

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PASCUAL SAUCILLO,

Defendant.

No. CR03-4018-MWB

**ORDER REGARDING
DEFENDANT'S MOTION TO
VACATE, SET ASIDE OR
CORRECT SENTENCE**

I. INTRODUCTION AND BACKGROUND

On February 20, 2003, a two count indictment was returned against defendant Pascual Saucillo charging him with conspiring to distribute 500 grams or more of methamphetamine within 1000 feet of a park, in violation of 21 U.S.C. § 846, and possessing 500 grams or more of methamphetamine with intent to distribute within 1000 feet of a park, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A). Defendant Saucillo subsequently pleaded guilty without reserving any issues for appeal and without a written plea agreement to both counts of the indictment. He was sentenced to concurrent terms of imprisonment of 135 months.

Defendant Saucillo did not appeal his conviction or sentence. Rather, defendant Saucillo filed his current pro se motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his § 2255 motion, defendant Saucillo argues that his sentence should be vacated and he should be permitted to file an out-of-time-appeal from his sentence on the ground that his counsel was constitutionally ineffective. Specifically, he contends that his counsel was ineffective in failing to appeal

the denial of his motion to suppress evidence.

II. LEGAL ANALYSIS

A. Standards For Relief Pursuant To § 2255

The court must first consider the standards applicable to a motion for relief from sentence pursuant to 28 U.S.C. § 2255. Section 2255 of Title 28 of the United States Code provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255; *Bear Stops v. United States*, 339 F.3d 777, 781 (8th Cir. 2003) (“To prevail on a § 2255 motion, the petitioner must demonstrate a violation of the Constitution or the laws of the United States.”). Thus, a motion pursuant to § 2255 “is ‘intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.’” *United States v. Wilson*, 997 F.2d 429, 431 (8th Cir. 1993) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)); accord *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995) (quoting *Wilson*). On the other hand,

Section 2255 relief is not available to correct errors which could have been raised at trial or on direct appeal, absent a showing of cause and prejudice, *United States v. Frady*, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 1594-95, 71 L. Ed. 2d 816 (1982), or a showing that the alleged errors were fundamental defects resulting in a complete miscarriage

of justice. See *United States v. Smith*, 843 F.2d 1148, 1149 (8th Cir. 1988) (*per curiam*).

Ramey v. United States, 8 F.3d 1313, 1314 (8th Cir. 1993) (*per curiam*); accord *Johnson v. United States*, 278 F.3d 839, 844 (8th Cir. 2002) (“In order to obtain collateral review of a procedurally defaulted issue, [a § 2255 movant] must show ‘either cause and actual prejudice, or that he is actually innocent.’”) (quoting *Bousley v. United States*, 523 U.S. 614, 622 (1998), with citations omitted).

The “cause and prejudice” that must be shown to resuscitate a procedurally defaulted claim may include “ineffective assistance of counsel.” See *Becht v. United States*, 403 F.3d 541, 545 (8th Cir. 2005). Otherwise, “[t]he Supreme Court recognized in *Bousley* that ‘a claim that “is so novel that its legal basis is not reasonably available to counsel” may constitute cause for a procedural default.’” *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001) (quoting *Bousley*, 523 U.S. at 622, with emphasis added, in turn quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). “Actual prejudice” requires a showing that the alleged error “‘worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’” *Johnson*, 278 F.3d at 844 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1981), and explaining, further, that the movant must show that there is a substantial likelihood that, absent the error, a jury would have acquitted him of the charged offense). To establish “actual innocence,” as an alternative way to resuscitate a procedurally defaulted claim, “‘petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.’” *Id.* (quoting *Bousley*, 523 U.S. at 623). “‘This is a strict standard; generally, a petitioner cannot show actual innocence where the evidence is sufficient to support a [conviction on the charged offense].’” *Id.* (quoting *McNeal v. United States*, 249 F.3d 747, 749-50 (8th Cir. 2001)).

The Eighth Circuit Court of Appeals will review the district court's decision on a § 2255 motion *de novo*, regardless of whether the district court's decision grants or denies the requested relief. Compare *United States v. Hilliard*, 392 F.3d 981, 986 (8th Cir. 2004) (“We review the district court's decision to grant or deny relief on a petitioner's ineffective assistance of counsel claim *de novo*.”) (citing *United States v. White*, 341 F.3d 673, 677 (8th Cir. 2003)); with *United States v. Hernandez*, 436 F.3d 851, 854 (8th Cir. 2006) (“We review *de novo* the district court's denial of a section 2255 motion.”) (quoting *Never Misses A Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005)). However, “[a]ny underlying fact-findings are reviewed for clear error.” *Hernandez*, 436 F.3d at 855 (quoting *United States v. Davis*, 406 F.3d 505, 508 (8th Cir. 2005)).

B. Ineffective Assistance Of Counsel

Defendant Saucillo argues that his sentence should be vacated and he should be permitted to file an out-of-time-appeal from his sentence on the ground that his counsel was constitutionally ineffective. Specifically, he contends that his counsel was ineffective in failing to file an appeal in this case challenging the denial of his motion to suppress evidence. The court will now consider Saucillo's allegations.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” *U.S. Const. amend. VI*. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003). By the same token, “ineffective assistance of counsel” could result in the imposition of a sentence in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255; *Bear Stops*, 339 F.3d at 781 (“To prevail on a § 2255 motion,

the petitioner must demonstrate a violation of the Constitution or the laws of the United States.”). The Eighth Circuit Court of Appeals has expressly recognized that a claim of ineffective assistance of counsel should be raised in a § 2255 proceeding, rather than on direct appeal, because it often involves facts outside of the original record. *See United States v. Hughes*, 330 F.3d 1068, 1069 (8th Cir. 2003) (“When claims of ineffective assistance of trial counsel are asserted on direct appeal, we ordinarily defer them to 28 U.S.C. § 2255 proceedings.”). Thus, whether or not Saucillo is entitled to relief on his § 2255 motion turns on whether or not he can satisfy the standards applicable to his “ineffective assistance” claim.

Saucillo’s argument is premised upon his counsel’s alleged failure to file a direct appeal in this matter. Persons convicted of crimes in federal district court have a right to direct appeal. *Evitts*, 469 U.S. at 396. To establish ineffective assistance of counsel, the general law is well-established: “[P]ost-conviction relief will not be granted on a claim of ineffective assistance of trial counsel unless the petitioner can show not only that counsel’s performance was deficient but also that such deficient performance prejudiced his defense.’” *United States v. Ledezma-Rodriguez*, 423 F.3d 830, 836 (8th Cir. 2005) (quoting *Saunders v. United States*, 236 F.3d 950, 952 (8th Cir. 2001), in turn citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Davis v. Norris*, 423 F.3d 868, 877 (8th Cir. 2005) (“To prove that his counsel rendered ineffective assistance in violation of the Sixth Amendment, [the movant] must satisfy the two prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),” which requires the movant to “show that his counsel’s performance was deficient” and that he was “prejudice[d]”). However, in situations where the defendant expressly requests that his counsel file an appeal and counsel fails to do so, thereby depriving the defendant of his right to appeal, courts have not required a showing of prejudice or of likely success on

appeal. *See Hollis v. United States*, 687 F.2d 257, 259 (8th Cir. 1982) (quoting *Robinson v. Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981)); *see Holloway*, 960 F.2d at 1356-57 (same); *Estes v. United States*, 883 F.2d 645, 648 (8th Cir. 1989) (“This Court has held that counsel’s failure to file a notice of appeal when so instructed by the client constitutes ineffective assistance of counsel for purposes of section 2255.”); *Williams v. Lockhart*, 849 F.2d 1134, 1137 n.3 (8th Cir. 1988) (“[D]eficient attorney performance in perfecting an appeal is prejudicial under the *Strickland v. Washington* standard for determining ineffective assistance of counsel.” (citation omitted)). Such a failure is considered to be prejudicial *per se* and the defendant is not required to show that a direct appeal would have been successful or even to suggest what issues may have been presented on appeal. *See Holloway*, 960 F.2d at 1357. Thus, if in fact Saucillo instructed his counsel to file an appeal, this case would be controlled by *Hollis v. United States* and *Holloway v. United States*, and this court would be compelled to hold that the failure of Saucillo’s counsel to file a notice of appeal constitutes ineffective assistance of counsel. However, defendant Saucillo does not directly state that he ordered his counsel to file an appeal in this case. Rather, what he alleges is that:

Petitioner explained to his appointed counsel that he was willing to accept his guilty plea on the possession and conspiracy Counts I, and II, upon his ability to appeal from the District Court’s denial of his motion to Suppress the fruits of a search of his house by the Sioux Police Department, Iowa. Despite petitioner’s expressed desire to appeal, his trial counsel did not file a Notice of Appeal.

Defendant’s Br. at 5. Indeed, later in his brief, defendant Saucillo states that:

he mentioned to his counsel that he wishing [sic] to appeal, but the Petitioner did not insisted [sic] to his counsel to perform the appeal, but anyway, that part of the proceedings by counsel to perform the direct appeal with or without the consent,

because the direct appeal constitute [sic] the course of proceedings of the entitled case. . .

Defendant's Br. at 8. Thus, there is no indication in defendant Saucillo's moving papers that he stated to his counsel either, at the time of sentencing, or immediately after it, that he desired to pursue an appeal. Accordingly, the court concludes that although Saucillo indicates that he inquired into the possibility of pleading guilty while still wanting to appeal the court's decision on his motion to suppress, he does not allege that he specifically directed his counsel to file an appeal.¹ Thus, the presumption of prejudice employed in *Hollis* and *Holloway* is inapplicable here because there is no allegation that defendant Saucillo's counsel failed to file a notice of appeal after being so instructed by defendant Saucillo. Therefore, defendant Saucillo's motion is denied.

C. Certificate Of Appealability

Defendant Saucillo must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). "A substantial showing is a showing

¹Defendant Saucillo would not have been able to enter an unconditional guilty plea and still appeal the court's denial of his motion to suppress since it is black letter law that a valid unconditional plea of guilty is an admission of guilt that waives all nonjurisdictional defects and defenses. *United States v. Smith*, 422 F.3d 715, 724 (8th Cir. 2005); *United States v. McNeely*, 20 F.3d 886, 888 (8th Cir. 1994). By entering an unconditional plea of guilty, Saucillo effectively waived his right to appeal the denial of his suppression motion. *See Smith*, 422 F.3d at 724; *United States v. Stewart*, 972 F.2d 216, 218 (8th Cir.1992).

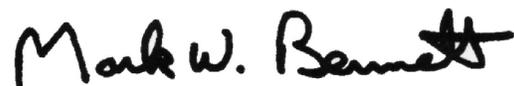
that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El v. Cockrell* that “[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Saucillo’s petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); *Fed. R. App. P.* 22(b). Accordingly, with respect to Saucillo’s claim, the court **shall not** grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c.)

III. CONCLUSION

Upon the foregoing, defendant Saucillo’s *pro se* Motion To Vacate, Set Aside, Or Correct Sentence (Doc. No. 56) is **denied in its entirety** and the court **shall not** grant the defendant a certificate of appealability.

IT IS SO ORDERED.

DATED this 14th day of February, 2007.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA