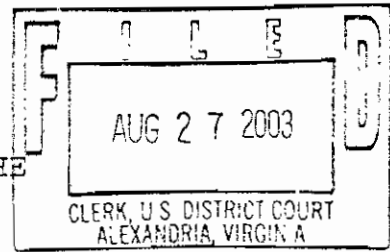


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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WILLIAM KINJO SMITH,)	
)	
Movant,)	
)	Criminal No. 00-421-A
v.)	Civil Action No. 03-561-A
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

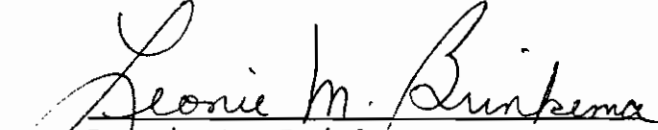
ORDER

For the reasons stated in the accompanying Memorandum Opinion, William Kinjo Smith's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is DISMISSED WITH PREJUDICE.

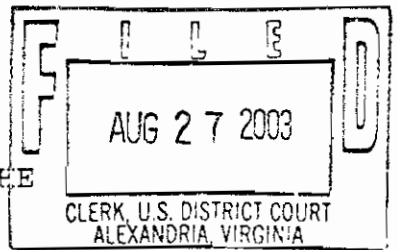
Should he wish to appeal, movant must file a notice of appeal in writing with the Clerk of this court within sixty (60) days of the date of this Order. He must also request and obtain a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b). This Court expressly declines to issue such a certificate.

The Clerk is directed to forward copies of this Order to counsel of record and the movant, pro se.

Entered this 27th day of August, 2002.


 Leonie M. Brinkema
 United States District Judge

Alexandria, Virginia



IN THE UNITED STATES DISTRICT COURT FOR THE
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Alexandria Division

WILLIAM KINJO SMITH,)	
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Movant,)	
)	Criminal No. 00-421-A
v.)	Civil Action No. 03-561-A
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MEMORANDUM OPINION

Before the Court is the pro se movant William Kinjo Smith's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence, in which he claims he received ineffective assistance from both his trial and appellate counsel. The Court has reviewed the case file and the transcript of Smith's trial and is satisfied that this is a meritless motion which will be summarily dismissed pursuant to Rule 4(b) of the Federal Rules Governing Section 2255 Proceedings for the United States District Courts.¹

BACKGROUND

On July 7, 2000 William Kinjo Smith's girlfriend, Karen Campbell, reported to the Alexandria Police Department that Smith had assaulted her in her apartment and briefly held Campbell and

¹Rule 4(b) provides that "[t]he motion together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified."

her child against their will. Criminal Complaint at 2. Campbell advised the police officers that Smith was armed. Id. The Alexandria police responded to Smith's apartment and employed a ruse to convince Smith to allow police to enter the apartment. Id. The police then arrested Smith pursuant to an arrest warrant charging him with felony abduction, and breaking and entering while armed with a deadly weapon. While executing the arrest warrant, police officers conducted a protective sweep of the apartment. During that sweep, officers observed numerous firearms and ammunition in plain view. Id. at 29-30. Following the arrest, officers obtained a search warrant from a City of Alexandria Magistrate, and seized from Smith's apartment firearms, ammunition, and components for explosives, as well as computers and radio scanners. Id. at 30, 35, Gov. Ex. 9. Later that month, federal investigators obtained another search warrant for the apartment, which they executed on July 26, 2000. Federal agents seized receipts for gun purchases, gun operations manuals, photographs, and other documents. Tr. at 98-104.

On July 24, 2000, a Criminal Complaint was filed in the this court, alleging Smith, a convicted felon,² had possessed a firearm in violation of 18 U.S.C. § 922(g)(1). On October 10, 2000, Smith was detained pursuant to a federal arrest warrant.

² Smith was convicted in the Circuit Court for Fairfax County of two counts of felony burglary in March, 1987 and felony malicious burning in February, 1987.

On November 21, 2000, the grand jury returned an indictment against Smith, charging two counts of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and (e)(1) on June 12, 1998 (Count I) and July 7, 2000 (Count II), and one count of possession of an unregistered destructive device in violation of 26 U.S.C. §§ 5861 and 5871 (Count III). Smith was represented at the time of his indictment by Billy Hicks, Esq., but fired him as counsel on November 29, 2000. Smith was arraigned on these charges on December 4, 2000. He was represented at the arraignment by Jeffrey D. Zimmerman, Esq. Thereafter, Smith retained Richard E. Gardiner, Esq. to represent him.

This case proceeded to trial on February 21, 2001. Before trial began, the Court dismissed Count III of the indictment, which alleged unlawful possession of an unregistered destructive device on the government's oral motion. After one day of trial, the jury returned a guilty verdict as to Counts I and II on February 22, 2001. The defendant was sentenced on June 8, 2001 to 262 months in the custody of the Bureau of Prisons on each count, to be served concurrently, and three years of supervised release, among other penalties.

Smith appealed his conviction and sentence. Smith was initially represented on appeal by Richard E. Gardiner, but Craig W. Sampson, Esq. was later appointed as counsel. On appeal, Smith argued that the district court erred in refusing to

suppress the firearms seized from his apartment on July 7, 2000, that there was insufficient evidence to prove that he possessed a firearm at a shooting range on June 12, 1998, and that the district court erred in raising his offense level for possession of a machine gun. The appellate court affirmed Smith's conviction and sentence in a per curiam opinion on May 6, 2002.

DISCUSSION

Title 28, U.S.C. § 2255 allows a prisoner in custody to move to vacate, set aside or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." Although § 2255 provides a method of collaterally attacking a defective judgment, it does not substitute for direct appeal of any error of law. United States v. Addonizio, 442 U.S. 178, 184 (1979). A prisoner may only collaterally attack an error of law if the claimed error violates the Constitution or constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). Smith alleges in his § 2255 Motion that his trial counsel was ineffective for failing to raise objections to the conduct of his trial and the introduction of certain evidence and for failing to introduce

evidence Smith believes would have been exculpatory.

To make out a claim of ineffective assistance of counsel, a movant must satisfy the performance and prejudice prongs of the test announced in Strickland v. Washington, 466 U.S. 668 (1984). The first prong requires showing that counsel's performance was "below an objective standard of reasonableness." Id. at 687-88. The second prong is established by showing a reasonable probability that counsel's deficient performance prejudiced the outcome of defendant's case. Id. at 694. As discussed below, none of the arguments Smith raises in this Motion have merit and, therefore, we do not find that his counsel was ineffective for failing to raise them.

A. Failure to Challenge the State Search Warrant

Smith contends that the material seized by Alexandria police officers ought to have been suppressed after Count III of the indictment was dismissed because the Virginia search warrant was premised on Count III. Smith argues that his trial counsel was ineffective for failing to raise this issue with the Court after Count III was dismissed.

Initially, we observe that defense counsel did file a Motion to Suppress evidence items seized from the defendant's apartment pursuant to the first search warrant. Defense counsel argued that the arrest of Smith and initial protective sweep of his apartment, which formed the basis for the later search warrant,

were illegal and, therefore, the search warrant was invalid. The Court denied defendant's Motion, however, finding that the protective sweep conducted by the officers was proper. This ruling was affirmed on appeal. United States v. Smith, Case No. 01-4486 (4th Cir., May 6, 2002).

Smith does not explain why he believes "probable cause is nullified based on count three's dismissal." Motion at 9. During the hearing on defendant's Motion to Suppress Officer Corle testified that during the protective sweep he observed "a tremendous amount of firearms, military hardware, gas masks, ammunition, handguns, assault rifles, a shotgun." Such evidence is more than sufficient probable cause to support a search warrant.

B. Failure to Challenge 18 U.S.C. § 922 as Void for Vagueness

Smith argues that his trial counsel was ineffective because he failed to challenge the statute, 18 U.S.C. § 922, as unconstitutionally vague. Numerous federal courts have previously held that 18 U.S.C. § 922 is not unconstitutionally vague. See e.g., United States v. Kowalski, 502 F.2d 203 (7th Cir.), cert. denied, 420 U.S. 979 (1974); United States v. Quiroz, 449 F.2d 583 (9th Cir. 1971). Therefore, defense counsel was not ineffective for failing to challenge the statute's validity on these grounds.

C. Failure to Object to Pre-Indictment Delay

Smith alleges that counsel was ineffective for failing to seek dismissal of the indictment based on pre-indictment delay. The federal Speedy Trial Act requires that an information or indictment be filed against a defendant "within thirty days from the date on which such individual was arrested." 18 U.S.C. § 3161(b). However, periods of delay "resulting from any pretrial motions" are excluded in computing the time period. Smith was arrested on the federal arrest warrant on October 10, 2000 and indicted on November 21, 2000. However, on October 12, 2000, the government requested that Smith be detained. Defense counsel Billy Hicks filed an Objection to the Government's Motion to Detain and a hearing was held on October 24, 2000. At that hearing, the magistrate judge granted the government's request to detain Smith.

Motions to detain a defendant pending indictment are considered pre-trial motions within the meaning of § 3161, even when orally made. United States v. Moses 15 F.3d 774, 776 (8th Cir. 1994). Excluding the time spent disposing of this pre-trial motion, no more than thirty days passed between defendant's arrest and his indictment. Because we find there is no merit to defendant's argument regarding pre-indictment delay, his counsel was not ineffective for having failed to raise this issue.

D. Failure to Object to "Constructive Amendment" of Indictment
Smith complains that his trial counsel failed to object to

"constructive amendment" of the indictment. In particular, Smith objects to his sentencing enhancement for possession of an automatic weapon, when the indictment in this case charged him with possession of a semi-automatic weapon. The Court's use of an increased offense level based upon Smith's possession of a machine gun has already been raised on appeal and affirmed by the Court of Appeals. Enhancement under the U.S. Sentencing Guidelines for relevant conduct does not constitute constructive amendment of the indictment. The Sentencing Guidelines provide that the offense level shall be determined based on, inter alia, all acts committed by the defendant that occurred during the commission of the offense of conviction, regardless of whether they are charged in the indictment. U.S.S.G. § 1B1.3 (2003); United States v. Cabe, 57 Fed. Appx. 542 (4th Cir. 2003). Therefore, trial counsel was not ineffective for failing to raise this meritless argument at the time of sentencing.

E. Failure to Raise Miranda Issue

Smith argues that his trial counsel failed to object to the testimony of Alexandria Police Officer Charles Pak, who testified about his interview of the defendant. Smith contends that this evidence was inadmissible because Smith did not receive a Miranda warning when he was re-arrested on federal charges on October 10, 2000.

The record reveals that there was no constitutional defect

in the interview testified to by Officer Pak. As Smith concedes in his Motion, Smith received his Miranda warnings, by Officer Pak, upon his arrest on state charges on July 7, 2000. Motion at 26, Tr. at 77. On that same date, Officer Pak interviewed Smith. It was this July 7, 2000 interview to which Officer Pak testified at trial. Tr. at 77-84. Whether or not Smith received additional Miranda warnings before a subsequent interview is irrelevant to the admissibility of Officer Pak's testimony. Therefore, defense counsel was not ineffective for failing to object to Officer Pak's testimony on these grounds.

F. Inadequate Trial Strategy

1. Failure to Object to Prejudicial Spillover from Dismissed Count

Smith argues that his trial counsel failed to object to evidence relevant only to Count III of the indictment, which was dismissed. Smith contends that the jury was prejudiced by this additional evidence of wrongdoing. Smith does not specifically identify the evidence he feels was wrongfully admitted. However, we note that Smith's trial counsel did object to references at trial to Smith's possession of a grenade, see Tr. at 27, and the Court overruled that objection. We do not find trial counsel was ineffective on these grounds.

2. Failure to Impeach Officers' Testimony

Smith argues that his trial counsel inadequately impeached

the trial testimony of Officer Duquette. First, Smith notes that in the affidavit supporting the search warrant, Officer Duquette stated that, upon opening the door to his apartment, Smith handed Officer Duquette a grenade. Affidavit at 2. At trial, however, Officer Duquette testified that Smith handed the grenade to Captain Corle and Captain Corle immediately handed the grenade to Officer Duquette. Tr. at 27. This is again contradicted by Captain Corle's pre-trial testimony, in which he stated that Smith did not have the grenade in his hand when he opened the door. Transcript of Motions Hearing, February 14, 2001, at 24. Although Smith correctly points out an inconsistency between Captain Corle's pre-trial testimony and Officer Duquette's trial testimony, Smith's trial counsel could not have impeached Officer Duquette with prior statements of Captain Corle. Trial counsel's decision not to impeach Officer Duquette with the inconsistent statement in his affidavit was not unreasonable. The inconsistency is slight and does not bear on the ultimate question of Smith's guilt. Therefore, trial counsel's decision to ignore that inconsistency was a reasonable tactical decision.

Second, Smith argues that his trial counsel failed to challenge Officer Duquette's testimony that the police did not force entry into the apartment. Smith contends that photos showing damage to the apartment lock and door could have been used to impeach Officer Duquette's statement. The photos, which

Smith has attached to his Motion, are blurry and do not show clearly any damage to the lock and door. Plaintiff's Ex. at 67. Moreover, even if these photos could have been used to impeach Officer Duquette's testimony, whether the police forced entry into the apartment does not bear on Smith's guilt. Therefore, trial counsel's decision not to impeach on this point was a reasonable tactical decision.

3. Failure to Present Defense Witnesses

Smith contends that his trial counsel failed to compel witnesses Lloyd Wyatt and Karen Campbell to testify on Smith's behalf. Smith does not state who Lloyd Wyatt is or to what he might have testified in Smith's defense.³ Therefore, we cannot determine that defense counsel was ineffective for failing to call him as a witness.

Regarding, Karen Campbell, the defendant's girlfriend, Smith contends that she would have testified that she purchased the firearms seized from defendant's apartment. Smith's trial counsel attempted to call Karen Campbell as a witness; however, her attorney advised the parties and the Court that Ms. Campbell would invoke her Fifth Amendment right to refuse to testify. Tr. at 62-63. Because of that fact, Smith's trial counsel elected

³ The trial transcript shows that defense counsel was able to locate Mr. Wyatt only one day before trial began and requested that Mr. Wyatt appear to testify. However, Mr. Wyatt did not appear. Tr. at 149.

not to call Ms. Campbell to testify. At the time, the Court specifically asked Smith whether he concurred with that decision. After conferring with counsel, Smith stated that he was "fine with that." Tr. at 67-68.

Moreover, even if Ms. Campbell had testified that she purchased the weapons at issue, that would not have provided Smith a defense to the crimes charged. The statute prohibits a convicted felon from knowingly possessing a firearm, regardless of who purchased it. 18 U.S.C. § 922(g). Because Smith has not demonstrated that defense counsel failed to present meaningful exculpatory evidence, we do find that counsel was ineffective.

4. Failure to Present Character Evidence

Smith contends that his trial counsel failed to make "an effort to establish a 'good character' defense, as to Petitioner's livelihood differing from conduct deem [sic] unlawful." Motion at 20. However, Smith does not state what specific character evidence, if any, his counsel failed to present. Smith is required to set forth in his Motion "the facts supporting each of the grounds" for relief. Moreover, had trial counsel presented character evidence on behalf of Smith, the government would have been permitted to rebut that character evidence with more detailed testimony about Smith's criminal history. See United States v. McLister, 608 F.2d 785, 789-90 (9th Cir. 1979) ("When the defendant offers testimony tending to

prove his good reputation, the Government may introduce contradictory evidence."). We find that counsel's tactical decision not to open the door to additional evidence of Smith's criminal history was reasonable and did not constitute ineffective assistance.

5. Failure to Object to Inadequate Identity Evidence

Smith argues that his trial counsel failed to object to the introduction of photographs of individuals in "balaclava gear." Gov. Ex. 25X. Smith contends that the government suggested at trial that he was one of the persons depicted in these photos. However, a review of the trial testimony shows that Special Agent Michael Mund of the Bureau of Alcohol, Tobacco & Firearms testified that he recovered the photos from Smith's apartment while executing the federal search warrant on July 26, 2000. The photographs were properly admitted because they were relevant evidence, and trial counsel's decision not to object to such evidence was not unreasonable.

6. Failure to Preclude Inadmissible Exhibits in Jury Room

In his § 2255 Motion, Smith speculates that "[e]xhibits which were not introduced as evidence were permitted to enter the jury room therein the exhibits binder, [and] counsel made no efforts to object [to] exhibits not introduced." Motion at 22. Smith does not explain why he believes that exhibits not introduced into evidence were sent into the jury room. Because

there is no evidence that improper material was presented to the jury, we do not find counsel was ineffective on this ground.

7. Failure to Challenge Chain of Custody

Smith argues that his trial counsel failed to challenge the chain of custody of certain evidence in this case. In support of this argument, Smith states that "the chain of custody plausibly was disturbed by law officials." Motion at 22. However, Smith does not identify what evidence he believes was improperly handled, and does not provide any evidence to support his claim that police officers, or anyone else, disturbed the evidence in this case. Therefore, we cannot find that Smith's trial counsel was ineffective for failing to make this challenge.

8. Failure to Object to References of Prior Conviction

Finally, Smith argues that his trial counsel failed to "motion the court for bifurcation, severance of the prior convictions to avoid substantial prejudice unto Petitioner." Motion at 24. Smith apparently believes that references to his prior convictions during the trial unduly prejudiced him. The only specific reference to Smith's prior convictions came at the outset of the government's case in chief, when counsel for the government published to the jury a stipulation regarding Smith's prior convictions. Tr. at 23-25. This stipulation, which the defendant and his counsel signed, was necessary because Smith's prior convictions are an element of the offense charged.

Therefore, trial counsel acted reasonably in consenting to it.

G. Ineffective Assistance of Appellate Counsel

Smith apparently argues that his appellate counsel was ineffective because he failed to raise the issues discussed above on appeal. In applying the Strickland test to appellate counsel, a reviewing court must accord counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993). "'Winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting, Jones v. Barnes, 463 U.S. 745, 751 (1983)). Generally, appellate counsel will only be found deficient if the issues he ignored are clearly stronger than those he raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000).

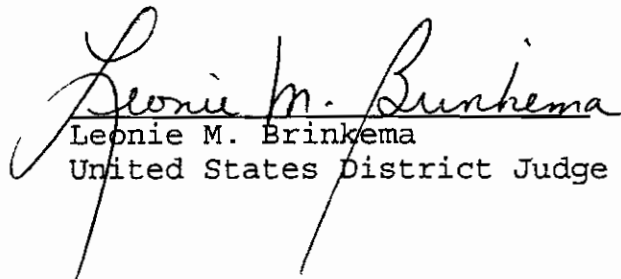
Smith does not state specifically the reasons why he believes his appellate counsel was ineffective, saying only that "[t]rial counsel's errors were ripe for appellate review, which appellate counsel negated." Motion at 6. On appeal, Smith's appellate counsel raised three issues. He argued that the district court erred in refusing to suppress the firearms seized from his apartment on July 7, 2000, that there was insufficient evidence to prove that he possessed a firearm at a shooting range

on June 12, 1998, and that the district court erred in raising his offense level for possession of a machine gun. The Court of Appeals rejected each of these arguments in a per curiam opinion. As discussed above, the additional arguments raised by Smith in this Motion are meritless. Therefore, we do not find that Smith's appellate counsel was ineffective for failing to raise them on appeal.

Because Smith has failed to demonstrate that he received constitutionally defective assistance from his trial and appellate counsel, his Motion must be dismissed. An appropriate Order shall issue.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record and the movant, pro se.

Entered this 27th day of August, 2003.


Leonie M. Brinkema
United States District Judge

Alexandria, Virginia