

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Civ. No.00-2716T(M1)V
)	Crim. No. 98-20263M1
CAREY ONEAL BLAKNEY,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO VACATE, SET ASIDE
OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

On August 13, 1999, the defendant, Carey Oneal Blakney, was sentenced to a term of imprisonment of twenty-five years and two months for one count of unlawful possession with intent to distribute cocaine and one count of unlawful possession with intent to distribute cocaine base, both of which are violations of 28 U.S.C. § 841(a)(1). Blakney pled guilty to both charges in exchange for the government recommending that he be given credit for accepting responsibility for his crime. Now before this court is Blakney's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255,¹ filed August 10, 2000, in which

¹ Section 2255 states in part:

Federal custody; Remedies on motion attacking sentence. A prisoner in custody under sentence of a court established by Act of

Blakney alleges ineffective assistance of counsel. The motion was referred to the United States Magistrate Judge for an evidentiary hearing and a report and recommendation.

In his motion, Blakney argues, *inter alia*,² that his attorneys failed to follow his express request to file an appeal after his sentencing hearing. He contends that shortly after his sentence was handed down, he spoke to both his attorneys, Lorna McClusky and William Massey, and told them that he wanted to appeal his sentence.³ He further alleges that his attorneys should have filed motions to suppress evidence which would have been introduced at trial against him. He asserts that the evidence was obtained in violation of his Fourth Amendment right to be free from unlawful searches and seizures.

Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

² Blakney's other claims contained in the instant motion were not discussed at the evidentiary hearing or in post-hearing briefs and are rendered moot by this recommendations. (See Order, Sept. 22, 2000.) Therefore, those claims are not discussed in this report and recommendation.

³ All parties agree that no appeal was ever filed.

At the evidentiary hearing, the government called both the attorneys who represented Blakney on the criminal charges, McClusky and Massey, as witnesses. Blakney called two witnesses: his father, Roy Blakney and his sister, Deborah Allen. In addition, Blakney took the stand and testified on his own behalf. Based on the evidence presented and the arguments of counsel, the court proposes the following findings of fact and conclusions of law and recommends that Blakney's motion be denied.

I. PROPOSED FINDINGS OF FACT

Pursuant to a plea agreement entered into with the government, on August 9, 1999, Blakney changed his plea to guilty on both counts of unlawful possession of cocaine and cocaine base charged in the indictment. In exchange, the government recommended that Blakney be given credit at sentencing for accepting responsibility for his crimes and that he be sentenced at the lowest end of the guideline range. On August 13, 1999, Judge Jon Phipps McCalla sentenced Blakney to twenty-five years and two months which was the lower end of the recommended range of imprisonment under the sentencing guidelines despite Blakney's status as a career offender with 18 criminal history points and possession of a very large amount of crack cocaine. The Sentencing Guideline range was 24 years and 4 months to 30 years and 5 months. (Sentencing Hearing Transcript at 5.) With Blakney's past criminal history, Judge

McCalla had grounds for an upward departure from the Sentencing Guidelines rather than choosing the low end of the range.

At the sentencing hearing, the possibility of a sentence reduction pursuant to a Rule 35 motion⁴ by the government was discussed in return for Blakney's future assistance in another drug investigation. Judge McCalla acknowledged that Blakney's chances for a Rule 35 motion within the year seemed positive. (*Id.* at 10-16.) No Rule 35 motion was ever filed by the government, however.

After the sentencing hearing, Blakney was taken to the lock-up outside the courtroom, and McClusky, one of his attorneys, followed him there. Blakney testified that he requested at that time that she file an appeal on his behalf because he was not pleased with the results of the hearing. Blakney stated specifically that McClusky said, "I know you are not satisfied. The only option is to appeal.", and that he responded, "I would like to appeal." He further testified that he also discussed an appeal with Massey, his

⁴ Rule 35 of the Federal Rules of Criminal Procedure provides:

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. . . .

Fed. R. Crim. P. Rule 35(b).

other attorney, when Massey visited him at the detention facility in Mason, Tennessee, to review the pre-sentence report prior to the sentencing hearing. In addition, Blakney claimed that his sister and father called McClusky and Massey on his behalf after the sentencing hearing to inquire as to the progress of the appeal. He testified that he never signed anything that would relinquish his right to appeal and that he never received the appeal package after the sentencing hearing. According to Blakney, he discovered that no appeal had been filed when he arrived at FCI Memphis. He then filed the present motion for ineffective assistance of counsel pursuant to 28 U.S.C. § 2255.

On cross examination, Blakney admitted that according to the terms of the retainer agreement he signed with Massey, Massey was only retained for the trial level of the case and not for appeal. On redirect, Blakney testified that he did not contact Massey and McClusky after the sentencing hearing because he thought that they were handling the appellate process for him.

Both Blakney's father and sister admitted on the stand that they never spoke specifically with Blakney's attorneys about an appeal. Roy Blakney, Blakney's father, testified that he had paid Massey on behalf of his son and thought that Massey was to handle the entire case, including any appeal that might arise. He felt certain that Massey would appeal because the sentence was too

severe. He testified that he tried to call Massey after the sentencing hearing at least twice but did not reach him. On cross examination, Roy Blakney stated that he left messages with Massey's secretary. He could not remember the exact dates that he placed the calls.

Blakney's final witness Deborah Allen, his sister, testified that she had spoken to Blakney's attorneys in the past and had attempted to contact them after the sentencing hearing at least once. On cross examination, Allen admitted that at no point did she discuss an appeal with either of Blakney's attorneys. She said that Massey stated only that "he was working on something."

At the evidentiary hearing, both of Blakney's attorneys testified that Blakney never requested an appeal be filed. Massey, lead counsel, stated that he was retained in November of 1998 and that he enlisted McClusky, an associate with his firm, to assist him in the case. He stated that when he agreed to represent Blakney, the agreement expressly provided that he was hired for the trial and sentencing stages and not for further appeal. Nevertheless, Massey admitted that he was involved with Blakney's case after the sentencing hearing and would have represented him in connection with a Rule 35 motion, if one had been filed. He testified that he was optimistic that the government would offer a Rule 35 sentence reduction for Blakney's assistance in another drug

case involving Kevin Webber. Unfortunately, the government did not find Blakney's information particularly useful, and no Rule 35 motion was ever filed. Massey maintained that after the sentencing hearing, he spoke with Blakney and Blakney did not express any interest in pursuing an appeal. He stated that if Blakney had requested an appeal, he would have protected Blakney's right to appeal.

On cross, Massey stated that he has been a criminal defense attorney for twenty years and that he is qualified to try capital murder cases. Massey explained that it was the government's decision whether Blakney's information was helpful in the narcotics investigation of Webber. Ultimately, the government decided that Blakney's information was not useful within the year; the government finally charged Webber only this year.

McClusky testified that she worked with Massey on Blakney's case and handled most of the sentencing hearing herself. She stated that she submitted Blakney's position paper, and she was pleased with Blakney's sentence. She thought that the motion for downward departure due to Blakney's newfound religion and drug rehabilitation helped convince Judge McCalla to sentence Blakney at the lower end of the range. McClusky denied that the conversation with Blakney regarding an appeal took place, although she admitted that the judge gave her the appeal papers which she kept and did

not mail to Blakney. She maintained that in lock-up, she and Blakney discussed the hope that the government would seek a Rule 35 sentencing reduction if it was able to use the information Blakney provided against Webber within the year. She also testified that she told him the result of the sentencing hearing was good as he was sentenced at the low end of the range. McClusky testified that Blakney was focused on the prospect of the Rule 35 reduction and was not interested in appealing his case. She stated that she and Massey would have represented Blakney in the Rule 35 motion had there been one. She did not make any notes in the file regarding Blakney's stance on an appeal. On cross, McClusky stated that the topic of conversation with Blakney in the lockup immediately following the sentencing hearing involved how well the hearing had gone and how they had known that it was unlikely that the judge would grant Blakney's motion for downward departure.

Aside from his own testimony, (which, as he is faced with a twenty-five-year sentence, is clearly self-serving), Blakney offered no additional proof to support his claim that he requested either of his attorneys to file an appeal on his behalf. His father and sister both admitted that they did not mention an appeal when they called Massey's law firm. At the sentencing hearing, Judge McCalla made it very clear that to appeal, Blakney had to file a notice of appeal within ten days of the hearing. The first

documented phone call to Massey on Blakney's behalf occurred on August 26, 1999, thirteen days after the sentencing hearing. As to whether Blakney requested an appeal be filed, the court finds the testimony of Massey and McClusky more credible than Blakney.

In addition, Blakney knew that his chances for a Rule 35 motion were favorable. He provided information to the government regarding suspected drug dealer Webber. The government, however, was in the early stages of the investigation and were unable to use much of Blakney's information. The government had a year from the date of Blakney's sentencing hearing to file the Rule 35 motion and failed to do so. It is noteworthy that Blakney filed the present § 2255 motion three days shy of one year from the date of the sentencing hearing.

Finally, there were no grounds for appeal, as Blakney pleaded guilty to the charges against him and he was sentenced at the low end of the Sentencing Guidelines range, despite his status as a career offender, his criminal history score of 18, and the amount of drugs involved. Therefore, Blakney had no viable issues to appeal. These facts make it even more unlikely that Blakney would have sought an appeal. In light of the aforementioned evidence, the court finds as fact that Blakney did not request his attorneys to file an appeal.

At the evidentiary hearing, Blakney, Massey, and McClusky also

testified regarding Blakney's claim that his attorneys should have filed suppression motions to exclude evidence discovered during four separate searches: the search of his person and his vehicle incident to arrest, the search of his residence, the search of a toolbox in that house, and a search of a storage facility.⁵ Blakney testified first and asserted simply that neither McClusky nor Massey ever discussed any decision on filing motions to suppress with him. He admitted that his girlfriend, Annette Sherman, consented to the search of his residence which was a house she owned, and the search of the storage unit, which was rented in her name.

Massey testified that he and Blakney mutually had decided that it would be of no use to file motions to suppress any of the evidence. He explained that at the controlled buy when Blakney was arrested, Blakney's conversation with the confidential informant regarding the buy was recorded. Through the recorded conversation with the confidential informant, the police were able to corroborate the description of Blakney's car and the time of his arrival for the buy in the parking lot at a Krystal's restaurant. The confidential informant also identified Blakney as the person he

⁵ Blakney's sister and father did not testify regarding the motions to suppress. Nor did either party call the arresting or investigating officers, the confidential informant, or Sherman.

spoke with to purchase the drugs. Taken as a whole, Massey believed that the police had probable cause to arrest Blakney and search his person and vehicle incident to arrest. Additionally, Sherman, Blakney's girlfriend, had consented to the search of her house at 3646 Joslyn and the storage unit, and Blakney lacked standing to challenge the searches. For the toolbox found in Sherman's home, the police had obtained a search warrant after they found scales containing marijuana residue and guns in Sherman's house. Massey testified that he realized Blakney was facing a lot of jail time, that he thought the motions to suppress would probably be unsuccessful, and that he and Blakney decided the best course of action was cooperation with the government.

On cross, Massey testified that he had handled many suppression motions in federal court and he believed that there were a number of problems with the searches in Blakney's case. He noted that Sherman's consent was very problematic and that her relationship with Blakney made his lack of standing more apparent, as Blakney had admitted that Sherman was his girlfriend and he did not have a private space in the house as a renter would. Massey had diagramed the searches and arguments on November 16, 2001, in order to explain the issues to Blakney. (See Ex. 1.)

McClusky agreed with Massey and stated that she saw no way to prevail in challenging any of the searches. She stated that they

had discussed whether to file motions to suppress prior to any discussions about cooperation with the government.

Again, the court finds the testimony of Massey and McClusky more credible than Blakney's and finds as fact that McClusky and Massey discussed filing suppression motions with Blakney.

II. PROPOSED CONCLUSIONS OF LAW

The two issues raised in Blakney's motion that were considered at the evidentiary hearing are (1) whether his attorneys, McClusky and Massey, had provided ineffective assistance of counsel because they failed to file an appeal on Blakney's behalf; and (2) whether the same attorneys provided ineffective assistance of counsel because they filed no motions to suppress evidence discovered as a result of four separate searches conducted by police.

The petitioner bears the burden on a § 2255 motion to demonstrate ineffective assistance of counsel by a preponderance of the evidence. *United States v. Bondurant*, 689 F.2d 1246, 1251 (5th Cir. 1982). There is a strong presumption that "counsel's conduct falls within a wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To show ineffective assistance of counsel, "a petitioner must demonstrate deficient performance and prejudice." *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (citing *Strickland*, 466 U.S. at 687). The court must find more than a mere deficiency in the attorney's

performance; rather, it must find that counsel's performance was deficient to the degree that it calls into question the overall fairness of the outcome of the trial. *Strickland*, 466 U.S. at 694.

A. Failure to File a Notice of Appeal

Blakney insists that he instructed McClusky and Massey to file a notice of appeal on his behalf. Blakney, as the petitioner in a § 2255 motion, has the burden to prove by a preponderance of the evidence that his attorneys' failure to file an appeal on his behalf was ineffective assistance of counsel in violation of the Sixth Amendment. *Bondurant*, 689 F.2d at 1251. The Sixth Circuit has held that proof that the defendant expressed a desire to appeal his case to his attorneys is crucial to determining a violation of the Sixth Amendment. *Ludwig*, 162 F.3d at 459. Having found as fact that Blakney did not request his attorneys to file an appeal, an essential element of his claim, this court submits that Blakney's ineffective assistance counsel claim for failure to file a notice of appeal fails as a matter of law and should be denied.

B. Failure to File Motions to Suppress Evidence

An ineffective assistance of counsel claim under the Sixth Amendment may be asserted by a habeas petitioner for counsel's failure to file a motion to suppress evidence excludable under the Fourth Amendment. *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986). To show that Massey and McClusky prejudiced the outcome of

his trial and performed deficiently, Blakney must first prove that he would have succeeded in a suppression motion, i.e., that his Fourth Amendment challenge would have been meritorious. *Northrop v. Trippett*, 265 F.3d 372, 384 (6th Cir. 2001). He must further show that it is reasonably probable that the verdict would have been different but for the admitted evidence. *Id.* In the context of a guilty plea, "the Supreme Court has assessed an ineffective assistance claim by defining prejudice as a showing that a reasonable probability exists that, but for counsel's errors, defendant would not have pleaded guilty." *Ludwig*, 162 F.3d at 458.

At the evidentiary hearing, Blakney failed to discuss the merits or viability of a Fourth Amendment challenge to the searches conducted in his case. He did not call any witnesses to testify regarding the constitutionality of the searches. His attorney Massey, however, testified that he had explained in detail to Blakney the reasons not to pursue a suppression motion. On a sheet of paper, Massey diagramed the searches in chronological order and outlined the basic arguments for each claim and why they would fail. In his testimony, Massey discussed his reasoning on this matter. Blakney offered no evidence to the contrary at the hearing or in his post-hearing brief. He only referred to the possibility that the searches were conducted in an unconstitutional manner and gave no concrete reasons for granting any of four possible motions

to suppress.

1. Search of Blakney's person and his car

Massey explained at the evidentiary hearing that the police recorded Blakney's conversation with an informant during which Blakney arranged a drug purchase at a nearby Krystal restaurant. In the taped conversation, Blakney described the car he was driving and told the informant what time he would arrive at Krystal. When Blakney arrived at the restaurant, the police and the informant were already present. The informant positively identified Blakney to the police, Blakney's car matched the description he gave in his previous conversation, and he arrived at the agreed-upon time.

Given the weight of the evidence, the police had probable cause to arrest Blakney. Probable cause can be defined as "reasonable ground for a belief, more than a mere suspicion but less than a prima facie case." *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993). A search incident to arrest may occur prior to the actual arrest if the police had probable cause to arrest the defendant before the search took place. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980).

Beyond mere speculation, Blakney offered no solid evidence that demonstrates his ability to succeed on the merits of this Fourth Amendment claim. The court submits, therefore, that Blakney's ineffective assistance of counsel claim is unsupported by

the evidence and that he has failed to meet his burden as set forth in *Northrup, supra*.

2. Search of Blakney's girlfriend's house

After Blakney's arrest, the police went to Blakney's girlfriend's house where Blakney lived. His girlfriend, Annette Sherman, gave consent to allow the police to search the house. Massey testified that he explained to Blakney the difficulties they would have in challenging this search: first, Blakney's girlfriend consented to the search; and second, if Blakney tried to challenge the search, it would probably be denied on lack of standing alone, as he did not own the house and no proof was submitted that he paid rent to Sherman or had an expectation of privacy in a particular area of the house.

To assert his Fourth Amendment rights and challenge an illegal search or seizure, Blakney has the burden of showing that he has standing. *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1510 (6th Cir. 1988) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). A person aggrieved by a search must show that he has a reasonable expectation of privacy at the place that was searched in order to have standing in a Fourth Amendment case. *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978). Blakney offered no proof to contradict Massey's assessment of his chances of success on the

standing issue. In his post-hearing brief, he stated only "it was simply impossible to know the outcome" of such a motion. Without more, this court submits that Blakney has not met his burden of showing the meritoriousness of this Fourth Amendment claim.

3. Search of the toolbox in Sherman's house

Based on drug paraphernalia discovered in Sherman's home, the police obtained a search warrant for a locked toolbox found in Sherman's house. Blakney's sole contention in rebutting the validity of the warrant was that it "might have been tainted" by the illegality of the prior warrantless searches. This argument does not satisfy Blakney's burden of proving his Fourth Amendment claim would be meritorious. Accordingly, having concluded that the other searches were proper, the court submits that Blakney has failed to satisfy his burden as to this Fourth Amendments claim.

4. Search of the storage unit

The search of the tool box pursuant to the warrant revealed a receipt for the storage unit. The storage unit was purchased by Sherman, and she had allowed Blakney to be an authorized user of the unit. Sherman consented to a search of the storage unit, and drugs and money were discovered there. Again, Massey testified that he explained the various problems with challenging the search of the storage unit, namely Sherman's consent and Blakney's lack of standing to file the motion. Blakney submitted no proof at the

evidentiary hearing to persuade this court that he would have succeeded on this motion had it been filed. The court therefore submits that Blakney failed to meet his burden of proving the meritoriousness of this Fourth Amendment claim.

CONCLUSION

Based on the foregoing, the court recommends that Blakney's § 2255 motion to vacate sentence for ineffective assistance of counsel based on (1) failure to file an appeal and (2) failure to file motions to suppress be denied in the entirety.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: November 28, 2001