

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RUSSELL P. PRICE, Jr.,)	Case No.: 1:08 CV 2804
)	
Petitioner)	
)	
v.)	JUDGE SOLOMON OLIVER, JR.
)	
RICHARD HALL, Warden,)	
)	
Respondent)	<u>ORDER</u>

On December 1, 2008, Petitioner Russell P. Price, Jr. (“Price” or “Petitioner”) filed a petition for writ of habeas corpus (“Petition,” ECF No. 1) pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state court conviction for illegal manufacture of drugs in a public place. Price argues that his Petition should be granted based on the following grounds:

Ground for Relief No. 1: When appellate counsel assigns as error a winning issue of law and fails to provide the reviewing court with the record necessary to allow review of that issue, appellant is denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Ground for Relief No. 2: When a trial court disregards mandatory minimum sentencing requirements and fails to justify that sentence on the record Defendant is denied due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution.

(See Petition at 18, 22.) With regard to the first ground, Petitioner maintains that he was denied effective assistance of appellate counsel when, on appeal of the trial court's denial of his motion to suppress, his counsel failed to submit the transcript of the suppression hearing, which led to the denial of appeal without full consideration. Second, he argues that he was denied his constitutional rights when the trial court sentenced him to a non-minimum sentence without relying on factual findings made by a jury.

This court referred the case to Magistrate Judge David S. Perelman for preparation of a Report and Recommendation. Magistrate Judge Perelman submitted his Report and Recommendation (ECF No. 11) on August 7, 2009, recommending that Price's Petition for Habeas Corpus under 28 U.S.C. § 2254 be dismissed. On the first ground, he concluded that Price could not demonstrate prejudice to support his ineffective assistance of appellate counsel claim, because the record did not demonstrate a reasonable probability that the outcome of the appeal would have been different had counsel presented the court with the transcript. With regard to the second ground, he determined that the trial court did not deny Price any constitutional rights by retroactively applying *State v. Foster*, 845 N.E.2d 470 (2006), which permits Ohio trial courts to impose a sentence within the statutory range without requiring the court to first make findings of fact or articulate reasons for imposing maximum sentences.

The court finds, after *de novo* review of the Report and Recommendation and all other relevant documents, that the Magistrate Judge's conclusions are fully supported by the record and controlling case law. Furthermore, as of the date of this Order, Petitioner has not filed objections to the Report and Recommendation. By failing to do so, he has waived the right

to appeal the Magistrate Judge's recommendation. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

Accordingly, the court adopts as its own the Magistrate Judge's Report and Recommendation (ECF No. 11). Price's Petition is hereby denied, and final judgment is entered in favor of the Respondent. The court further certifies that pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.

UNITED STATES DISTRICT JUDGE

August 25, 2009