IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MICHAEL TYRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Crim. No. 02-006-1-SLR
	)	Civ. No. 03-450-SLR
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM ORDER

I. INTRODUCTION

Petitioner Michael Tyre is an inmate in federal custody. (D.I. 95) Currently before the court is petitioner's pro se motion to vacate, set aside, or downward depart from sentence pursuant to 28 U.S.C. § 2255.[1] (D.I. 94, 95) Respondent United States of America has filed its opposition and petitioner has filed a reply. (D.I. 99, 102) For the reasons that follow, petitioner's motion is denied.

II. BACKGROUND

On August 2, 2003, petitioner pled guilty to: Count II of an indictment charging him with conspiracy to possess with intent

[1]Prisoners in federal custody may attack the validity of their sentences via 28 U.S.C. § 2255. Section 2255 is a vehicle to cure jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979). See also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3rd Cir. 1993).

to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(B); and, Count III of an indictment charging him with possession of a firearm during and in relation to a drug trafficking offense, in violation of 21 U.S.C. § 924(c) and 2. (D.I. 80) On December 17, 2002, petitioner was sentenced to a term of 60 months of imprisonment on Count II and 60 months of imprisonment on Count III, to run consecutively.[2] (Id.) Respondent moved to dismiss the remaining three counts at the sentencing hearing. (Id.) In May 2003, petitioner filed this motion to vacate, set aside or downward depart from sentence pursuant to 28 U.S.C. § 2255. (D.I. 92) He subsequently supplemented his arguments, requested an evidentiary hearing and moved for relief under Fed.R.Crim.P. 35(b). (D.I. 94, 95)

III. DISCUSSION

Petitioner argues that respondent failed to file a motion for downward departure from the applicable Sentencing Guidelines pursuant to U.S.S.G. § 5K1.1. Petitioner claims to have made an agreement with Drug Enforcement Administration ("DEA") agent Marzak to provide assistance to law enforcement in exchange for a

[2]This represented the mandatory minimum sentence mandated under 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 924(c)(1)(A) and (D).

"deal called 5K1.1"[3] from the government. (D.I. 95) Petitioner made this agreement, ostensibly, after being arrested on the charges underlying the conviction and sentence at issue.

To assist DEA efforts, petitioner claims to have worn a "wire" to record his conversations wherein he agreed to purchase drugs from two drug dealers. (D.I. 95 at 3) When the dealers arrived at the arranged meeting place for the drug exchange, they were arrested by DEA and state police officers. According to petitioner, one of the dealers pled guilty to related charges and the other assisted DEA to "capture a cocaine dealer." (Id.)

Respondent argues that petitioner lacks standing to raise this issue because Fed.R.Crim.P. 35 clearly states that the court's authority to grant a post-sentencing departure for substantial assistance is premised on the filing of a motion by the government. The court agrees. Rule 35(b) provides:

> (1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:
> (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and
> (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

It is evident from the record that respondent has not filed

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[3]Under Sentencing Guidelines 5K1.1, the court may depart from the applicable sentencing guidelines "**upon motion of the government** stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offence." (emphasis added)

a motion to implicate Fed.R.Crim.P. 35, nor has evidence been presented demonstrating that petitioner has provided assistance to law enforcement since the imposition of his sentence.

To the extent that petitioner asserts that his attorney provided ineffective assistance of counsel by failing to seek a downward departure based on his alleged assistance to law enforcement, this claim likewise fails. It is well established that the court cannot grant a downward departure in the absence of a motion by the government. See United States v. Abuhouran, 161 F.3d 206, 208 (3d Cir. 1998).

The plea agreement at bar does not contain any reference to an agreement by respondent to file a 5K1.1 motion for substantial assistance. (D.I. 63) The record is likewise devoid of evidence that there was an agreement between petitioner and respondent that had not been reduced to writing. Moreover, there is nothing to suggest that a § 5K1.1 motion was contemplated and then disregarded for unconstitutional motive. See United States v. Swint, 223 F.3d 249, 253 n. 5 (3d Cir. 2000); United States v. Isaac, 141 F.3d 477, 481 (3d Cir. 1998).

Further, to establish ineffective assistance of counsel, a defendant must satisfy the two-prong standard announced in Strickland v. Washington, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's advice was unreasonable and was not within the range of competence demanded of attorneys

in criminal cases. Id. at 690. The defendant must overcome the "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689.

Second, a defendant must demonstrate "prejudice," meaning that there is a "reasonable probability" that the deficient assistance of counsel affected the result of the proceeding in issue. Id. at 694; see also Hill v. Lockhart, 474 U.S. 52, 56-57 (1985). In light of this authority, the court finds that petitioner's attorney's failure to move for a downward departure does not constitute ineffective assistance of counsel.

Petitioner next asserts that his attorney provided ineffective assistance of counsel by failing to move for a downward departure from the sentencing guidelines pursuant to United States v. Sally, 116 F.3d 76, 81 (3d Cir. 1997). In Sally, the Third Circuit concluded that a defendant's post-conviction rehabilitation efforts may form the basis for a downward departure from the guidelines sentence. Ordinary efforts to change are not sufficient; instead the sentencing court must specifically find,

> at a minimum, . . . evidence demonstrating that a defendant has made concrete gains toward 'turning his life around' before a sentencing court may properly rely on extraordinary post-conviction

> rehabilitation efforts as a basis for a downward departure. Unlike the usual adjustment for acceptance of responsibility where defendants may all-too-often be tempted to feign remorse for their crimes and be rewarded for it, we view the opportunity for downward departures based on extraordinary or exceptional post-conviction rehabilitation efforts as a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and rebuild their lives.

Id.

Although not specifically stated, petitioner appears to argue that a downward departure based on Sally was appropriate at the time of his sentencing and is presently warranted based on his completion of a "Wellness Course" in prison. (D.I. 95) To the extent this argument implicates an ineffective assistance of counsel at sentencing claim, the court finds the argument without merit. At the time of sentencing, there was nothing of record to demonstrate that petitioner was engaged in rehabilitation efforts or had changed his life to the magnitude identified by the Third Circuit for a Sally downward departure. Petitioner's attorney's failure to move for a sentencing departure on such a basis does not rise to constitutionally deficient representation as defined by Strickland and its progeny. Moreover, petitioner's rehabilitative efforts since sentencing do not warrant a Sally departure.

Petitioner's final argument is that his attorney failed to object to the sentencing calculation in the presentence investigation report, which did not find him eligible for

sentencing under the U.S.S.G. § 5C1.2, the "safety valve" provision. (D.I. 92) This section is known as the "safety valve" because it carves out an exception to statutory mandatory minimum sentences for certain drug offenders. See United States v. McQuilkin, 78 F.3d 105 (3d Cir. 1996)(safety valve limited to the statutes listed in § 5C1.2). The safety valve provision specifically excludes the defendant who possesses a firearm in connection with the offense. § 5C1.2(a)(2) Because petitioner pled guilty and was sentenced to possession of a firearm during a drug trafficking offense, the safety valve section does not apply, United States v. Wilson, 106 F.3d 1140 (3d Cir. 1997), and his attorney's failure to raise this issue does not constitute ineffective assistance of counsel under Strickland.

IV. CONCLUSION

At Wilmington, this 27th day of August, 2004, for the reasons stated;

IT IS ORDERED that:

1. Petitioner's above captioned application for habeas corpus relief (D.I. 92) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113

F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

Sue L. Robinson
United States District Judge