IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	Civ. No. 00-2716 (T/V)
	)	Crim. No. 98-20263
CAREY ONEAL BLAKNEY,	)	
	)	
Defendant.	)	

ORDER ADOPTING REPORT AND RECOMMENDATION
ORDER DENYING MOTION PURSUANT TO 28 U.S.C. § 2255
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

The defendant, Carey Oneal Blakney, filed a motion pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside or correct the sentence that was imposed August 13, 1999, following a guilty plea in case #98-20263. The government was ordered to respond, and the Court subsequently referred the § 2255 motion to Magistrate Judge Diane K. Vescovo for an evidentiary hearing. Defendant was found to be indigent, and counsel was appointed to represent him. The hearing was conducted on October 24, 2001. Following the submission of post-hearing briefs, the Magistrate Judge issued a report on November 28, 2001, recommending that the motion be denied in its entirety. Defendant filed timely objections, to which the government has responded.

The issues addressed in the evidentiary hearing were: (1) whether Blakney's trial attorneys, William Massey and Lorna McClusky, provided ineffective assistance of counsel by disregarding his expressed desire to file an appeal; and (2) whether his attorneys were ineffective because they did not file a motion to suppress evidence that was found in four separate searches. In recommending denial of the motion, the Magistrate Judge found that the defendant failed to prove that he specifically requested his attorneys to file an appeal, and failed to prove that a suppression motion would have been successful.

The Magistrate Judge found that the only evidence offered by the defendant regarding whether he expressly requested his attorneys to file an appeal was his own testimony, which was directly contradicted by that of Massey and McClusky. Defendant takes issue with this finding. He points out that his family called, or attempted to call, his attorneys several times after the hearing to check on the progress of the appeal. Defendant's sister testified that Massey told her that he was "working on something."[1] Defendant argues that this evidence credibly establishes that both he and his family thought that an appeal had been filed. He also argues that counsel admitted that there were no notes or letters in his file indicating that an appeal had even been discussed, or informing him that no appeal was being filed on his behalf.

The critical issue in determining whether Massey and McClusky provided ineffective

[1] Massey and McClusky both testified they were hopeful the government would file a Rule 35 motion based on information the defendant had provided regarding another drug suspect. However, the government did not find defendant's information useful within the one-year limitation contained in Rule 35, so no such motion was filed.

assistance is not whether they considered filing an appeal, or whether the defendant or his family presumed an appeal would be, or had been, filed. The issue is whether his attorneys disregarded defendant's actual request to file an appeal. As the Sixth Circuit explained in Ludwig v. United States, 162 F.3d 456 (6th Cir. 1998):

> We emphasize, of course, that a defendant's actual "request" is still a critical element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request.

Id. at 459. Although the defendant's relatives apparently presumed an appeal would be filed, both his father and his sister admitted that they never expressly discussed an appeal with either Massey or McClusky.

The Magistrate Judge also found that any appeal filed by the defendant would not have been meritorious, given that he pleaded guilty and was sentenced at the low end of the guideline range, despite his extensive criminal history and the amount of drugs involved. The Court emphasizes that this finding is simply a factor making it less likely that Blakney actually requested that an appeal be filed. If a defendant's request for an appeal is disregarded, prejudice is presumed; he is not required to make a showing that the appeal would have been successful. Ludwig, 162 F.3d at 459.

The Court finds that the defendant's evidence on this issue falls short of establishing, by a preponderance of the evidence, that Massey and McClusky were ineffective because he has failed to prove the crucial element — that is, that he actually requested them to file an

appeal on his behalf.

With regard to the issue of whether Massey and McClusky were ineffective in failing to file motions to suppress, the defendant must first establish that his Fourth Amendment challenge was meritorious. See Northrop v. Trippett, 265 F.3d 372, 384 (6th Cir. 2001). He must also show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Magistrate Judge considered the potential merits of the Fourth Amendment issues, and found that the defendant failed to make any showing that a motion to suppress would have been successful. Defendant himself testified only that his attorneys did not discuss with him any decision on whether to file a motion to suppress. He called no other witnesses to testify regarding the circumstances surrounding the searches— not the arresting officer, the confidential informant involved, or his girlfriend, Annette Sherman.[2] Once again, defendant's own testimony was directly contradicted by Massey, who testified that he explained to the defendant, in detail and with the assistance of a diagram, the reasons not to file a motion to suppress. Massey also testified about what he understood to be the circumstances surrounding the searches.

In objecting to the Magistrate Judge's conclusion, defendant now argues, based solely on the description of the offense conduct set out in the Presentence Investigation Report prepared for the criminal file, that a motion to suppress the initial search of his person and

[2] Defendant conceded that Sherman consented to the search of her house, where defendant was living, and to the search of a storage unit that was rented in her name.

his car might have been successful. Defendant further argues that if the initial search was suppressed, the others would have to be as well, as "fruit of the poisonous tree." However, without any actual evidence, this is nothing but speculation.

The Court agrees with the Magistrate Judge's analysis of the potential merits of a motion to suppress the various searches involved in this case. Given Massey's understanding of the circumstances of the initial search, the police had probable cause to arrest the defendant and search his person and his vehicle. Defendant's girlfriend had given consent to search both her home and the storage unit rented in her name, and there were problems with defendant's standing to challenge those searches. In addition, the police obtained a warrant to search the locked toolbox found in Sherman's house; in any event, there is no evidence regarding defendant's interest in the toolbox.

The Court finds that due to the absence of evidence regarding the actual circumstances surrounding the four searches, defendant has not shown that a motion to suppress would have had merit. Northrop, 265 F.3d at 384. Thus, he has failed to show that he suffered prejudice from the failure to file such a motion.

Having reviewed the report and recommendation of the Magistrate Judge, and having made a *de novo* determination of the defendant's objections, the Court hereby ADOPTS the report and recommendation of the Magistrate Judge. Accordingly, the defendant's § 2255 motion is hereby DENIED in its entirety.

Consideration must also be given to issues that may occur if the defendant files a

notice of appeal. Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion. No § 2255 movant may appeal without a certificate of appealability.

In Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997), the Sixth Circuit held that amended § 2253 codifies the standard for issuing a certificate of probable cause found in prior § 2253, which was essentially a codification of Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

> [P]robable cause requires something more than the absence of frivolity . . . and the standard for issuance of a certificate of probable cause is a higher one than the 'good faith' requirement of § 1915. . . . [A] certificate of probable cause requires petitioner to make a substantial showing of the denial of [a] federal right. [A] question of some substance, or a substantial showing of the denial of [a] federal right, obviously [does not require] the petitioner [to] show that he should prevail on the merits. He has already failed in that endeavor. Rather, he 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.

Barefoot, 463 U.S. at 893 (internal quotations and citations omitted). In this case, the defendant's claims are without merit, and he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore DENIES a certificate of appealability.

Also in regard to any appeal, the United States Court of Appeals for the Sixth Circuit has held that the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. § 1915(b), does not apply to appeals of orders denying § 2255 petitions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to seek leave to appeal *in forma pauperis* in a § 2255 case, and

thereby avoid the $105 filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must seek permission from the district court under Fed. R. App. P. 24. Kincade, 117 F.3d at 952. If the motion is denied, or the district court certifies that an appeal is not taken in good faith, the prisoner may renew the motion in the appellate court. Fed. R. App. P. 24(a)(4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a)(3)-(4), that any appeal in this matter by the defendant is not taken in good faith, and he may not proceed on appeal *in forma pauperis*.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____
DATE