IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JIM ANTHONY WALKER,

Petitioner,

No. 4:10-cv-00353-JAJ

VS.

UNITED STATES OF AMERICA,

Respondent.

INITIAL REVIEW ORDER

This matter comes before the Court pursuant to Defendant Jim Anthony Walker's ("Walker") Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. [Dkt. No. 1.] Pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, the Court conducts the following initial review of the petition. For the following reasons, the Court denies Walker's § 2255 application.

I. FACTUAL AND PROCEDURAL HISTORY

Law enforcement officers ("LEO") devised a plan to utilize a confidential informant ("CI") to conduct a reverse buy-bust at the Arrowhead Motel in Mount Pleasant, Iowa, on September 13, 2007. The CI was to provide three firearms to Keri Christofferson ("Christofferson") in exchange for one-half ounce of cocaine base. Christofferson would then exchange the firearms for drugs from Walker. On September 11, 2007, the CI spoke with Christofferson and they agreed to meet in a few days to consummate the exchange. LEO provided the CI with three guns: two Smith and Wesson, Model 6906, 9mm caliber pistols, and a Glock, Model 22, .40 caliber pistol.

On September 13, 2007, the CI and Christofferson traveled together to the Arrowhead Motel and entered one of the rooms. The CI showed Christofferson the firearms and she called an individual on her cell phone. Several minutes later, Walker entered the

motel room with an object in his hand, placed the item on the bed next to the firearms, and then looked at and handled the firearms. Surveillance videos of the transaction revealed that Walker looked at each of the firearms and worked the actions of the firearms. Christofferson placed the item on the bed in her bra. LEO entered the room shortly thereafter before Walker, Christofferson, or the CI could leave the motel room. The item Christofferson placed in her bra was determined to be cocaine base.

Walker was Mirandized and interviewed at the Burlington, Iowa, police station. Walker told police that he had only brought money to the sale and intended to purchase the firearms for protection.

On November 15, 2007, a grand jury charged Walker in a four-court indictment.¹ Count One charged him with conspiracy to distribute at least five grams of a mixture and substance containing a detectable amount of cocaine base, pursuant to 21 U.S.C. §§ 846 and 841(a)(1), and Count Three charged him with possession of firearms in furtherance of drug trafficking, pursuant to 18 U.S.C. § 924(c).² He entered a guilty plea to Counts One and Three on July 7, 2008. Walker stipulated to the following relevant facts in Attachment A to the plea agreement:

- 3. The Defendant agrees that during and in relation to the offense described in Count 1 of the Indictment . . . he did knowingly possess firearms, to wit, two Smith and Wesson, Model 6906, 9mm caliber pistols, and a Glock, Model 22, .40 caliber pistol, which were possessed in furtherance of said crime.
- 4. The defendant agrees that he participated in an exchange of cocaine base, a.k.a. "crack" cocaine, for the weapons described in paragraph 3 above, and that said transaction occurred on or

¹The Court refers to documents from Walker's criminal case, No. 3:07-cr-627.

² The indictment, in relevant part, stated that Walker "did knowingly possess firearms, to wit, two Smith and Wesson, Model 6906, 9mm caliber pistols, and a Glock, Model 22, .40 caliber pistol, in furtherance of, and did knowingly use said firearms during and in relation to, drug trafficking crimes"

about September 13, 2007, in and about Des Moines County in the Southern District of Iowa. The defendant agrees that he brought the cocaine base, a.k.a. "crack" cocaine, to the transaction and handled one or more of the weapons.

[Plea Agreement, Att. A, Dkt. No. 47.]

On March 3, 2009, the Court sentenced Walker to the mandatory minimum of sixty months incarceration on Count One, followed by a consecutive mandatory minimum of sixty months on Count Three. Walker filed a notice of appeal to the Eighth Circuit Court of Appeals on March 9, 2009, but the Eighth Circuit dismissed his appeal on December 3, 2009.

Walker filed this § 2255 motion on August 2, 2010. He claims his counsel was ineffective for two reasons: (1) he rendered erroneous advice to plead guilty to a firearm offense under 18 U.S.C. § 924(c), and (2) he failed to ensure that the probation department and the district court complied with Fed. R. Crim. P. 32(e)(2) and 32(i)(1)(A). Walker also requests an evidentiary hearing to resolve these disputes.

II. CONCLUSIONS OF LAW

A. Standards for Relief Pursuant to Section 2255

Title 28, of the United States Code, section 2255, provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground (1) that the sentence was imposed in violation of the Constitution or laws of the United States, or (2) that the court was without jurisdiction to impose such sentence, or (3) that the sentence was in excess of the maximum authorized by law, or (4) is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. Section 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." <u>United State v. Addonizio</u>, 442 U.S. 178, 185 (1979). Rather,

§ 2255 is intended to redress only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962); see also United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.") (citing Poor Thunder v. United States, 810 F.2d 817, 821 (8th Cir. 1987)). A § 2255 claim is a collateral challenge and not interchangeable for a direct appeal, see United States v. Frady, 456 U.S. 152, 165 (1982), and an error that could be reversed on direct appeal "will not necessarily support a collateral attack on a final judgment." Id.

Thus, a § 2255 motion "afford[s] federal prisoners a remedy identical in scope to federal habeas corpus." <u>United States v. Wilson</u>, 997 F.2d 429, 431 (8th Cir. 1991) (quoting <u>Davis v. United States</u>, 417 U.S. 333, 343 (1974)).

B. Ineffective Assistance of Counsel Standard

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." <u>Strickland v. Washington</u>, 466 U.S. 668, 684 (1984). The United States Supreme Court reformulated the <u>Strickland</u> test for constitutionally ineffective assistance of counsel in Lockhart v. Fretwell:

[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

506 U.S. 364, 369 (1993) (quoting <u>United States v. Cronic</u>, 466 U.S. 648, 658 (1984)). The Eighth Circuit Court of Appeals applies the <u>Lockhart</u> test:

Counsel is constitutionally ineffective under [Lockhart

<u>v.]Fretwell</u> when: (1) counsel's representation falls below an objective standard of reasonableness; and (2) the errors are so prejudicial that the adversarial balance between defense and prosecution is upset, and the verdict is rendered suspect.

English v. United States, 998 F.2d 609, 613 (8th Cir. 1993) (citing Lockhart, 506 U.S. at 364).

Where conduct has not prejudiced the movant, the court need not address the reasonableness of that conduct. <u>United States v. William</u>, 994 F.2d 1287, 1291 (8th Cir. 1993); <u>Siers v. Weber</u>, 259 F.3d 969, 984 (8th Cir. 2001) (citing <u>Strickland</u>, 466 U.S. at 697) (courts need not reach the effectiveness of counsel if it is determined "that no prejudice resulted from counsel's alleged deficiencies."). To determine whether there is prejudice, the court examines whether the result has been rendered "fundamentally unfair or unreliable" as the result of counsel's performance. <u>Lockhart</u>, 506 U.S. at 369. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural rights to which the law entitles him. <u>Id.</u> at 372. Prejudice does not exist unless "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." <u>Strickland</u>, 466 U.S. at 694; <u>Williams</u>, 994 F.2d at 1291.

"Judicial scrutiny of counsel's performance is highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional judgment." <u>United States v. Martinez-Salinas</u>, 573 F.3d 595, 598–99 (8th Cir. 2009) (quoting <u>Armstrong v. Kemna</u>, 534 F.3d 857, 863 (8th Cir. 2008)).

1. Counsel's Advice to Plead Guilty to a Firearm Offense

Walker contends that his previous attorney, Lee T. Boyd ("Boyd"), rendered erroneous advice to plead guilty to a firearm offense under 18 U.S.C. § 924(c). Walker argues that he was innocent of the offense and that there was no factual basis for him to

plead guilty. He asserts that simultaneous possession of drugs and firearms is not alone sufficient to support a conviction under § 924(c), and that there was no nexus between the possession of the charged firearm and the drug crime. Walker further asserts that a mere examination of the firearms does not establish a nexus where that possession had the effect of furthering or advancing a drug conspiracy. Walker claims that it was impossible for him to facilitate the drug trafficking or to use guns near drugs as he never had a possessory interest in the firearms. Accordingly, Walker argues that he did not acquire ownership because the drugs for guns exchange was never completed with the confidential informant.

Walker argues that the Supreme Court's decision in <u>Watson v. United States</u>, 552 U.S. 74 (2007), supports his contention that a guns for drugs exchange is not "use" of a firearm. In <u>Watson</u>, the Supreme Court held that, pursuant to § 924(c), "use" of a firearm does not occur in a guns for drugs exchange. <u>Id.</u> at 79. The Court compared receipt of a firearm in exchange for drugs, to be similar to other transactions, such as trading an apple for a granola bar, or paying for a cup of coffee. <u>Id.</u> (citing <u>United States v. Stewart</u>, 246 F.3d 728, 731 (C.A.D.C. 2001)). As the Court stated, "[t]he Government may say that a person 'uses' a firearm simply by receiving it in a barter transaction, but no one else would." <u>Id.</u> Accordingly, conviction under § 924(c) for use of a firearm on the basis of only an "exchange of drugs for a gun cannot stand." <u>Accord United States v. Pruett</u>, 523 F.3d 863, 864 (8th Cir. 2008); <u>United States v. Spotted Elk</u>, 548 F.3d 641, 665 (8th Cir. 2008); <u>United States v. Huntley</u>, 523 F.3d 874, 875 (8th Cir. 2008) (per curiam).

But § 924(c) contains two separate offenses: (1) using or carrying a firearm during or in relation to a drug trafficking crime, and (2) possessing a firearm in furtherance of a drug trafficking crime. See § 924(c)(1)(A); United States v. Gamboa, 439 F.3d 796, 810 (8th Cir. 2006). Watson is inapplicable to the *other* prong of § 924(c), that is, for *possession* of a firearm in furtherance of a drug trafficking crime. United States v. Murphy, 572 F.3d 563, 571 (8th Cir. 2009); United States v. Washington, 528 F.3d 573, 574 (8th Cir. 2008).

The Eighth Circuit Court of Appeals has held that simultaneous possession of drugs and firearms is alone insufficient to support a conviction for possession of a firearm in furtherance of a drug trafficking crime. <u>United States v. Spencer</u>, 439 F.3d 905, 914 (8th Cir. 2006). Possession of a firearm "may be actual or constructive and need not be excessive." <u>United States v. Sadler</u>, 538 F.3d 879, 888 (8th Cir. 2008). Constructive possession is shown when a defendant "knowingly has the power and intention to exercise control over the firearm." <u>Id.</u>

There must be a "nexus between the defendant's possession of the firearm and the drug offense." <u>Id.</u> (quoting <u>United States v. Hamilton</u>, 332 F.3d 1144, 1150 (8th Cir. 2003)). A jury may find there is the requisite nexus where the possession of firearms had the effect of "furthering, advancing, or helping forward" the drug crime. <u>Sadler</u>, 538 F.3d at 888. Likewise, a jury may infer a nexus if there is evidence of possession if "the firearm was used for protection, was kept near the drugs, or was in close proximity to the defendant during drug transactions." <u>United States v. Sanchez-Garcia</u>, 461 F.3d 939, 947 (8th Cir. 2006).

In <u>Washington</u>, the defendant argued that he never "possessed" the gun because he was arrested before he could touch it. 528 F.3d at 574. The court disagreed and held that he had constructive possession of the gun because he knew of it and had the "intent and ability to exercise control over it." <u>Id.</u> (citing <u>United States v. Robertson</u>, 519 F.3d 452, 455 (8th Cir. 2008)). The defendant had selected the gun, offered drugs for it, and was then arrested before touching the gun. Id.

Other circuits are in accord that trading drugs for weapons constitutes possession in furtherance of a drug trafficking crime. See United States v. Gardner, 602 F.3d 97, 103 (2d Cir. 2010) ("We join our sister circuits in concluding that when a defendant acquires a firearm using drugs as payment, he possessed that firearm in furtherance of a drug trafficking crime in violation of [§ 924(c)]."); United States v. Boyd, 209 Fed. Appx. 285, 290 (4th Cir. 2006) ("We conclude that accepting possession of firearms as payment for

crack cocaine is possession in furtherance of a drug trafficking crime."); United States v. Sterling, 555 F.3d 452, 458 (5th Cir. 2009) ("assuming without deciding that bartering drugs for guns constitutes 'possession in furtherance' of a drug trafficking offense"); United States v. Frederick, 406 F.3d 754, 764 (6th Cir. 2005) ("As a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell does promote or facilitate that illegal sale."); United States v. Doody, 600 F.3d 752, 755 (7th Cir. 2010) ("when a defendant receives a gun for drugs, he takes possession of the firearm in a way that furthers, advances, or helps forward the distribution of drugs. The same is true when a defendant holds the gun only as collateral, rather than taking permanent ownership of it."); United States v. Mahan, 586 F.3d 1185, 1189 (9th Cir. 2009) ("When a defendant accepts a gun as payment for his drugs, his sale—and thus his crime—is incomplete until he receives possession of the firearm. We fail to see how possession that completes a drug trafficking offense is not possession 'in furtherance' of a drug trafficking offense."); United States v. Luke-Sanchez, 483 F.3d 703, 706 (10th Cir. 2007) (recognizing that bartering drugs for guns constitutes possession in furtherance of a drug trafficking crime under § 924(c)(1)).

Here, Walker brought drugs to the motel room, looked at the three guns, and picked up the guns to see if they were operable. The Court finds that he had more contact with the guns than the defendant did in <u>Washington</u>. Walker also stipulated in his plea agreement that he possessed the guns in furtherance of drug activity. The Court explained to Walker during his change of plea hearing that the government would have to prove he either used the firearms or possessed the firearms in furtherance of drug trafficking. After this explanation, Walker pled guilty to both counts.

Later, at his sentencing, Boyd argued that Walker was not in possession of the firearms for two reasons. He argued that handling a gun is not possession, or, alternatively, the weapons were still in Christofferson's possession. The Court then, as now, rejects

Walker's arguments. Walker had constructive possession of the firearms because he had negotiated for their purchase by selling crack to Christofferson. See Sadler, 538 F.3d at 888. The nexus between the firearms and drugs is that Christofferson brought the guns for the specific purchase of selling them to Walker in exchange for drugs. Id. Walker also completed the sale and was either standing by or handling the guns when LEOs entered the hotel room. Regardless, he was in close proximity to the guns.

Boyd argued at sentencing that Walker did not possess the firearm. But Walker stipulated to possessing a firearm in his plea agreement. Boyd's conduct did not prejudice Walker, William, 994 F.2d at 1281, and there is no indication that Walker's sentencing was "fundamentally unfair or unreliable" as the result of counsel's performance. Lockhart, 506 U.S. at 369. There was ample evidence to demonstrate that Walker's exchange of drugs for guns was constructive possession of the guns. As a result, the Court dismisses Walker's claim of ineffective assistance of counsel, as to Boyd's alleged erroneous advice to plead guilty to a firearm offense under § 924(c).

2. Counsel's Failure to Ensure that the Probation Department and the Court Adhered to Their Duties under Fed. R. Crim. P. 32(e)(2) and 32(i)(1)(A)

Walker's next ineffective assistance of counsel claim is that his attorney failed to ensure that the probation office complied with Fed. R. Crim. P. 32(e)(2), thereby causing the Court to inadequately comply with its duty under Fed. R. Crim. P. 32(i)(1)(A). Walker asserts that he never received a copy of his presentence report ("PSR"), Boyd did not discuss the PSR with him, and he was not made aware until his sentencing that Boyd had filed an objection to the PSR. Walker asserts that the Court was improperly led to believe that Boyd had reviewed the PSR with Walker. As a result, Walker argues that Boyd's deficient performance prejudiced Walker because had he been afforded the opportunity to review the PSR, he would have seen exculpatory information and withdrawn his plea on the firearm charges.

Federal Rule of Criminal Procedure 32, reads in relevant part:

(e) Disclosing the Report and Recommendation.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

. .

(i) Sentencing.

- (1) In General. At sentencing, the court:
- (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

Fed. R. Crim. P. 32.

Walker cites to <u>United States v. Nappi</u>, 243 F.3d 758, 763 (3d Cir. 2001), for the proposition that a defendant's due process rights are violated if courts do not provide copies of the PSR to counsel for the defendant. He asserts that Boyd evaded the Court's question as to whether Boyd had reviewed the PSR with Walker:

THE COURT: Mr. Boyd, following your review of the Presentence Report with your client, did you find factual errors in the report that need to be resolved here today? COUNSEL BOYD: Well, Judge, I filed our objection to the Presentence Report.

[Sentencing, Dkt. 82 at 2.] Walker asserts that Boyd's evasive answer supports his argument that there is no proof that either the probation office or Boyd gave him a copy of the PSR, and as a result, the Court is not in compliance with Fed. R. Crim. P. 32(I).

A sentencing court complies with the rule requiring disclosure of the PSR to the defendant by asking defense counsel at the hearing, in defendant's presence, whether the attorney had reviewed and discussed the PSR with the defendant. <u>United States v. Griggs</u>, 71 F.3d 276, 282 (8th Cir. 1995). A trial judge need not ask specifically ask the defendant if he has discussed the report with his counsel. <u>United States v. Jeross</u>, 521 F.3d 562 (6th

Cir. 2008) (quoting <u>United States v. Osborne</u>, 291 F.3d 908, 910 (6th Cir. 2002)); <u>United States v. Lockhart</u>, 58 F.3d 86, 88 (4th Cir. 1995) ("However, the district court need not expressly ask whether the defendant has read the presentence report and discussed it with his counsel, provided there is ... evidence in the record from which one could reasonably infer that the defendant and his counsel have read and discussed the report.") (quotations omitted). "[T]he court need only *somehow* determine that defendant and counsel have had an opportunity to read and discuss the PSR." <u>Id.</u> (quoting <u>United States v. Stevens</u>, 851 F.2d 140, 143 (6th Cir. 1988)) (emphasis in original). Even if a defendant alleges counsel never discussed the PSR with him, "[b]ecause counsel filed meaningful, though ultimately unsuccessful, arguments and objections on his behalf, the . . . defendant received constitutionally-effective counsel at sentencing." <u>United States v. Stoltz</u>, 325 F. Supp. 2d 982, 990 (D. Minn. 2004).

Here, the PSR was disclosed well in advance of the statutorily-required 35 days. The probation office disclosed the PSR to Boyd and the Government on August 27, 2008 [PSR, Dkt. No. 64 at 29], and the sentencing occurred on March 3, 2009. Boyd filed objections on January 12, 2009 [Obj., Dkt. No. 62], and the probation office filed an addendum to the PSR on January 20, 2009. [PSR, Dkt. No. 64 at 29.] Walker also had an opportunity to speak to the Court at his sentencing and did not contradict Boyd's answers to the Court's questions. See, e.g., United States v. Knorr, 942 F.2d 1217 (7th Cir. 1991) (holding that a defendant can waive review of a PSR by participating in sentencing without objection). The Court can infer that, at some point from August 27, 2008, to March 3, 2009, Boyd spoke to Walker about the PSR. In support of this inference is that Boyd filed objections to the PSR.

Moreover, Walker cannot show that prejudice resulted from Boyd's alleged failure to review the PSR with him. See <u>United States v. Soltero</u>, 510 F.3d 858, 863–64 (9th Cir. 2007) (defendant must show prejudice if defendant did not have copy of PSR and attorney failed to discuss the PSR with defendant). Walker asserts that if he had reviewed the PSR, then he would have used exculpatory information "to withdraw the plea on the firearm

charge, and would have proceeded to trial." This argument is without merit as Walker stipulated to possession of the firearm. And for the reasons discussed previously, there was more then sufficient evidence to rebut any arguments as to possession of a firearm that Walker, or his counsel, could have made. Indeed, Boyd did file specific objections relating to possession of the firearm and also raised the issue at Walker's sentencing. As such, there is no evidence to show that Boyd's representation "fell below an objective standard of reasonableness" and he was prejudiced by this deficiency. See Theus v. United States, 611 F.3d 441, 447–48 (8th Cir. 2010).

C. Request for Evidentiary Hearing

Section 2255 requires a hearing for the purposes of determining the issues and making findings of fact with respect thereto. See 28 U.S.C. § 2255. A hearing is not required where the "motion and the files and records of the case conclusively show" that relief is not available. Id. Because Walker fails to show the requisite prejudice resulting from any of his claims, it is clear that relief is unavailable. Accordingly, a hearing is unnecessary.

III. CONCLUSION

The Court finds that Walker is not entitled to relief pursuant to 28 U.S.C. § 2255. There has not been a "miscarriage of justice" because Walker stipulated in his plea agreement that he possessed a firearm in furtherance of a drug trafficking crime. Apfel, 97 F.3d at 1076. The Court finds that Walker's counsel did not prejudice Walker when he advised Walker to enter a plea of guilty for possession of a firearm in furtherance of drug trafficking, or when he allegedly failed to confer with Walker about the PSR. See William, 994 F.2d at 1291. The Clerk of Court is directed to enter judgment in favor of the respondent.

Upon the foregoing,

IT IS ORDERED that the Petitioner's August 2, 2010 Petition for Writ of Habeas

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Corpus [Dkt. No. 1] is denied.

DATED this 27th day of October, 2010.

JOHNIA. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA