

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §
 §
VS. § NO. 4:11-CV-891-A
 § (NO. 4:09-CR-160-A)
 §
JUAN RAMIREZ §

MEMORANDUM OPINION
and
ORDER

Came on to be considered the motion of movant, Juan Ramirez, under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. The government filed a response, and movant filed a reply. Having now considered all of the parties' filings, the entire record of this case, and applicable legal authorities, the court concludes that the motion should be denied.

I.

Background

On December 11, 2009, movant pleaded guilty to two counts of making false statements during purchase of a firearm, in violation of 18 U.S.C. § 924(a)(1)(A). On April 2, 2010, the court sentenced movant to sixty months' incarceration with the Bureau of Prisons as to each count, to be served consecutively to each other, for a total term of imprisonment of 120 months, followed by a three-year term of supervised release. On June 1,

2011, the United States Court of Appeals for the Fifth Circuit affirmed movant's sentence. United States v. Ramirez, 427 F. App'x 294 (5th Cir. June 1, 2011). The United States Supreme Court denied certiorari on October 11, 2011.

II.

Grounds of the Motion

All of movant's grounds for relief concern the same issue: that movant's sentence was increased above the guideline range based on facts contained in the presentence report. Specifically, movant's first ground for relief alleged that the court was required to impose a sentence based on the facts in the plea agreement and not on any additional findings of fact based on the probation officer's conclusions in the presentence report.

As movant's second ground for relief he alleged that his guilty plea was not knowing and voluntary because he was not advised that his sentence would be based on his involvement with over 200 weapons.

The third ground for relief alleged ineffective assistance of his attorney, Matt Belcher ("Belcher"), during pretrial, plea negotiations, and at sentencing.

For his fourth ground movant alleged that the court exceeded its jurisdiction and invaded the province of the jury when it

used additional facts to which movant did not plead guilty to increase his sentence.

In a memorandum of law attached to the motion movant set forth his arguments in support of his grounds for relief. The essence of movant's argument on the first ground is that the facts the court used to increase movant's sentence--including his alleged affiliation with the La Familia drug trafficking organization and his purchase and movement of approximately 300 firearms--were only found in the presentence report prepared by the probation officer. Movant did not admit to those facts as they were not in the plea agreement, and the court invaded the province of the jury when it used those facts to increase his sentence. In support of his first ground movant relied heavily on the decision of the United States Supreme Court in Cunningham v. California, 549 U.S. 270 (2007).

In support of his second ground movant argued that the statutory range "post-[Sentencing Reform Act]" was seventy months, not 120 months, and that movant only admitted to the facts in the plea agreement, not to any additional facts. Mot. at 8. Movant alleged that he was never advised that the court would ignore the facts in the plea agreement and rely on the "unreliable and error-prone" presentence report in calculating

his sentence. Id.

Movant argued as to the third ground that Belcher was ineffective for failing to inform him that the court would determine movant's sentence based on facts in the presentence report and not admitted to by movant. Movant also alleged that had he been apprised that the court would disregard the facts in the plea agreement he would have elected to go to trial. Movant further complained that at sentencing Belcher should have objected that the sentence exceed the "statutory maximum" of seventy to eighty-seven months. Id. at 11.

As to the fourth and final ground, movant argued that the court exceeded its jurisdiction when it found movant guilty of conduct comprising the offense that constituted the crime.

III.

Treatment of § 2255

After conviction and exhaustion of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152, 164 (1982); United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc). A defendant can challenge his conviction or sentence after it is presumed final only on issues of constitutional or jurisdictional magnitude and may not raise an

issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the errors. Shaid, 937 F.2d at 232. Section 2255 does not offer recourse to all who suffer trial errors, but is reserved for transgressions of constitutional rights and other narrow injuries that could not have been raised on direct appeal but, if condoned, would result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 21, 1981).

IV.

None of the Grounds Has Merit

All of movant's grounds for relief are based on the same general proposition: that the court erred in sentencing movant based on information in the presentence report, rather than on the facts admitted in the plea agreement. Rather than address each of the grounds separately, the court will discuss all of movant's arguments and grounds for relief together.

The sum of movant's claims is that any facts used in determining his sentence must be found by the jury, rather than the court, and that the court impermissibly considered facts in the presentence report that failed to meet this standard. "The sentencing judge is entitled to find by a preponderance of the

evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence." United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005).

Movant's complaint that the court relied on the presentence report is also unavailing. A "presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alford, 142 F.3d 825, 831-32 (5th Cir. 1998) (citation omitted). Thus, it was no error for the court to rely on the facts established by the presentence report, especially in light of movant's failure to provide controverting evidence. Id. at 832.

Movant's reliance on Cunningham v. California, 549 U.S. 270 (2007) affords him no relief. Cunningham addressed the constitutionality of California's determinate sentencing law and did nothing to disturb the advisory nature of the sentencing guidelines following the Supreme Court's decision in Booker. See Cunningham, 549 U.S. at 292 ("California's [determinate sentencing law] does not resemble the advisory system the Booker Court had in view.").

Further, from movant's motion and memorandum of law it

appears he has confused the recommended sentencing range under the U.S. Sentencing Guidelines and the maximum statutory sentence. Movant repeatedly argues that the new statutory maximum "post-[Sentencing Reform Act]" was somewhere between seventy to eighty-seven months, and he objects that the court exceeded the new "statutory maximum" with a sentence of 120 months. As set forth in the presentence report, and as the court informed movant at sentencing, the applicable guideline range was seventy to eighty-seven months. Sentencing Tr. at 7. However, at movant's rearraignment the court informed movant that the maximum sentence was five years' imprisonment as to each count for a total term of imprisonment of ten years. Rearraignment Tr. at 47. Additionally, the factual resume and plea agreement clearly stated that the maximum statutory sentence was five years as to each count for a total term of imprisonment of ten years. It could not have been made more clear to movant that the statutory maximum sentence for both counts was ten years' imprisonment.

Although movant claims that his plea was unknowing and involuntary, the record fails to support movant's contention. For a guilty plea to be knowing and voluntary, the defendant must have "a full understanding of what the plea connotes and of its

consequence." United States v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000) (per curiam) (internal quotations and citations omitted). However, "[t]he defendant need only understand the direct consequences of the plea; he need not be made aware every consequence that, absent a plea of guilty, would not otherwise occur." Id. (internal citations omitted). The defendant's representations, as well as those of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 74 (1977). Solemn declarations in open court carry a strong presumption of truthfulness, and a defendant bears a heavy burden to show that the plea was involuntary after testifying to its voluntariness in open court. DeVille v. Whitley, 21 F.3d 654, 659 (5th Cir. 1994).

At movant's arraignment, the court explained that in federal court, "the Judge determines the penalty if a defendant is convicted" either by jury trial or guilty plea, and admonished movant not to "depend or rely upon any statement or promise by anyone" as to the potential sentence. Arraignment Tr. at 15. The court explained that: it was required to consider the applicable sentencing guidelines but could also depart from the

guidelines under some circumstances; it was not bound by any stipulated facts between movant and the government; and, it could impose punishment that might disregard any stipulated facts or take other, unstipulated facts into account. Id. at 22. Of particular relevance here, the court specifically informed movant that the guideline range for his case could not be determined until after completion of the presentence report by the probation officer, and that the court relied heavily on the presentence report in deciding the sentence to impose. Id. at 22, 24.

The court explained how it determined movant's applicable guideline range and read the possible penalties to which movant could be subjected. Id. at 48. Movant testified that he understood the possible penalties and punishments. Id. Pertinent here, upon specific questioning by the court, movant denied that anyone had made any promise or assurance to induce him to plead guilty. Id. at 52.

Movant testified that the plea agreement and factual resume had been read to him in his language, that he had discussed them with his attorney and understood their content and legal effect, and that he signed both documents. Id. at 42. Both documents contained information about the potential penalty movant could face, including imprisonment for a maximum of five years as to

each count for a total term of imprisonment of ten years. Movant testified unequivocally that he understood that by pleading guilty he was subjecting himself to such penalties. Id. at 48. Also included in the plea agreement was the acknowledgment that the court would impose the sentence, and that the actual sentence imposed was within the court's discretion, so long as it was within the statutory maximum. Id. at 49. Movant testified that he understood the terms of the plea agreement and entered into the agreement voluntarily of his own free will. Id. at 51-52.

After considering all of the aforementioned testimony, the court expressly found movant's plea to be knowing and voluntary. Id. at 55. Under these facts, it is clear that movant knew the consequences of his plea as contemplated by the Fifth Circuit, and the court cannot now conclude that movant's plea was anything other than knowing and voluntary.

Finally, to prevail on his claim of ineffective assistance of counsel, movant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Both prongs of the Strickland test must be met to demonstrate

ineffective assistance; however, both prongs need not be considered if movant makes an insufficient showing as to one. Id. at 687, 697. Judicial scrutiny of this type of claim must be highly deferential, and movant must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689. Here, movant is entitled to no relief based on the alleged ineffective assistance of counsel because he has failed to meet the standard set forth by Strickland.

To the extent movant complains that Belcher failed to apprise him that the court would consider facts outside the plea agreement in determining his sentence, movant is unable to show prejudice. As discussed supra, the court informed movant at his arraignment hearing that the court would determine the sentence, that in doing so it could consider facts outside those agreed to by the government and movant, and that it would rely heavily on the presentence report. Arraignment Tr. at 22-24. Movant testified that he understood the court's explanations about the sentencing process. Id. at 25. The court also expressly cautioned movant not to rely on promises made by anyone as to a possible sentence, and movant testified that no one had made any such promises. Id. at 52. Considering all of the

foregoing, movant is unable to show any prejudice as a result of Belcher's alleged errors or omissions.

Movant's contention that Belcher should have objected to the sentence also fails. At sentencing, Belcher argued against imposition of the ten-year statutory maximum sentence and instead argued for application of the seventy to eighty-seven month guideline range. That Belcher was unsuccessful in his objection and argument does not constitute ineffective assistance of counsel. See Youngblood v. Maggio, 696 F.2d 407, 410 (5th Cir. 1983) (per curiam).¹

V.

ORDER

Therefore,

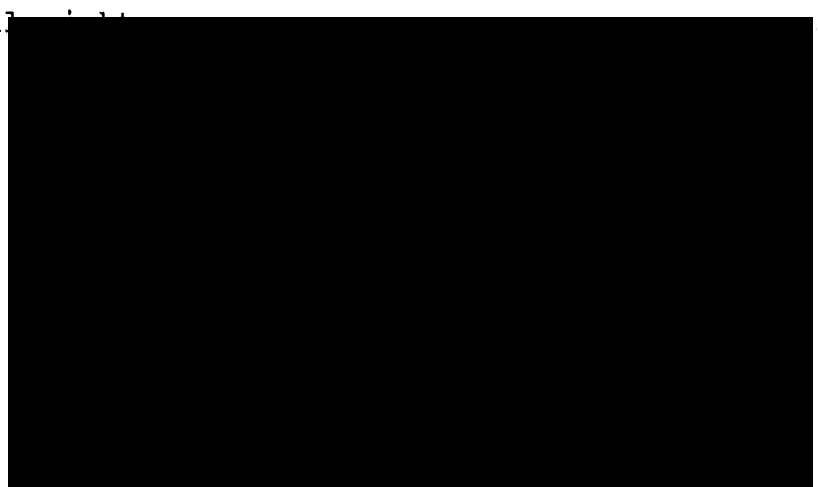
The court ORDERS that the motion of Juan Ramirez to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 be, and is hereby, denied.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, and 28 U.S.C. § 2253(c)(2), for the reasons discussed herein, the court further

¹Movant also complains that Belcher failed to object that the sentence was greater than the "statutory maximum," Mot. at 11, and that the statutory maximum was now the guideline range of seventy to eighty-seven months. As discussed, movant has confused the U.S. Sentencing Guidelines with the maximum sentence set forth in 18 U.S.C. § 924(a)(1)(A). Thus, any objection on this point would have been frivolous; counsel is not required to raise frivolous objections. Emery v. Johnson, 139 F.3d 191, 198 (5th Cir. 1997).

ORDERS that a certificate of appealability be, and is hereby,
denied, as movant has not made a substantial showing of the
denial of a constitutional right.

SIGNED April 3, 2012.



JOHN MCBRYDE
United States District Judge