IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RICARDO GANT,

Petitioner,

v. **Civil No. 2:06-cv-02160-JPM-cgc**
Criminal No. 2:03-cr-20369-JPM

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION ON
PETITIONER'S MOTION TO VACATE SENTENCE

Before the Court is Petitioner Ricardo Gant's ("Petitioner") Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion to Vacate") (Docket Entry "D.E." # 1). The instant motion was referred to United States Magistrate Judge Charmiane G. Claxton for Report and Recommendation. For the reasons set forth herein, the Court RECOMMENDS that Petitioner's Motion to Vacate be DENIED.

I. Proposed Findings of Fact

On November 24, 2004, Petitioner pled guilty to two counts of the indictment, fraud in the offer and sale of securities and tax evasion for calendar year 1998 in violation of 15 U.S.C. §§ 77q(a), 77x and 26 U.S.C. § 7201. On March 2, 2005, Petitioner was sentenced to sixty months incarceration for each count, to be served consecutively, for a total sentence of one hundred and twenty months incarceration. Petitioner filed his Motion to Vacate on the grounds that his defense counsel, Lorna McClusky ("Counsel"), provided ineffective assistance when she

failed to appeal that his sentences were imposed consecutively. On July 11, 2011, the Magistrate Judge held a hearing on Petitioner's Motion to Vacate. At the hearing, Petitioner and Counsel each testified regarding the facts surrounding the March 2, 2005 sentencing hearing.

Petitioner testified that when reviewing the proposed Plea Agreement with Counsel, he was concerned with paragraph nine, which states as follows: "[t]he parties understand that the United States will seek imposition of consecutive sentences, and that the defendant will argue for a concurrent sentence." (July 11, 2011 Tr. at 8, 30; D.E. # 104 ¶ 9). Petitioner testified that he informed Counsel that he wanted to appeal his sentence if he was sentenced to consecutive terms of incarceration. (July 11, 2011 Tr. at 9). Once Petitioner was sentenced to consecutive terms, Petitioner assumed that Counsel would appeal the sentence. (July 11, 2011 Tr. at 10). After Petitioner was sentenced, he was out on bond for one month before he self-reported to the Department of Corrections. (July 11, 2011 Tr. at 12). During this time period, Petitioner did not attempt to contact Counsel. Id. Petitioner testified that once he was incarcerated, he asked his family to contact Counsel regarding appealing his sentence. (July 11, 2011 Tr. at 10). It was at this point that Petitioner learned that his sentence had not been appealed. Id.

Counsel testified that she communicated regularly with Petitioner and also communicated with Petitioner whenever documents were filed in his case. (July 11, 2011 Tr. at 23). Before Petitioner's change of plea, Counsel explained the terms of the Plea Agreement in their entirety, including the penalties, and Petitioner stated that he understood everything in the Plea Agreement. (July 11, 2011 Tr. at 24). Counsel specifically explained the consecutive sentencing paragraph, and Petitioner acknowledged that he understood his sentences could be imposed consecutively. (July 11, 2011 Tr. at 25). After sentencing concluded, Counsel testified that she asked Petitioner if he wanted to appeal his sentence. (July 11, 2011 Tr. at 26). Petitioner stated

that he did not wish to appeal the sentence. Id. After sentencing, Petitioner never contacted Counsel regarding an appeal. (July 11, 2011 Tr. at 26-27). Counsel did speak directly with Petitioner to confirm Petitioner's report date, and Petitioner never mentioned appealing his sentence. (July 11, 2011 Tr. at 28).

II. Proposed Conclusions of Law

The Supreme Court addressed the issue of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

In order to satisfy the first prong of Strickland, counsel's performance must be evaluated based on the time of actual representation and not in hindsight. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); Walker v. McQuiggan, No. 10-1198, 2011 WL 3873787, at *5 (6th Cir. Sept. 2, 2011). In order to satisfy the second prong of Strickland, a "defendant must show that 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." 466 U.S. at 694; see Walker, 2011 WL 3873787 at *5.

With respect to accrediting the testimony of witnesses, judges have significant discretion in determining credibility. United States v. Dillard, 438 F.3d 675, 681 (6th Cir. 2006) (stating that an appellate court gives great deference to a court's credibility determination). When judging a witness' credibility, "courts may consider whether the testimony is plausible, whether there are inconsistencies in witness' testimony, and whether the defendant is a 'sophisticated and experienced criminal.'" United States v. Perry, No. 09-20324, 2011 WL 184014, at *4 (W.D. Tenn. Jan. 19, 2011) (quoting United States v. Van Shutters, 163 F.3d 331, 336 (6th Cir.1998)).

In order for Petitioner to prevail on his claim of ineffective assistance of counsel, Petitioner must show that Counsel's performance was "deficient." See Strickland, 466 U.S. at 687. In the instant case, there has been no showing that Counsel made any errors in not appealing Petitioner's sentence, let alone "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." See id. During the hearing on this matter, two versions of the facts were presented. Petitioner's version of the facts was that he told Counsel that he wished to appeal his sentence if it was consecutive. Counsel testified that Petitioner did not communicate this to her, and after asking Petitioner specifically if he wished to appeal his sentence, Petitioner said no. Judges have discretion in determining whether a witness' testimony is credible. Dillard, 438 F.3d at 681. Here, the Court recommends a finding that Counsel's testimony is credible and Petitioner's is not. Specifically, the Court recommends accrediting Counsel's testimony that Petitioner told her after the sentencing hearing that he would not like his sentence to be appealed and that Petitioner never attempted to contact counsel prior to reporting to the Department of Corrections. The transcript of the sentencing hearing

supports this finding as it reflects that Petitioner stated that he did not wish to appeal his sentence. (Sent. Tr. at 245:6-7; D.E. #145 in No. 2:03-cr-20369-JPM). For these reasons, Counsel's performance was not "deficient" as defined by the Court in Strickland. Because the first prong of Strickland has not been met, the Court need not analyze the second prong of Strickland to determine that Counsel did not render ineffective assistance of counsel.

III. Conclusion

For the reasons set forth herein, the Court RECOMMENDS that Petitioner's Motion to Vacate be DENIED.

DATED this 12th day of October, 2011.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.