

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD NEIL HARP,

Defendant.

No. CR00-3035-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANT’S MOTION TO
VACATE, SET ASIDE OR CORRECT
SENTENCE**

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND 2

II. LEGAL ANALYSIS 5

A. Standards Applicable To § 2255 Motions 5

B. Ineffective Assistance Of Counsel 7

1. Failure to File Appeal 10

2. Failure to Advise a Plea on Drug Charges 12

a. Prejudice 12

b. Trial Counsel’s Performance 15

C. Certificate of Appealability 18

III. CONCLUSION 19

I. INTRODUCTION AND BACKGROUND

On June 28, 2000, a criminal complaint was filed in the United States District Court for the Northern District of Iowa charging the defendant Howard Neil Harp with: 1) Count I, on or about May 30, 2000, knowingly and intentionally possessing with intent to distribute a mixture or substance containing a detectable amount of methamphetamine within 1,000 feet of a public playground, 2) Count 2, on or about May 15, 2000, knowingly and intentionally distributing a mixture or substance containing a detectable amount of methamphetamine within 1,000 feet of a public playground, and 3) Count 3, on or about May 30, 2000 knowingly and intentionally distributing a mixture or substance containing a detectable amount of methamphetamine within 1,000 feet of a public playground. On July 27, 2000, a three count indictment was returned by the grand jury for the Northern District of Iowa which charged defendant Harp with two counts of delivery of methamphetamine and one count of possession with intent to distribute methamphetamine. On October 27, 2000, a four count superseding indictment was returned by the grand jury charging Harp with the original three counts and an additional count of using and carrying a firearm or firearms during and in relation to one or more drug trafficking crimes.

Trial commenced on May 1, 2001. During trial, defendant Harp was represented by attorneys Clemens Erdahl and Robert Walker. On May 3, 2001, following two and a half days of trial, the government and defendant Harp negotiated a plea agreement. On May 3, 2001, Harp plead guilty to the drug charges contained in counts one, two and three of the superseding indictment. The government agreed to dismiss count four— possession of a firearm. On August 31, 2001, during the sentencing hearing, the court found that Harp had a Criminal History Category of I and a total offense level of 27. Harp's sentencing range was 70 to 87 months. Harp was sentenced to 70 months imprisonment.

Harp did not appeal his sentence.

A letter from Harp to the court dated October 17, 2001, states, “From what I understand [trial counsel] tore up the check that was to be used for appeal, and I’m not really sure why this happened.” In a second document, dated February 13, 2002, a similar allegation appears in Harp’s *pro se* petition, “My attorney was to file appeal, he was give[n] check for appeal from my Mother-in-Law. But he tore it up.” (Docket No. 112 at 2). In his original *pro se* motion, Harp asserted four specific grounds, in addition to his allegation that his attorney failed to file a timely appeal. The four grounds were: 1) counsel “failed to advise [Harp] to plead to the drug charges and fight the gun charge at trial”; 2) counsel failed to file an appeal on the proximity to park enhancement that would have allowed Harp to pursue a safety valve reduction; 3) “counsel gave confidential information”; and 4) co-counsel was implicated in Harp’s case by the government’s confidential informant as a drug user and a drug dealer. Harp requested appointment of counsel to assist him with his action pursuant to 28 U.S.C. § 2255. The court granted this request. The court required that Harp, through counsel, file an amended and substituted petition for relief. On January 10, 2003, Harp filed his Recast Petition under 28 U.S.C. § 2255.■¹ In his Recast Petition defendant Harp requested that the court find ineffective assistance at trial. One of the claims for ineffective assistance of counsel was, “In spite of efforts by Movant to secure an appeal through his attorney, no appeal was commenced.” (Docket No. 121). In addition, Harp argued that his trial counsel, Mr. Erdahl, failed to properly advise him with regard to pleading to the drug charges and only going ahead with

¹ The filed Recast Petition indicated that the filing was pursuant to 18 U.S.C. § 2255. The court notes that 18 U.S.C. refers to civil remedies for personal injuries resulting from the sexual exploitation and other abuse of children. The court assumes counsel meant to reference 28 U.S.C. § 2255 and that this is a typographical error.

trial on the firearm possession. Harp asserted that had he plead to the drug charges and gone to trial only on the gun charge he would have received an additional reduction as to his sentence.

The court reviewed the record and determined that there was a question as to whether Harp's rights were violated based on Harp's allegation that he requested an appeal be timely filed by trial counsel and that trial counsel refused to file a timely appeal and "tore" up Harp's check. The court initially granted an evidentiary hearing to consider whether defendant Harp had instructed trial counsel to file an appeal. Harp's counsel, however, sent a letter notifying the court that the only issue Harp planned to provide evidence on would be the issue of whether Harp's trial counsel was ineffective for failing to advise Harp to plead to the drug charges and to go ahead with trial on only the firearm possession charge. The court found that since the evidentiary hearing was granted to consider whether Harp had instructed counsel to file an appeal and Harp was not planning to discuss or provide any additional evidence during the hearing on this issue then there was no need to hold an evidentiary hearing. The court determined that there was enough information in the record as to the other issues raised by Harp in his petition and the evidentiary hearing was cancelled.■²

² The court received a letter from defendant Harp on May 26, 2004, in which he stated that the reason for filing his § 2255 motion was to appeal the "1000 feet from a park rule" and that his trial counsel deprived him of his right to appeal. This issue was not raised on direct appeal nor included as part of Harp's Recast Petition. A motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather, "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir.1996). As discussed in this order, Harp has failed to show cause
(continued...)

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as “the statutory analogue of habeas corpus for persons in federal custody.” *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

[Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement for claims that a 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.”

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not

²(...continued)

because the court finds his attorney did not prevent Harp from filing a timely appeal. Harp may surmount this procedural default only if he “‘can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.’” *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). This he cannot do. Therefore, as to this issue, defendant’s Harp’s petition is denied. On July 13, 2004, Harp submitted an addendum to his petition. He argues that the court must consider the Supreme Court’s recent decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). In *Blakely* the court addressed a sentence that was greater than the statutory maximum allowable. The court determined that Harp would receive an enhancement because trial had commenced and had almost concluded before Harp agreed to a plea agreement. Harp’s case is distinguishable from *Blakely* as it did not involve a maximum sentence that the judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant. Further, Harp’s addendum citing *Blakely* is premature. The Supreme Court has not made the *Blakely* rule applicable to cases on collateral review as is required for authorization under § 2244(b)(2)(A) and § 2255 ¶ 8(2). Therefore, as to this issue, defendant’s Harp’s petition is denied.

serve as a substitute for a direct appeal, rather “[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected would result in a complete miscarriage of justice.” *United State v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant’s ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brook*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997). A defendant may surmount this procedural default only if the defendant “‘can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.’” *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

However, in cases involving a request by a defendant to trial counsel to file an appeal the Eighth Circuit Court of Appeals has made it clear that:

A criminal defendant is entitled to effective assistance of counsel on a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985); *Bell v. Lockhart*, 795 F.2d 655, 657 (8th Cir. 1986). 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. *E.g.*, *Hollis v. United States*, 687 F.2d 257, 259 (9th Cir. 1982), *cert. denied*, 459 U.S. 1221, 103 S.Ct. 1228, 75 L.Ed.2d 462 (1983); *Williams v. United States*, 402 F.2d 548, 552 (8th Cir. 1968).

Estes v. United States, 883 F.2d 645, 648 (8th Cir. 1989). Further, “where ineffective

assistance of counsel deprives a defendant of his right to appeal, courts have not required a showing of prejudice or of likely success on appeal.” *Id.* at 649 (quoting *Robinson v. Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981)). This standard is followed by every Court of Appeals that has addressed this issue, as explained by the Sixth Circuit Court of Appeals:

[E]very Court of Appeals that has addressed the issue has held that a lawyer’s failure to appeal a judgment, in disregard of the defendant’s request, is ineffective assistance of counsel regardless of whether the appeal would have been successful or not . . . We agree with those courts and hold that the failure to perfect a direct appeal, in derogation of a defendant’s actual request is a *per se* violation of the Sixth Amendment.

Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998). Therefore, in cases where the defendant has actually requested an appeal and counsel disregards the request, the Eighth Circuit Court of Appeals has found, “[D]eficient attorney performance in perfecting an appeal is prejudicial under the *Strickland v. Washington* standard for determining ineffective assistance of counsel.” *Williams v. Lockhart*, 849 F.2d 1134, 1137 n. 3 (8th Cir. 1988). Thus, if Harp instructed his counsel to file an appeal the court would be compelled to hold that the failure of Harp’s counsel to do so would constitute ineffective assistance of counsel.

Harp acknowledges that none of the claims presented in his § 2255 motion were raised on appeal. He asserts that this procedural default should be excused, however, because it was the result of ineffective assistance of counsel. With these standards in mind, the court now turns to its consideration of the issues raised in Harp’s § 2255 motion.

B. Ineffective Assistance Of Counsel

The Eighth Circuit Court of Appeals has pointed out that “[a] motion under § 2255 is not a substitute for a direct appeal.” *Anderson v. United States*, 25 F.3d 704, 705 (8th

Cir. 1994); *see Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995); *United States v. Wilson*, 997 F.2d 429, 431 (8th Cir. 1993) (per curiam); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993); *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims “are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255”); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims are “more appropriately raised in collateral proceedings under 28 U.S.C. § 2255”)); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255).

To meet the standard for claims of ineffective assistance of counsel under § 2255, defendant Harp must meet two prongs, that “counsel’s assistance fell below an objective standard of reasonableness” and that the “deficiencies in counsel’s performance [were] prejudicial to the defense.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see United States v. Craycraft*, 167 F.3d 699, 703 (8th Cir. 1999). The court must keep in mind that in determining whether counsel’s conduct was objectively reasonable, there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Nguyen v. United States*, 114 F.3d 699, 703-04 (quoting *Strickland*, 466 U.S. at 689). In addition to showing that his counsel’s assistance was ineffective, defendant Harp must demonstrate that there was a “reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see Craycraft*, 167 F.3d at 454; *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998).

It is not necessary to address counsel's performance and the prejudice prong in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one of the prongs. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. In *Strickland* the Supreme Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir.1999) (citing *Strickland*). A conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir.2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)).

To prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient

prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697. The court now turns to its consideration of defendant Harp’s claims of ineffective assistance of counsel.

1. Failure to File Appeal

In his revised § 2255 petition, defendant Harp contends that he received ineffective assistance of counsel because his trial counsel, Clemens Erdahl, failed to file a direct appeal of his sentence despite Harp’s request. Defendant Harp states that after his conviction he wanted to file an appeal and that he attempted to contact Mr. Erdahl but that he could not get in touch with him. The government’s response to this assertion is that Harp originally agreed with Mr. Erdahl not to file an appeal and did not subsequently notify his counsel regarding filing any appeal until after the time for filing had passed. The government submitted to the court the affidavit of Mr. Erdahl which denies Harp’s allegations. Mr. Erdahl’s affidavit states in pertinent part:

3. After sentence was pronounced, arrangements were made for a possible appeal including provision of a check, by a relative of Mr. Harp, made payable to the Clerk of Court for the appellate fee.

5. I had a conversation with Mr. Harp in which I passed along this contention and advised against an appeal since it appeared more likely that my client would lose 17 months than that he would gain 10. At that point, Mr. Harp agreed not to appeal.

6. A few days later, I had a phone conversation with Mrs. Harp (who was directly involved in all stages of Pre-Trial and Trial preparation). During my conversation with Mrs. Harp I passed along the Government’s warning about a cross-appeal and, again, advised against an appeal since it appeared more likely that my client would lose 17 months than that he would gain 10. At that point, Mrs. Harp agreed it was inadvisable to appeal and indicated she would pass that along to her husband.

I received no further contact from either my client or his wife until well after the appeal period had run.

7. It was only after the time for appeal had run that I became aware of Mr. Harp's contention that he could not get in touch with me to tell me to appeal.

Affidavit of Clemens Erdahl, Government Exhibit 1 at 2. Mr. Erdahl was Harp's counsel during both the trial and sentencing. Harp responds to this contention by stating that it was Mr. Erdahl's refusal to file a timely appeal after sentencing that fell below an objective standard of reasonableness. After reviewing the record and case law, the court determined that an evidentiary hearing should be held. However, once the evidentiary hearing was scheduled, the court was informed by Harp's appeal's counsel, Mr. F. David Eastman, that Harp did not plan to provide further evidence or argue this issue during the hearing.

The court acknowledges that prior cases decided in this circuit and by the Supreme Court have already established that a defendant has a right to an appeal and that the defendant's attorney is obligated to file that appeal. *See Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). Although, those cases involve the abandonment of a criminal defendant by counsel after trial, as stated previously, the Eighth Circuit Court of Appeals has held that when an attorney fails to file an appeal, when requested to by a defendant, this failure constitutes *per se* ineffective assistance of counsel.

The court finds that Harp has failed to provide this court with any evidence that he instructed his trial counsel to file an appeal and that his trial counsel refused to do so. His allegations, standing alone, are not enough to convince this court that trial counsel refused to file an appeal. The court notes that Harp submitted no affidavits from his wife or mother-in-law regarding the check that was allegedly torn up. Harp refused to testify or provide testimony of anyone else that would verify that a check had been given to Mr.

Erdahl to file an appeal and that he refused to file the appeal. Harp has provided no evidence to support his allegations and Harp's accusations do not support a finding that Harp did, in fact, "instruct" Mr. Erdahl to file an appeal. Although the affidavit submitted by the government fails to address the allegation that Mr. Erdahl "tore up" the check, it does reveal that there were discussions between Mr. Erdahl and Harp regarding whether an appeal should be filed. The government asserts that, upon advice from trial counsel, Harp made the decision not to seek an appeal. This is not a case where the defendant has actually requested an appeal and counsel has disregarded the request. The record reveals that defendant Harp, after discussions with trial counsel, decided not to file an appeal. The fact that Mr. Erdahl did not file an appeal is not prejudicial under the *Strickland v. Washington* standard for determining ineffective assistance of counsel. Therefore, as to this issue, defendant Harp's petition is denied.

2. Failure to Advise a Plea on Drug Charges

Defendant Harp contends that his trial counsel was ineffective for failing to advise him to plead to the drug charges and to go to trial on the firearm possession charge. The court will consider whether Harp's claims meet the *Strickland* test.

a. Prejudice

The court will first consider whether defendant Harp was prejudiced when his counsel failed to advise him to plead to the drug charges and go to trial on the firearm possession charge. Even if Harp can show counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Harp must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

The firearm possession count carried with it a mandatory minimum of a five-year sentence. Harp’s trial counsel could have advised Harp to plead to the drug charges and go to trial on the firearm possession count. However, instead, Harp’s trial counsel proceeded to trial on all claims and before the conclusion of trial negotiated a plea agreement in which the firearm possession charge was dismissed by the government. Defendant Harp waited to plead until after trial commenced and this decision resulted in the court denying Harp the third point reduction for acceptance of responsibility. The court points out that if Harp had been found guilty of possession of a firearm there would have been an automatic two point enhancement added to his sentence. At sentencing, the court held that Harp’s base offense level³, with a two point reduction for acceptance, was 27 and his criminal history category was 1 for a Sentencing Guideline range of 70 to 87 months. Harp’s trial counsel made a motion for downward departure during sentencing. The court considered the issues raised in support of Harp’s motion for downward departure and found that there were no issues outside the heartland and denied the motion for downward departure.

There were many factors considered when this court sentenced defendant Harp, such as the government’s withdrawal of the firearm possession charge, the allegation that Harp sold methamphetamine while he was on bond, the quantity of methamphetamine he sold and his criminal history. Further, even if Harp had received the third point for acceptance of responsibility, and no enhancement for firearm possession count; his base offense level would have changed to 26 and his Sentencing Guideline range to 68 to 78

³ At the beginning of sentencing Harp’s total offense level was 29, his criminal history category 1 and his range was 87 to 108 months. Transcript of Sentencing, Doc. No. 116 at 3.

months. As such Harp's sentence of 70 months would still have been within the Sentencing Guideline range that would have been used to determine his sentence. Although this court's history is one of sentencing defendants to the low end of their respective guideline ranges, in this case there is not a strong likelihood that Harp would have received a sentence in the low end of his revised guideline range. If Harp had proceeded to trial only on the firearm possession charge and been found guilty, a mandatory minimum of five-years (60 months) would have been added to Harp's sentence. Therefore, even if his sentencing range would have been 68 to 78 months, 60 months would have been mandatory. Harp's contention would require the court to accept an argument that Harp would have been sentence to less than ten months for the three drug charges to equal 69 months or less. There is not a reasonable probability that Harp would have received less than ten months for the three drug counts.

The prejudice prong of *Strickland* requires defendant Harp to show there was an actual adverse effect, not just that appointed counsel's errors had some conceivable effect on the outcome of the proceeding because arguably every act or omission of counsel would meet such a test. See *Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). As stated above, Harp must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

The court finds that Harp has not demonstrated there is a reasonable probability that his sentence would have been lower than the 70 month sentence he actually received. As indicated in the record, the government did not originally agree to dismiss the firearm possession charge. Therefore, in order for Harp's argument to be persuasive the court

would have to assume not only that Harp would have plead earlier to the drug charges; but also, one of the following: 1) that the jury would have found Harp not guilty as to the firearm possession charge, 2) that the court would have granted Harp's Rule 29 motion, or 3) that the government would have agreed to dismiss the firearm possession charge before the charge was submitted to the jury. The court finds that none of these scenarios would likely have occurred and that there is not a reasonable probability that Harp's sentence would have been lower. Because there is not a reasonable probability that any of the discussed scenarios would have occurred had Harp gone to trial only on the firearm possession charge the court finds Harp's argument unpersuasive.

Therefore, Harp has not met this prong. The court will now turn to the second prong and consider trial counsel's performance.

b. Trial Counsel's Performance

In order for this court to find ineffective assistance of counsel, as to failing to advise Harp to plead only to the drug counts, Harp must demonstrate not only prejudice but that his trial counsel's performance was not objectively reasonable. If both prongs are not met, the court cannot find ineffective assistance of counsel as to this claim.

The court begins by observing that “[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Whether it was a reasonable strategic decision for trial counsel to choose to go to trial on all the counts and not separate out the counts, the failure to advise Harp to plead to the drug counts and going to trial on only the firearm possession is a decision that trial counsel, Mr. Erdahl, made based on the information he had at the time and his experience. As demonstrated in the trial transcript, the government was not willing, during earlier negotiations, to dismiss the firearm possession charge:

Mr. Erdahl: We also have a gun charge which adds an additional mandatory minimum. The government is not offering a reduction of either of those charges so that should we prevail on one of these issues I would want to keep the door open to acceptance of responsibility of those things that Mr. Harp is not contesting during trial, and I wouldn't want the Court to leave with the impression that we were just going to trial over quantities because that's not completely accurate.

Transcript of Trial, Doc. No. 118 at 31. It was only after three days of trial, that a plea was agreed to by the parties. It was reasonable for trial counsel to have taken the "normal" course and tried all counts, but, this strategy was not necessarily the best course for the defendant. As noted in the exchange between trial counsel and the court:

MR. ERDAHL: With respect to the acceptance, I can make a professional statement that we had discussions three or four months before trial in which I asked Mr. Wehde and he went and checked with his supervisor as to whether we could plead to the charge if the gun was eliminated. And he came back and said they would not get rid of the gun charge. Again about two or three weeks before trial, I talked to him about that. I also talked to him if he would just eliminate the park proximity and do it as 841 we would plead even with the gun charge.

And so I believe there's no question we were trying to accept responsibility, but the primary reason we went to trial was because of the mandatory minimum five-year sentence on the gun. I believe then the Court can take judicial notice, is aware from presiding at the trial that it was a close question on the gun, and really it was when we got to that close question at the motion for directed verdict that I was able then to make a plea.

So it seems to me fairly clear that the only reason - - the main reason we went to trial was the gun and that once they were willing to drop the gun Mr. Harp was willing to do what he had offered to do much earlier which was accept

responsibility for the other three counts.

THE COURT: He could have pled on the other counts and gone to trial on the gun count. I've had that happen, and then he would have gotten acceptance on the drug counts.

MR. ERDAHL: Well, he - - perhaps he was not properly advised by his counsel on that. That really wasn't a focus, and I never mentioned that possibility to Mr. Harp. I believe in the normal range of affairs in these matters that we normally think of going to trial on all counts or not. And he doesn't have to be foolhardy to accept responsibility because there are all kinds of things that could happen at trial. But he had a very legitimate reason for trying the gun charge, and that is my point. And we offered to plead. So I still believe he should get credit for acceptance of responsibility.

Transcript of Sentencing, Doc. No. 116 at 4-5. Mr. Erdahl reasonably believed that normally defendants go to trial on all counts. In hindsight, Mr. Erdahl realized he should have sought a plea for the drug charges and gone to trial only on the firearm possession charge.

The court notes, however, that had Harp been found guilty of firearm possession, a two point enhancement would have been added to his sentence. Trial counsel's strategy resulted in a plea that did not include the firearm charge. Therefore, even, if in hindsight, Mr. Erdahl believed he did not "properly advise" defendant Harp, this does not mean his performance was deficient. This said, the court advises counsel that the "normal" course is not always the "best" course for clients. As stated by the court during sentencing, "[defendants] have pled on [certain] counts and gone to trial on [only one count]." This type of approach, though not "normal", allows defendants to receive each and every acceptance of responsibility point available. With respect to trial counsel's assistance, there exists a strong presumption that counsel's conduct falls within the wide range of

professionally reasonable assistance and sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Trial counsel's challenged conduct is to be evaluated in light of the circumstances surrounding the decision, not with the 20/20 vision of hindsight. *Id.* "Law is an art, not a science, and many questions that attorneys must decide are questions of judgment and degree." *Garrett v. United States*, 78 F.3d 1296, 1306 (8th Cir. 1996). On these facts, and though a close call, defendant Harp has failed to show that trial counsel's representation fell below an objective standard of reasonableness. Trial counsel reasonably believed that the "normal" course was to go to trial on all counts, and advised his client accordingly. The court finds that trial counsel's decision was objectively reasonable.

To prove a claim of ineffective assistance of counsel, a convicted defendant must meet both the deficient performance prong and there must be actual prejudice as a result of the deficiency. Although Harp has demonstrated prejudice, he has not demonstrated that his trial counsel's performance was deficient. He has failed to meet both prongs. Therefore, Harp's motion, as to this issue, is denied.

C. Certificate of Appealability

Defendant Harp must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these issues. *See 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), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing 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. As to Harp's § 2255 motion, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

III. CONCLUSION

The court has considered Harp's motion pursuant to 28 U.S.C. § 2255, and for the reasons set forth above, concludes that Harp is not entitled to have his sentence corrected. Therefore, Harp's motion under 28 U.S.C. § 2255 is denied. The court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 22nd day of July, 2004.



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