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46.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CARLOS ALBERTO RODRIGUEZ-ALVAREZ, )

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



03CV00730  
01CR198-1

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Carlos Alberto Rodriguez-Alvarez, a federal prisoner, has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. A jury convicted petitioner of possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). (Docket nos. 1, 20) Petitioner was driving a tractor trailer when it was stopped by a North Carolina Division of Motor Vehicles officer for a routine inspection. The officer eventually inspected the trailer and found over 500 kilograms of marijuana. (Partial Tr. of Jury Trial Proceedings, July 16, 2001, at 4-26) The court sentenced petitioner to 87 months in prison. (Docket no. 27) Petitioner appealed to the Fourth Circuit, which affirmed his conviction and sentence. (Docket no. 36)

Petitioner then filed this section 2255 motion raising two ineffective assistance of counsel grounds for relief. He alleges that counsel denied him his right to testify at trial and failed to raise that issue on appeal. (Docket no. 41 at 4) Respondent has responded to the motion. (Docket no. 43) Petitioner has replied

to that response. (Docket no. 45) The matter is now ready for ruling.

#### DISCUSSION

In order to prove ineffective assistance of counsel, a petitioner must establish, first, that his attorney's performance fell below a reasonable standard for defense attorneys and, second, that he was prejudiced by this performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner is not entitled to a hearing based upon unsupported, conclusory allegations. See Nickerson v. Lee, 971 F.2d 1125, 1136 (4<sup>th</sup> Cir. 1992) (in order to obtain an evidentiary hearing a habeas petitioner must come forward with some evidence that the claim might have merit), cert. denied, 507 U.S. 923, 113 S.Ct. 1289, 122 L.Ed.2d 681 (1993), abrog'n on other grounds recog'd, Yeatts v. Angelone, 166 F.3d 255 (4<sup>th</sup> Cir. 1999). The petitioner bears the burden of affirmatively showing deficient performance. See Spencer v. Murray, 18 F.3d 229, 233 (4<sup>th</sup> Cir. 1994). He also bears the burden of affirmatively proving prejudice—that there is a reasonable probability that, absent the alleged errors, the factfinder would have had a reasonable doubt respecting guilt. See Strickland, 466 U.S. at 693-95.

The Court will first assume that petitioner was denied his request to testify. He still must surmount the prejudice prong of the Strickland test. To do this, petitioner must show that there is a reasonable probability that, had counsel not denied him his right to testify, the jury would have acquitted him. See id.

By affidavit, petitioner sets out the testimony he would have given. He says that he would have testified that he was not present when his trailer was loaded, he requested a seal on the trailer, the seal was placed on and was intact when he left the company where the limes (his legitimate cargo) were loaded. (Docket no. 41, attached affidavit, at 2) He also says that he would have told the jury that he regularly has his trailers sealed to protect him by ensuring the integrity of the shipment. (Id.)

However, at trial, the jury heard virtually the same story from the testimony of FBI Agent Stoy. He testified that petitioner told him that during the entire loading process he (petitioner) never got out of the cab of his truck. (Partial Tr. of Jury Trial Proceedings, July 16, 2001, at 68) The agent said that petitioner told him that when the truck was loaded a worker sealed the door, woke petitioner up, and said the load was ready to go. (Id. at 68-69) On cross-examination, the agent reiterated that this was what petitioner had told him. (Id. at 76) The agent also said that, as to his knowledge of marijuana being on the truck, petitioner "emphatically stated that he was not involved in it." (Id.)

It is quite evident that petitioner's version of the facts was before the jury. On appeal, the Fourth Circuit found that the jury had to choose between the government's version of the events and petitioner's. It summarized the two versions as follows:

On September 8, 2000, a North Carolina Division of Motor Vehicles Enforcement officer stopped the tractor trailer Rodriguez-Alvarez was driving to conduct a safety inspection. The trailer was locked and sealed, and after initially denying that he had a key, Rodriguez-Alvarez

eventually gave the key to the officer who opened the trailer and discovered a shipment of limes, along with a large quantity of marijuana. The government presented evidence at trial contradicting Rodriguez-Alvarez's claims that he was asleep when the trailer was loaded and that the produce company loaded the trailer, and locked and sealed it. Specifically, two witnesses testified that Rodriguez Alvarez was present when the trailer was loaded and made specific requests about the manner in which the cargo was loaded, including accepting a smaller load than the order indicated. Furthermore, the witnesses stated that the produce company did not lock and seal trailers and that Rodriguez-Alvarez inquired about seals and also specified that he wanted the cargo destined for Philadelphia placed in the front of the trailer and the cargo destined for New York in the back of the trailer, even though the shipment was heading north from Texas. The jury found Rodriguez-Alvarez guilty.

United States v. Rodriguez-Alvarez, 42 Fed. Appx. 2d, 2002 WL 1792106 at \*\*1 (4<sup>th</sup> Cir. Aug. 6, 2002) (No. 02-4280).

All of the points that petitioner says he would have testified to were testified to by Agent Stoy in his summary of petitioner's post-arrest statement. To this showing, petitioner can only reply that his testimony "could have clarified any misunderstanding related to those statements." (Docket no. 45 at 5) But, he fails to identify any misunderstanding that he could have clarified. The substance of petitioner's proffered testimony was before the jury. The jurors obviously chose not to believe it. Therefore, there is no reasonable probability that, had petitioner testified, the jury would have changed its mind regarding his guilt. Petitioner has, therefore, failed to show any resulting prejudice from his not testifying. See Strickland, 466 U.S. 668. This first ground for relief should be dismissed on this basis.

Because it is possible that a claim of denial of the right to testify might be a structural error thereby precluding a harmless error analysis, Owens v. United States, 236 F. Supp. 2d 122, 143 (D. Mass. 2002), the Court will also examine the first Strickland prong of the ineffective assistance of counsel test. Here, the Court finds no deficient conduct by counsel.

Petitioner's counsel has submitted an affidavit responding to this claim. Counsel Placke states that he and petitioner had initially planned for petitioner to testify at his trial. (Docket no. 41, ex. B, at 2-3) They discussed the questions that counsel would ask and how petitioner would respond. (Id. at 3) After Agent Stoy's testimony about petitioner's exculpatory statements described above, counsel met with petitioner with a Spanish interpreter and told petitioner that he no longer recommended that petitioner testify. (Id. at 4) Counsel states that petitioner agreed with this advice and no longer wished to testify. (Id.) The transcript confirms that the defense rested without calling any witnesses, and that petitioner did not object when counsel relayed that information to the court. (Partial Tr. of Jury Trial Proceedings, July 17, 2001, at 17)

Petitioner denies he agreed not to testify. Although it would appear that this denial creates a dispute of facts, the Court finds that not to be the case, at least for the purpose of determining whether an evidentiary hearing is required. The Court finds there is "a substantial, independent basis for crediting [counsel's affidavit] over petitioner's affidavit." Ellis v. Picklesimer, 135

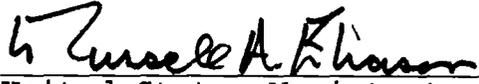
F. Supp. 2d 717, 720 (M.D.N.C. 2000). Under these circumstances, an evidentiary hearing is not required. Id.

In the instant case, the transcript shows that petitioner never objected to the Court, or asked to speak with the Court, when counsel informed the court that the defense would not present evidence. (Partial Tr. of Jury Trial Proceedings, July 17, 2001, at 17) Petitioner's inaction constitutes conduct from which the Court may infer that petitioner agreed with counsel's decision. See United States v. Joelson, 7 F.3d 174, 177 (9<sup>th</sup> Cir. 1993). Moreover, counsel's affidavit shows that they practiced the questions that petitioner would be asked if he testified. Petitioner clearly knew that he could testify. Under these circumstances, counsel could reasonably conclude from petitioner's silence that petitioner had changed his mind and decided not to testify. The Court finds there is no material disputed fact requiring an evidentiary hearing and also, no deficient conduct by counsel. See Strickland, 466 U.S. 668.

Petitioner's second ground for relief is that on appeal counsel failed to raise the above issue of petitioner being denied his right to testify at trial. Given the Court's earlier finding that counsel, in fact, did not render ineffective assistance, petitioner has failed to show any deficient conduct or prejudice on this claim. Counsel is not required to raise every non-frivolous claim on appeal. See Jones v. Barnes, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). This would have been a frivolous claim for the reasons discussed above. Further, because

such a claim would have to rely on evidence outside of the record, it was not a proper subject for appellate argument. See United States v. Fisher, 477 F.2d 300, 302 (4<sup>th</sup> Cir. 1973). This ground for relief should be dismissed.

**IT IS THEREFORE RECOMMENDED** that petitioner's motion to vacate, set aside or correct sentence (docket no. 41) be **DENIED** and that Judgment be entered dismissing this action.

  
United States Magistrate Judge

November 3, 2003