood the amount of cocaine to be stolen from the stash house to be 50 kilograms and the Court would have been entitled to rely on that evidence had there been a dispute as to the drug quantity to be considered

at sentencing. (Trial Tr. at 228, 308); see United States v. Munoz, 268 F. App'x 46, 48-49 (2d Cir. 2008) (summary order) ("Based on the evidence presented at trial, [the judge] fairly surmised [defendant] conspired to distribute at least 15 kilograms of cocaine. The trial testimony of drug dealers to whom [defendant] sold cocaine provided a sufficient basis for that finding . . . ."). Brito offers no basis for contesting the drug quantity used at his sentencing other than the fact that because he was arrested as part of a sting operation, the drugs did not exist and the amount was determined by the government. (Petition at 19, 22). He alleges that the federal agents "knew that placing the bar above 5 kilograms or more came with a mandatory minimum of 10 years to life imprisonment" and took advantage of their "unfettered ability to inflate the amount of drugs in the house" to "obtain a greater sentence for each of the men involved in this alleged crime." (Petition at 22). The Second Circuit has recognized that "[i]t is unsettling that in this type of reverse sting, the government has a greater than usual ability to influence a defendant's ultimate Guidelines level and sentence" by setting the "bait," or the amount of drugs to be stolen, in the reverse sting. United States v. Caban, 173 F.3d 89, 93-94 (2d Cir. 1999) (involving reverse sting where government informant approached defendants with opportunity to steal up to 50 kilograms of cocaine from stash house). However, Brito has come forward with no evidence of any wrongdoing or improper conduct on the part of the government in this case. As there is no evidence that Brito's counsel would have had a factual basis for challenging the drug quantity used at sentencing, it was reasonable for defense counsel not to request a Fatico hearing.

D. Failure to Cross Examine Edy Pena.

Brito also complains that his trial counsel failed to adequately cross-examine Edy Pena, the Government's cooperating witness. Specifically, Brito notes that when the Court asked

defense counsel how much longer he intended to cross-examine Pena, defense counsel indicated that he needed ten to fifteen more minutes when trial resumed the following day, but when the next day came, counsel indicated that he had finished his cross-examination the day before. (Trial Tr. at 310, 314). This, Brito claims, constituted ineffective assistance of counsel. (Reply at 10). Courts consider the examination of witnesses to fall within the purview of a trial counsel's legal strategy; therefore, decisions related to the nature and scope of cross-examination will generally not support a claim of ineffective assistance of counsel. United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992) (holding that trial lawyer was effective, despite defendant's claim that lawyer failed to thoroughly impeach prosecution witness); Nersesian, 824 F.2d at 1321 ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are . . . strategic in nature."). "[T]he conduct of examination and cross-examination is entrusted to the judgment of the lawyer, . . . and [a court] should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998) (citing Eisen, 974 F.2d at 265). Brito does not support his conclusory allegations with any description of what topics or questions were left out of the cross-examination of Pena. Defense counsel cross-examined Pena at length and covered topics such as Pena's difficulty identifying Brito, the questions that Brito asked while they drove to the robbery site, and the fact that Brito was not present at any of the planning meetings that took place prior to the day of the robbery. (Trial Tr. at 258-308). Brito does not identify additional questions that should have been asked, nor does he establish that another ten to fifteen minutes of cross-examination would have resulted in a different outcome at trial. Accordingly Brito has failed to establish that his trial counsel's actions were unreasonable or that he was prejudiced by those actions.

E. Failure to Raise Brady and/or Giglio Violations.

Brito also claims that his trial counsel was ineffective because he did not raise what Brito asserts were Brady and/or Giglio violations. Specifically, Brito claims that the government was aware that Felo would have provided exculpatory testimony and therefore "seized . . . and 'tucked' him away before the defense could find [him] and call him to the stand to impeach the testimony of other government witnesses and suppressed evidence." (Petition at 18-19). According to Brito, defense counsel's failure to pursue this argument violated the Strickland standard. (Petition at 20). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Aside from his own self-serving statements, Brito does not provide any evidence of government wrongdoing that might support an argument under Brady. In addition, as discussed above, Brito has failed to show that he was prejudiced in any way by the absence of Felo's testimony. Accordingly, Brito cannot establish that his counsel's decision not to pursue this line of argument fell below an objective standard of reasonableness.

F. Failure to Raise an Entrapment Defense.

Finally, Brito claims that both his trial counsel and appellate counsel provided ineffective assistance by failing to raise an entrapment defense. "[A] lawyer's decision not to pursue a defense does not constitute deficient performance if, as is typically the case, the lawyer has a reasonable justification for the decision." Greiner, 417 F.3d at 319 (quoting DeLuca v. Lord, 77 F.3d 578, 588 n.3 (2d Cir. 1996)); see United States v. Kirsh, 54 F.3d 1062, 1072 (2d Cir. 1995). To assert an entrapment defense, a defendant must establish "(1) government

inducement of the crime, and (2) lack of predisposition on the defendant's part." United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995). "A defendant is predisposed to commit a crime if he is ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity to do so." Id. (citations and internal quotation marks omitted). The government may show predisposition with evidence of "(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." Id. (quoting United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir. 1980)).

Any decision by Brito's trial and appellate counsel not to pursue an entrapment defense was a reasonable one given the risks associated and the low likelihood of success of such a defense. Generally speaking, entrapment defenses are rarely successful. See Aluear-Rodriguez v. United States, No. 95 Civ. 2381 (KTD), 1996 WL 67939, at *2 (S.D.N.Y. Feb. 15, 1996) (failure to raise entrapment defense did not constitute ineffective assistance of counsel because an entrapment defense "could materially harm the interests of the defendant and has a small likelihood of success at trial") (citing Isaraphanich v. United States, 632 F. Supp. 1531, 1534 (S.D.N.Y. 1986) ("it is a matter of legal realism that [entrapment] defenses rarely succeed")). In this case, the government had introduced considerable evidence of Brito's willingness to participate in the scheme and his "ready response to the inducement." Salerno, 66 F.3d at 547. Pena testified that Brito appeared serious about participating in the robbery and did not display any hesitation about the plan. (Trial Tr. at 229-31). In the recordings of Brito's conversation with Pena, Brito never objected to the scheme or indicated that he was not planning on moving forward with the robbery. Rather Brito asked about what they should do once they

were inside the stash house and the physical characteristics of the guard Brito was responsible for handling. (Trial Tr. at 241, 252). Pena understood Brito's questions about the robbery logistics as showing that Brito wanted to be as prepared as possible before the robbery, not that he was on the fence about participating. (Trial Tr. at 249-50).

An entrapment defense also involves significant risks in that it requires a defendant to admit to an intent to commit the crime charged and opens the door to the introduction of government evidence regarding the defendant's propensity to engage in criminal conduct. See United States v. Collins, 957 F.2d 72, 76 (2d Cir. 1992) (presenting entrapment defense entailed conceding the elements of the charged crimes); United States v. Tutino, 883 F.2d 1125, 1138-39 (2d Cir. 1989) (government may introduce prior bad acts to show predisposition). Arguing entrapment would have required Brito to essentially admit that he participated in the robbery scheme, weakening his primary argument that he never joined the conspiracy in the first place. Given these risks and the low likelihood of success, it was not unreasonable for Brito's attorneys to decide not to raise an entrapment defense at trial or on appeal.

II. Brito's Claims related to Entrapment, Sentencing, and Racial Bias are Procedurally Barred.

Aside from his ineffective assistance of counsel claims, Brito asserts three additional bases for vacating, setting aside, or correcting his sentence. First, he argues that the DEA sting operation that resulted in his arrest constituted entrapment. (Petition at 21). Second, he claims that he was "oversentenced" in comparison to his co-defendants. (Petition at 25). Third, he contends that "[t]he stash house case brought by the government [was] racially bias[ed]." (Petition at 27). On this point Brito appears to attack sting operations in general on the grounds that they "allow[] the government to cast a wide net, trawling for criminals in seedy,

poverty-ridden areas all without an iota of suspicion that any particular person has engaged in similar conduct in the past" resulting in the arrests and prosecutions of "poverty-ridden Hispanic American, or African American male[s] with no priors[,] or robbery[,] or violence[,] or any criminal record . . . who [are] simply enticed by the l[u]re of a large amount of money and quick way out of his impoverished life." (Petition at 27). None of these issues were raised in Brito's direct appeal.

Generally, claims not raised on direct appeal may not be raised in a section 2255 petition. Zhang v. United States, 506 F.3d 162, 166 (2d Cir. 2007). A petitioner may not raise new grounds for relief in a section 2255 proceeding that previously could have been raised in a direct appeal, unless he has shown either "(1) 'cause' for the failure to bring a direct appeal and 'actual prejudice' from the alleged violations; or (2) 'actual innocence.'" Id. (quoting Bousley v. United States, 523 U.S. 614, 622 (1998)); see also United States v. Pipitone, 67 F.3d 34, 38 (2d Cir. 1995) ("A party who fails to raise an issue on direct appeal and subsequently endeavors to litigate the issue via a § 2255 petition must 'show that there was cause for failing to raise the issue, and prejudice resulting therefrom.'") (quoting Douglas v. United States, 13 F.3d 43, 46 (2d Cir. 1993)). "To satisfy the cause requirement, the petitioner must show circumstances external to the petitioner, something that cannot be fairly attributed to him." Zhang, 506 F.3d at 166 (internal quotation marks omitted). Alternatively, to establish actual innocence, a petitioner must demonstrate by a preponderance of the evidence that "'it is more likely than not that no reasonable juror would have convicted him.'" United States v. Thorn, 659 F.3d 227, 234 (2d Cir. 2011) (quoting Bousley, 523 U.S. at 623).

Brito asserts that he did not raise his entrapment, sentencing, and racial bias claims in his direct appeal due to the ineffective assistance of his appellate counsel. Deficient

attorney performance that rises to the level of a Sixth Amendment violation may provide "cause" excusing a failure to raise claims on direct appeal. Coleman v. Thompson, 501 U.S. 722, 753–54 (1991); Murray v. Carrier, 477 U.S. 478, 488 (1986). The Court has already found that appellate counsel's decision not to raise an entrapment defense on appeal was a "reasonable strategy," Massaro, 538 U.S. at 501, and did not amount to a Sixth Amendment violation. Appellate counsel's decisions not to raise the sentencing disparity and racial bias issues on direct appeal were similarly reasonable and fail to cure the procedural default.

Brito, who was sentenced principally to 144 months' imprisonment, claims that he was "oversentenced" in comparison to his co-defendants who received sentences ranging from 18 to 37 months' imprisonment. However, a District Court considers many variables when determining an appropriate sentence and is not required to sentence each participant in a conspiracy to an equal term. In this case, Brito's co-defendants were not similarly situated and therefore any sentencing disparity was warranted. Brito chose to proceed to trial while his co-defendants pled guilty. In addition, Brito was sentenced as a career offender due to his extensive criminal history. Finally, Brito was subject to a mandatory minimum sentence of 120 month's imprisonment. Thus, appellate counsel's decision not to raise the issue of a sentencing disparity on appeal was not objectively unreasonable. For the same reasons, Brito cannot show that he was prejudiced by this decision as required by the second Strickland prong.

It was also reasonable for appellate counsel not to argue that the sting operation that resulted in Brito's arrest was racially biased. The record contains no evidence of such bias nor does Brito point to any indication of bias in this case. Rather, his argument appears to be based almost entirely on an excerpted USA Today article regarding DEA sting operations in

which race is not mentioned. (Petition at 28-32). Brito's appellate counsel reasonably chose not to raise arguments based on these unsupported and conclusory allegations.

CONCLUSION

Brito's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is DENIED. The Clerk is directed to close the case captioned Brito v. United States, 16 Civ. 5585 (PKC).

Brito has not made a substantial showing of the denial of a constitutional right and, accordingly, a certificate of appealability will not issue. 28 U.S.C. § 2253; see Blackman v. Ercole, 661 F.3d 161, 163-64 (2d Cir. 2011). His motion was not filed in forma pauperis, and the Court therefore makes no finding pursuant to 28 U.S.C. § 1915(a)(3).

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
July 24, 2017