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

MAURICE WHITE, SR., Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 4:11-cv-00307-JAJ **INITIAL REVIEW ORDER**

This matter comes before the Court pursuant to Defendant Maurice White, Sr.'s ("White") Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. [Dkt. Nos. 1 & 2.] 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 White's § 2255 application. The Court also denies White a Certificate of Appealability pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Law enforcement officers and the Iowa Division of Narcotics Enforcement ("DNE") investigated the distribution of cocaine base by Charles Miller ("Charles") and Terry Markey Miller ("Terry"). Tara Loret Robinson ("Robinson") was also involved in the distribution. Through a series of proffer interviews, law enforcement officers learned that Charles and Terry collaborated together to distribute cocaine base and Charles often used White, an addict, to conduct transactions in exchange for cocaine base. White helped Charles with various tasks, including distribution of cocaine base, to support his drug habit.

The officers conducted several controlled buys. In a controlled transaction on October 4, 2007, an undercover officer ("UC officer") approached Robinson to purchase 14 grams of cocaine base for $500. Charles and White were on a nearby bench in the pre-arranged parking lot for the buy. The UC officer observed Robinson arrive in a vehicle, talk

with Charles briefly, and then walk over to the UC officer's car. Robinson confirmed the UC officer had the money, went back again to speak with Charles, came back with White to the UC officer's car, and then White handed Robinson a quantity of cocaine base, which Robinson gave to the UC officer. Upon the UC officer's request, White used a digital scale and confirmed the weight of the cocaine base was 14 grams.

White and Charles were pulled over for speeding shortly after the controlled buy occurred on October 4, 2007. White fled the scene, but was later apprehended and a search of his person revealed a baggie containing approximately .7 grams of cocaine base, unused sandwich baggies, and a digital scale with cocaine residue. Terry later proffered in an interview that Charles told him that when White ran away from the vehicle, White had tossed baggies containing 8 or 9 ounces of cocaine base in a field. Charles later bonded White out of jail to have White successfully find the cocaine base.

On June 10, 2009, a grand jury charged White in a two-count indictment.[1] Count One charged him with conspiracy to manufacture, distribute, and possess with intent to distribute fifty grams or more of cocaine base, pursuant to 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A). Count Two charged him with distribution of five grams or more of cocaine base on or about October 4, 2007, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B). [Dkt. No. 1.] He entered a guilty plea to Count One on December 11, 2009, which the Court accepted on December 31, 2009. [Dkt. Nos. 61 & 75.] White stipulated to the following relevant facts in Attachment A to the plea agreement:

> 1. Defendant Maurice E. White, Sr., . . . and others reached an agreement and came to an understanding that they would obtain crack cocaine and distribute it to others. At all relevant times, Defendant Maurice White, Sr., knew that it is and was illegal to distribute crack.
> 2. In 2007 and earlier, Defendant Maurice White, Sr., assisted Charles Miller in his drug distribution business.

[1]The Court refers to documents from White's criminal case, No. 3:09-cr-00062.

> 3. . . . On October 4, 2007, Special Agent Dan Stepleton was working undercover to buy crack from Tara Robinson. . . . Upon meeting with Robinson and showing her the $500, Robinson met with Charles Miller and Defendant Maurice White, Sr., near the restaurant. Robinson and White walked back toward Stepleton as Defendant White handed Robinson the crack cocaine. The crack was weighed and determined to be 11.12 grams (DCI Lab weight).
> 4. Following the transaction . . . [t]he car was stopped by Davenport Police Department for a traffic violation . . . White fled from the scene of the traffic stop on foot, and upon being apprehended, was found to be in possession of a package containing .7 grams of crack, and a digital scale.
> 5. Charles Miller and White had several ounces of crack with them when they were stopped by the police and White discarded the crack before he was apprehended by the police. Later, they returned to the area and found the crack.
> 6. Defendant White admits that he knew the conspiracy involved at least 150 grams and more of cocaine base, also known as "crack."

[Plea Agreement, Att. A, Dkt. No. 52.]

On September 3, 2010, the Court sentenced White to 143 months[2] on Count One, to run concurrent with the undischarged portion of the state sentence he was currently serving. [Dkt. No. 163.] The remaining count was dismissed on motion of the government. White filed a notice of appeal to the Eighth Circuit Court of Appeals on September 9, 2010, but the Eighth Circuit dismissed his appeal on December 29, 2010 because of an appeal waiver in his plea agreement, and mandate issued on February 16, 2011. [D.t Nos. 165, 195, 204.]

White filed this § 2255 motion on June 30, 2011. He claims his counsel was ineffective for a myriad of reasons, although the Court groups his claims into two broad categories. The first category alleges ineffective assistance of counsel related to charging documents supporting his enhancement for being a career offender, with many of these

[2]White received a substantial departure from the career offender guideline range of 262 to 327 months.

claims overlapping.[3] The second category broadly concerns generalized ineffective assistance of counsel claims: (1) failure to call any witnesses at sentencing; (2) the Court's denial of a motion to continue the sentencing prejudiced his right to present witnesses; (3) his attorney failed to file motions; (4) his attorney led him to believe he could appeal the Court's finding of him as a career offender; (5) his attorney led him to believe he would not be subject to sentencing enhancements; and (6) his attorney failed to object to the Court's finding of drug quantity.

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 claims errors in conviction and sentencing." *United State v. Addonizio*, 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*

[3] Specifically, White alleges the following claims as to counsel's performance: (1) failure to object to the Court and Probation Office's use of a police complaint; (2) failure to object to the Court's statements at sentencing related to a theft in the first degree charge; (3) failure to adequately investigate said theft charge; (4) failure to object to the Court's inquiry related to the charging documents; and (5) failure to object to not including the actual charging documents in the Court's review of his past criminal convictions.

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.*

B. Ineffective Assistance of Counsel Standard

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The United States Supreme Court reformulated the *Strickland* 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 United States v. Cronic*, 466 U.S. 648, 658 (1984)). The Eighth Circuit Court of Appeals applies the *Lockhart* test:

> Counsel is constitutionally ineffective . . 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. *United States v. Williams*, 994 F.2d 1287, 1291 (8th Cir. 1993); *Siers v. Weber*, 259 F.3d 969, 984 (8th Cir. 2001) (citing *Strickland*, 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. *Lockhart*, 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. *Id.* 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." *Strickland*, 466 U.S. at 694; *Williams*, 994 F.2d at 1291.

1. Claims Related to Enhancement for Career Offender

White contends that his previous attorney, Mark A. Appleton ("Appleton"), was ineffective because he failed to object to the Court's finding that White was a career offender under the Sentencing Guidelines. Generally, White makes several contentions related to the Presentence Investigation Report's ("PSIR") inclusion of White's conviction for Theft in the First Degree. The PSIR states that "[t]he defendant was originally charged with Robbery, Second Degree; however, he pled to the lesser included offense noted above." [Dkt. No. 81 at 21.] White argues that he was never formally charged with anything other than robbery, and as a result, the facts recounting his criminal history are incorrect.

White first states that his attorney was ineffective for failing to object to the use of a police complaint at the sentencing hearing. While the PSIR referred to the police complaint (which was initially listed as Robbery, Second Degree), the PSIR only referred to the lesser-included offense that White pled to of Theft, First Degree. [Dkt. No. 81 at 21.] There is nothing improper in including White's conviction of theft in the first degree in the PSIR because he pled guilty to the charged offense on March 2, 1990.

Several additional arguments concern the attorney's failure to investigate the theft charge, a failure to include charging documents in the PSIR or present them to the Court, and a failure to object to the Court's inquiry of conduct that was not expressly charged.

These arguments are all without merit because White cannot demonstrate that any prejudice resulted. *See Lockhart*, 506 U.S. at 364. White's similar argument that his attorney should have objected when the Court stated that White "pled down to" a charge of theft in the first degree instead of robbery in the second degree is also without merit.

Additionally, the Court notes that it used the theft in the first degree conviction to support White's enhancement as a career offender. The robbery complaint was irrelevant. According to Iowa Code Section 714.2, theft in the first degree includes the "theft of property from the person of another," or theft in excess of a dollar limit. The charging document that White presented to the Court undercuts his argument. The information dated December 18, 1989, clearly states White was charged with committing "Theft in the First Degree against Norma Meador." It was clear that he was not charged with stealing over the monetary threshold. There was a lengthy discussion at White's sentencing about the appropriateness of including the theft conviction as a predicate for career offender status. The Court found that the theft conviction is a "qualifying predicate crime of violence for purposes of career offender status." [Dkt. No. 177 at 12.] Therefore, the Court properly sentenced White as a career offender because of his prior convictions for assault with intent to commit sexual abuse and for theft in the first degree.

2. General Claims

White next argues that his counsel was ineffective for the following reasons: (1) failure to call any witnesses at sentencing; (2) the Court's denial of a continue to the sentencing prejudiced his right to present witnesses; (3) his attorney failed to file motions; (4) his attorney led him to believe he could appeal the Court's finding of him as a career offender; (5) his attorney led him to believe he would not be subject to sentencing enhancements; and (6) his attorney failed to object to the Court's finding of drug quantity.

Two of these complaints can be summarily dismissed as White is unable to demonstrate any prejudice resulted from a failure to call witnesses at sentencing or that his attorney failed to file motions. *See Lockhart*, 506 U.S. at 364. White has not shown how

presenting any witnesses or unfiled motions would have otherwise changed the outcome of sentencing. *See Williams*, 994 F.2d at 1291; *Owens v. Dormire*, 198 F.3d 679, 682-83 (8th Cir. 1999) (defendant must show actual prejudice as a result of failure to call a witness).

Likewise, White's arguments are unavailing that his attorney was somehow ineffective because the attorney led White to believe he could appeal the Court's career offender finding and that he could object to sentencing enhancements. White's plea agreement contained the following appeal waiver, as well as limiting his Section 2255 rights to appeal:

> . . . the defendant knowingly and voluntarily waives the right to appeal any and all issues relating to this agreement and conviction and to the sentence, including any fine or restitution, within the maximum penalties provided in the states of conviction, and the manner in which the sentence . . . was determined, on any ground whatever, in exchange for the concessions made by the United States in this Agreement.

[Dkt. No. 52 at 4-5.] This appeal waiver forecloses White's ability to attack the Court's career offender finding. When White entered his plea of guilty, he stated that he understood he was giving up almost all his rights to appeal. [Dkt. No. 173 at 18-19.] The plea agreement also separately informed him that he could be a career offender pursuant to USSG § 4B1.1. [Dkt. No. 52 at 3.]

Likewise, White's attorney should have counseled him that he could object to sentencing enhancements and he did, and as a result, White's plea was knowing and voluntary. *See United States v. Taylor*, 519 F.3d 832, 835-36 (8th Cir. 2008) (quoting *United States v. Vaughan*, 13 F.3d 1186, 1187 (8th Cir.), *cert. denied*, 511 U.S. 1094 (1994)) ("A knowing and intelligent guilty plea forecloses independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."). The plea agreement clearly stated that the Sentencing Guidelines would incorporate several factors to determine a recommended sentence, such as drug quantity, his role in the offense, his criminal history, and acceptance of responsibility. [Dkt. No. 52 at 2-3.] The Court

informed White when he entered his plea how the Sentencing Guidelines would be applied and that the Court had discretion in sentencing. [Dkt. No. 173 at 14-17 .] As a result, this claim likewise fails.

Lastly, the Court considers White's claim that the Court improperly calculated his drug quantity or breached some agreement as to drug quantity. The PSIR supported an attribution of 93,559.57 grams of cocaine base. [Dkt. No. 81 at 18.] The plea agreement stated only that "the defendant distributed *more than* 150 grams of cocaine base and his co-conspirators, including Charles Miller, distributed additional amounts of cocaine base (crack)." *Id.* (emphasis added). It continued that drug quantity will "be determined by the court at the time of the sentencing hearing." *Id.* White was informed at the time when he entered his plea that the Court would determine the drug amount for which he was responsible for; he did not "stipulate" to being responsible only for 150 grams. Additionally, as the Court stated at sentencing, White's sentence was not driven by cocaine quantity, but rather by his status as a career offender.

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 White fails to show the requisite prejudice resulting from any of his claims, it is clear that relief is unavailable. Accordingly, a hearing is unnecessary.

IV. CERTIFICATE OF APPEALABILITY

Before a petitioner can appeal to the court of appeals from a final order in a habeas corpus proceeding, the district court judge must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). Such certificate may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and indicates "which specific issue or issues satisfy the [substantial] showing." *Id.* § 2253(c)(3).

To meet the "substantial showing" standard, the petitioner must demonstrate that a

reasonable jurist would find the district court ruling on the constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke,* 542 U.S. 274, 276, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)); *see also Randolph v. Kemna*, 276 F.3d 401, 403 (8th Cir. 2002) ("the petitioner must 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)) (alteration in original)). A "substantial showing" must be made for each issue presented. *See Parkus v. Bowersox*, 157 F.3d 1136, 1140 (8th Cir. 1998). The certificate of appeal will then contain "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-el v. Cockrellu*, 537 U.S. 322, 336 (2003). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* Thus, a district court may issue a certificate of appeal even if the court is not certain that "the appeal will succeed . . . [because a certificate of appealability] will issue in some instances where there is no certainty of ultimate relief." *Id.* at 336–37 (citing *Slack v. McDaniel*, 539 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

Here, White cannot show that reasonable jurists would disagree or debate whether the fact issues presented should have had a different outcome, and whether the fact issues are adequate to deserve encouragement to proceed further. *See Barefoot*, 463 U.S. at 893 n.4. The Court denies a Certificate of Appealability.

IV. CONCLUSION

The Court finds that White is not entitled to relief pursuant to 28 U.S.C. § 2255. There has not been a "miscarriage of justice" because none of White's claims support a finding for ineffective assistance of counsel. *Apfel*, 97 F.3d at 1076.

Upon the foregoing,

IT IS ORDERED that the Petitioner's June 30, 2011 Petition for Writ of Habeas

Corpus [Dkt. No. 1] is dismissed. The Clerk of Court is directed to enter judgment in favor of the respondent.

IT IS FURTHER ORDERED that the Petitioner is denied a Certificate of Appealability.

DATED this 2d day of August, 2011.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA