IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

VERNON ANTHONY REID,	:	
	:	
Petitioner,	:	
	:	**NO. 5:09-CR-00029 (CAR)**
VS.	:	**NO. 5:11-CV-90109 (CAR)**
	:	
UNITED STATES OF AMERICA,	:	
	:	**Proceedings under 28 U.S.C. § 2255**
Respondent.	:	**Before the U.S. Magistrate Judge**
	:	

RECOMMENDATION

Before the Court is Petitioner Vernon Anthony Reid's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. Doc. 148. Petitioner entered a plea of guilty to one count of robbery of money belonging to the United States and was sentenced to 180 months imprisonment followed by five years of supervised release. In his motion, Petitioner raises two grounds alleging that he received ineffective assistance of counsel and one ground alleging that the sentencing court abused its discretion by making impermissible findings of fact. Because Petitioner has failed to show that his counsel's performance was deficient or that he was prejudiced by his counsel's performance, and because the Eleventh Circuit found that the sentencing court's factual determinations were reasonable, it is hereby **RECOMMENDED** that Petitioner's motion be **DENIED**.

BACKGROUND

1. Course of Proceedings

On April 23, 2009, a two-count indictment was returned in this Court against Petitioner Vernon Anthony Reid and co-defendants Harold Leroy Housley, Jr., Darious Jerome Flowers, and Willie James Williams, Jr. Doc. 1. Count One of the indictment charged Petitioner and his

co-defendants with conspiracy to commit robbery of money belonging to the United States, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 2114(a). Count Two of the indictment charged Petitioner and his co-defendants with robbery of money belonging to the United States, in violation of 18 U.S.C. § 2114(a). On May 4, 2009, Petitioner entered a plea of not guilty to the offenses. Doc. 30.

Following discovery and plea negotiations, Petitioner entered into a plea agreement in which Petitioner agreed plead guilty to Count Two of the indictment in exchange for the Government's dismissal of Count One. Doc. 77. On September 3, 2009, Petitioner pleaded guilty to Count Two of the indictment. Doc. 75.

On November 12, 2009, Petitioner's case was called for sentencing. Doc. 121. At sentencing, Petitioner objected to the Presentence Investigation Report's (PSR) six-level enhancement pursuant to United States Sentencing Guidelines Manual § 2B3.1(b)(2)(B).[1] Section 2B3.1(b)(2)(B) calls for a six-level enhancement when a firearm is "otherwise used" during a robbery. Because the facts stipulated to in the plea agreement stated that the firearm was brandished, Petitioner argued that the firearm was merely brandished and not otherwise used. Id. The Court overruled Petitioner's objection and accepted the PSR. Id. Because Petitioner had an offense level of twenty-five and a criminal history category of five, the advisory sentence guideline range for Petitioner was 100 to 125 months. Id. The Court, however, found that the guideline range did "not adequately address the seriousness of [Petitioner]'s actions or the danger posed to postal employees and customers." Id. The Court therefore varied upward from the guideline range and sentenced Petitioner to 180 months imprisonment followed by five years of supervised release. Id.

[1] The PSR and Petitioner refer to the enhancement as a Section 2B3.1(b)(1)(B) enhancement; however, the six-level enhancement at issue is a Section 2B3.1(b)(2)(B) enhancement.

On November 19, 2009, Petitioner filed a notice of appeal.[2] Doc. 98. On appeal, Petitioner argued that the district court wrongfully found that Plaintiff "otherwise used" the firearm and therefore erred in applying the six-level enhancement. Doc. 139. The Eleventh Circuit affirmed Petitioner's conviction and sentence on August 31, 2010. Id. On August 2, 2011, Petitioner filed the instant Section 2255 motion. Doc. 148.

2. The Plea Agreement

On September 3, 2009, Petitioner signed a written plea agreement in which he agreed to plead guilty to Count Two of the indictment in exchange for the Government's dismissal of Count One. Doc. 77. In signing the plea agreement, Petitioner agreed that he understood the following: (1) that he was knowingly and voluntarily entering a plea of guilty to Count Two; (2) that his guilty plea subjected him to a maximum of twenty years imprisonment; (3) that the Court was not bound by any sentencing estimates provided by Petitioner's counsel or the Government; (4) that he would not be able to withdraw his plea because he received an estimated guideline range from his counsel or the government that was different than that computed in his PSR; (5) that the Court would not be able to determine the appropriate guideline range until after a PSR was completed; and, (6) that the Court had the authority under certain circumstances to impose a sentence that was more or less severe than the sentence called for by the guidelines. Id. at ¶¶ 3(A)-(E). The plea agreement also stated that "[n]othing herein limits the sentencing discretion of the Court." Id. at ¶ 5.

The plea agreement also stipulated the facts giving rise to the charge in Count Two of the indictment. The stipulation, however, was "entered into in good faith with all parties

[2] Petitioner was represented by Attorney Reza Sedghi during the plea process, at sentencing, and on appeal.

understanding that **the stipulation is not binding on the Court**." Id. at ¶ 7 (emphasis added).

Petitioner stipulated to the facts as follows:

> That between December 1, 2008 and December 5, 2008, HAROLD LEROY HOUSLEY, JR., WILLIE J. WILLIAMS, JR., DARIUS FLOWERS and [Petitioner] agreed to rob the United States Post Office located 1040 Pio Nono Avenue, Macon, Georgia. WILLIAMS and FLOWERS met HOUSLEY who asked if they wanted to make some easy money. WILLIAMS, FLOWERS and HOUSLEY traveled to HOUSLEY's residence and met with [Petitioner]. HOUSLEY and [Petitioner] retrieved firearms and returned to WILLIAMS' vehicle. All four defendants then traveled to the United States Post Office located at 1040 Pio Nono Avenue in WILLIAMS' burgundy Honda automobile for purpose of surveilling the Post Office before the robbery.
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> After initially dismissing the idea, all four Defendants returned to the United States Post Office located at 1040 Pio Nono Avenue, Macon, GA. WILLIAMS and FLOWERS exited the Honda automobile and entered the Post Office. WILLIAMS and FLOWERS looked around the Post Office to determine the number of customers present so HOUSLEY and [Petitioner] could determine whether it was the appropriate time to rob the Post Office.
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> WILLIAMS and FLOWERS exited the Post Office and informed HOUSLEY and [Petitioner] that there were several customers inside the Post Office, including a law enforcement officer. Based on the information provided by WILLIAMS and FLOWERS, HOUSLEY and [Petitioner] decided to leave the area and return later in the day to rob the Post Office.
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> Later on December 5, 2008, WILLIAMS and FLOWERS transported HOUSLEY and [Petitioner] back to the United States Post Office located at 1040 Pio Nono Ave for the purpose of robbing the Post Office.
>
> HOUSLEY and [Petitioner] entered the Post Office each brandishing firearms, a revolver and shotgun, ~~and threatened U.S. Postal employees R.M., D.S., and R. R., persons with bodily harm if they did not provide them with money~~. The postal employees complied with the demands of HOUSLEY and [Petitioner] and provided HOUSLEY and [Petitioner] with $6,769.00 in U.S. currency as well as three postal money orders.
>
> After the completion of the robbery, HOUSLEY and [Petitioner] fled to the Honda Accord occupied by WILLIAMS and FLOWERS. WILLIAMS then drove all of the Defendants away until they reached a safe location.
>
> After reaching the safe location, HOUSLEY and [Petitioner] provided WILLIAMS and FLOWERS with approximately $350.00 each for their assistance and participation in the robbery.

> The Government and [Petitioner] stipulate that at the time of the robbery, the United States Post Office located at 1040 Pio Nono Avenue, Macon Georgia had money belonging to the United States and that the money stolen by HOUSLEY and [Petitioner] was money belonging to the United States.

Id. Petitioner therefore acknowledged that he was guilty of robbing a United States Post Office in Macon, Georgia and stealing money belonging to the United States. The parties struck the language above regarding threats made towards postal workers, in order to stipulate to facts showing that the firearm was merely brandished without additional threats being made towards the postal workers. Doc. 121. Petitioner, however, acknowledged that the stipulated facts were not binding on the Court. Doc. 77 at ¶ 7.

The plea agreement was signed by Petitioner and his attorney. By signing the agreement, Petitioner confirmed that he discussed the agreement with his attorney and that he fully understood the agreement and agreed to all terms. Doc. 77.

DISCUSSION

Petitioner alleges three grounds for relief: (1) that counsel was ineffective by failing to advise Petitioner that the stipulated fact that Petitioner merely brandished the firearm was not binding on the Court and that Plaintiff could therefore be subject to a six-level enhancement rather than the anticipated five-level enhancement; (2) that counsel was ineffective for failing to move to withdraw Petitioner's guilty plea after the terms of the plea agreement were "breached" and for failing to raise the alleged breach on appeal; and, (3) that the Court abused its discretion by making findings of fact that the firearm was otherwise used. Because the record shows that Plaintiff was advised that the terms of the plea agreement were not binding on the court and because it was reasonable for counsel to not move to withdraw Petitioner's guilty plea, Ground One and Ground Two are without merit. Additionally, because the Eleventh Circuit determined

that the district court did not err in finding that the firearm was otherwise used and applying the six-level enhancement, Ground Three is barred by the law of the case doctrine.

1. Ineffective assistance of counsel

Petitioner's first two grounds for relief are based on claims of ineffective assistance of counsel. The Sixth Amendment of the United States Constitution states that "in all criminal prosecutions, the accused shall enjoy…the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The right to counsel provision provides the accused the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). To prevail on a claim of ineffective assistance of counsel, the petitioner bears the burden of establishing by a preponderance of the evidence that: 1) his attorney's performance was deficient, *and* 2) he was prejudiced by the inadequate performance. Strickland v. Washington, 466 U.S. 668, 687 (1984); Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000). A petitioner must prove both prongs of the Strickland test to show his counsel was ineffective. Id.

To establish deficient performance, a petitioner must prove that his counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. Chateloin v. Singletary, 89 F.3d 749, 752 (11th Cir. 1996). A strong presumption exists that the counsel's performance was reasonable and the challenged action constituted sound strategy. Id. In order to establish that counsel's performance was unreasonable, a petitioner must show that no objectively competent counsel would take the action in question. Van Poyck v. Florida Department of Corrections, 290 F.3d 1318, 1322 (11th Cir. 2002). In the context of a guilty plea, a petitioner must demonstrate that counsel's advice was outside the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

To establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's inadequate representation, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 697; Meeks v. Moore, 216 F.3d 951, 960 (11th Cir. 2000). In the context of a guilty plea, a petitioner must establish "that there is a reasonable possibility that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Hill, 474 U.S. at 58-59. If a petitioner fails to prove that he has suffered prejudice, the court need not address the deficient performance prong of the Strickland test. Holiday v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

An evidentiary hearing is not necessary in this case. Petitioner has the burden to establish the need for an evidentiary hearing, and the Court is not required to hold an evidentiary hearing where the record makes "manifest the lack of merit of a Section 2255 claim." United States v. Lagrone, 727 F.2d 1037, 1038 (11th Cir. 1984). As explained below in addressing each of Petitioner's grounds for relief, the files and records in this case are sufficient to show that Petitioner's claims are without merit, and no evidentiary hearing is necessary.

a. Counsel's failure to inform Petitioner about potential six-level enhancement

Ground One alleges that counsel was ineffective for failing to inform Petitioner that he could be subject to a six-level sentencing enhancement. Petitioner's allegations being accepted as true, Petitioner is not entitled to relief on a claim of ineffective assistance of counsel for counsel's failure to adequately predict Petitioner's sentencing guideline range. An erroneous prediction of a sentence by counsel does not render a guilty plea involuntary. See Johnson v. Massey, 516 F.2d 1001, 1002 (5th Cir. 1975). Where, as here, a defendant "pleads guilty relying upon his counsel's best professional judgment, he cannot later argue that his plea was due to coercion by counsel." Lagrone, 727 F.2d 1037, 1038 (11th Cir. 1984). Moreover, the Eleventh

Circuit has made it clear that counsel's failure to adequately predict a defendant's ultimate sentence does not amount to prejudice when the defendant is properly warned of his minimum and maximum penalties by the court. See, e.g., United States v. Pease, 240 F.3d 938, 941-42 (11th Cir. 2001).

Although Petitioner now contends that he was unaware that he could be subject to the six-level enhancement, the record shows that Petitioner was aware of the consequences of his guilty plea. As indicated above, Petitioner signed a written plea agreement acknowledging that he understood that he could be sentenced up to a maximum of twenty years imprisonment. Petitioner further acknowledged in the plea agreement that he understood that the Court was not bound by any estimate of the probable sentencing range that Petitioner may have received from his counsel, the Government, or the probation office. Additionally, Petitioner acknowledged in the plea agreement that nothing in the agreement limited the sentencing discretion of the Court and that the stipulation of facts was not binding on the Court.

Moreover, the record indicates that, during the change of plea hearing, the Court informed Petitioner of the length of time that he could be incarcerated and the consequences of his guilty plea. Doc. 156. After informing Petitioner that he faced a maximum of twenty years imprisonment, the Court stated:

> THE COURT: I assume you and Mr. Sedghi have tried to estimate approximately what your sentence will be in this case. Is that true?
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> THE DEFENDANT: Yes, sir.
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> THE COURT: I want you to understand that you may not rely on any estimate made by anyone at this time as to what your sentence may be in this case and that you should not enter a plea of guilty in reliance on any such estimate. The reason is that when you are sentenced, the Court will rely on the presentence report filed by the probation office. That report has not been written. No one knows today what it will contain, and it is possible that it could contain material about you

> which you do not anticipate now, but which could cause your sentence to be more severe than you now believe. Do you understand that?
>
> THE DEFENDANT**:** Yes, sir.

Doc. 156. The Court clearly informed Petitioner that he was potentially subject to a harsher sentence than that was predicted by his counsel. As such, any defect in counsel's failure to properly predict Petitioner's sentencing guideline range was cured by the Court during the change of plea hearing. Accordingly, Ground One of Petitioner's motion is without merit.

b. Counsel's failure to withdraw Petitioner's guilty plea

Ground Two contends that counsel was ineffective for failing to move to withdraw Petitioner's guilty plea after the Government allegedly breached the plea agreement. Petitioner contends that the Government wrongfully argued for a six-level enhancement after stipulating to facts that would have otherwise led to five-level enhancement. Petitioner argues that the Court found that the firearm was otherwise used and applied the six-level enhancement as a result of the alleged breach.

Petitioner's counsel was not ineffective for failing to move to withdraw Petitioner's guilty plea. At sentencing, counsel objected to the PSR's six-level enhancement based on the probation officer's determination that the firearm was otherwise used. The six-level enhancement was based upon the PSR's finding that the firearm was held within twelve inches of a postal employee's head. Counsel argued that the facts as stipulated in the plea agreement specifically removed language stating that Petitioner "threatened U.S. postal employees R.M., D.S., persons with bodily harm if they did not provide them with the money." Doc. 77; Doc. 121. As such, counsel argued, the facts stipulated that the firearm was merely brandished and not otherwise used. The Court overruled counsel's objection, finding that the Court was not "bound by the restricted view of the commission of the offense as it may be admitted to by the defendant in a

plea agreement." Doc. 121. Following the Court's denial of counsel's objection and subsequent sentencing, counsel raised the argument on appeal, which was denied by the Eleventh Circuit. Doc. 139.

Because counsel strenuously objected to the six-point enhancement at sentencing and on appeal, counsel was not ineffective for failing to move to withdraw Petitioner's guilty plea based on the alleged breach of the agreement. Further, counsel's decision not to move to withdraw Petitioner's guilty plea was reasonable in light of the language in the plea agreement stating that Petitioner could not withdraw his guilty plea based on his dissatisfaction with the Court's sentence.

Moreover, because the Government did not breach the terms of the plea agreement at sentencing, Petitioner was not prejudiced by counsel's failure to move to withdraw the guilty plea. The plea agreement did not contain any specific language regarding Petitioner's sentencing range other than the disclosure that Petitioner was subject to a maximum of twenty years imprisonment. The plea agreement specifically stated that the Court was not bound by any sentencing estimations made by the Government and that nothing in the plea agreement limited the sentencing discretion of the Court. As the Court discussed at sentencing, the language deleted from the stipulated facts in the plea agreement related to verbal threats made by Petitioner to postal workers while Petitioner was brandishing the firearm. The six-level enhancement in the PSR, however, was based on the proximity of the weapon to the employee, not on the threats that were removed from stipulated facts in the plea agreement. As such, the Government did not argue facts at sentencing that were specifically removed from the stipulated facts in the plea agreement.

Petitioner cites United States v. Taylor in support of his argument that the Government unlawfully breached the terms of the plea agreement. 77 F.3d 368 (11th Cir. 368). The facts of this case are distinguishable from those in Taylor as well as those in cases cited by Taylor. In Taylor, the government promised in the plea agreement to recommend at sentencing that the defendant be sentenced to no more than ten years incarceration. Id. at 368-69. The PSR, however, calculated a range of 188-235 months imprisonment. Id. The Eleventh Circuit found that despite the government's "begrudging recommendation" at sentencing of 120 months, the government breached the plea agreement through the PSR. Id. at 371. Similarly, in United States v. Boatner, the Eleventh Circuit held that the government breached the plea agreement through the PSR. 966 F.2d 1575(11th Cir. 1992). In Boatner, the plea agreement stipulated that only two ounces would be considered for sentencing purposes, but the PSR stated that the drugs involved amounted to nearly three kilograms. Id. at 1579.

Unlike Taylor and Boatner, the plea agreement in this case did not contain a specific promise that was breached by the Government through the PSR. Whereas the plea agreement in Taylor specifically stated that the government would recommend a ten year sentence, and the plea agreement in Boatner specifically stated that the sentence would be based on two ounces of cocaine, Petitioner's plea agreement contained no language stating that the Government promised to refrain from arguing for the six-level enhancement. The Government merely stipulated to a non-binding set of facts, which included that Petitioner did not verbally threaten the postal employees with harm if they did not provide Petitioner with money.

Because counsel's performance was reasonable based on his objection to the PSR's six-level enhancement at sentencing and on appeal, and because the Government did not breach the specific provisions of the plea agreement, Ground Two of Petitioner's motion is without merit.

2. Court's abuse of discretion at sentencing

Ground Three alleges that the Court abused its discretion at sentencing by making impermissible findings of fact that Petitioner otherwise used the firearm, leading to the six-level enhancement. Because the Eleventh Circuit determined on appeal that the district court did not err in finding that the firearm was otherwise used and applying the six-level enhancement, Petitioner's claim is barred by the law of the case doctrine.

The law of the case doctrine binds both district and appellate courts to a prior appellate decision in the same case. Thomas v. U.S., 527 F.3d 1300, 1303 (11th Cir. 2009). "The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal." Id. (quoting Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289, 1291 (11th Cir. 2005)). Absent new evidence, an intervening change in controlling law, or a clearly erroneous appellate decision, an appellate decision is binding in all subsequent proceedings in the same case. Id. "The district court is not required to reconsider claims of error that were raised and disposed of on direct appeal." United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000).

Although Petitioner presents Ground Three in a slightly different color than the issue was raised on appeal, the Eleventh Circuit determined on direct appeal that the district court did not err by applying the six-level enhancement. Doc. 139. Moreover, the Court did not engage in impermissible fact-finding, as a district court is not bound by stipulations of facts in plea agreements and may determine all facts relevant at sentencing after reviewing the PSR. United States v. Forbes, 888 F.2d 752, 754 (11th Cir. 1989). Additionally, Petitioner's argument is based on his erroneous contention that his plea agreement was pursuant to Rule 11(c)(1)(C) of the FEDERAL RULES OF CRIMINAL PROCEDURE, which binds the court at sentencing after the court

accepts the agreement. FED. R. CRIM. P. 11(c)(1)(C). As indicated above, Petitioner's plea agreement was not binding on the Court, and therefore was not a Rule 11(c)(1)(C) plea agreement. Because Petitioner has not presented new evidence or new controlling law, or shown that the Eleventh Circuit's decision on direct appeal was clearly erroneous, Ground Three of Petitioner's motion is without merit.

CONCLUSION

For the above reasons, **IT IS RECOMMENDED** that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **DENIED**. In addition, and pursuant to the requirements of Section 11(a) of the Rules Governing Section 2255 Proceedings, it does not appear that Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). Accordingly, **IT IS FURTHER RECOMMENDED** that the Court **DENY** a certificate of appealability in its final order.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this RECOMMENDATION with the district judge to whom this case is assigned WITHIN FOURTEEN (10) DAYS after being served a copy thereof.

SO RECOMMENDED, this 24th day of August, 2012.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge