UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:01cr106(JBA)**
	:	
Wander Morel	:	

Ruling on Motion under 28 U.S.C. § 2255 [Doc. #74]

Wander Morel has moved to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. For the reasons set out below, the motion is denied.

I. Background[1]

DEA agents recorded a telephone conversation between Morel and a confidential source ("CS") on April 5, 2001, in which Morel quoted the price of heroin and cocaine by the kilogram ($71,000 for heroin, referred to as "Martha," and $26,000 for cocaine, referred to as "Pedro"). PSR ¶¶ 7-9; [Doc. #74] at 3. Morel and his co-defendant, Miguel Vidal, drove together to Stamford, Connecticut, where Morel introduced Vidal to the CS and stated that Vidal owned the heroin. PSR ¶¶ 9-12; [Doc. #74] at 4. The CS and Vidal reached an agreement for the sale of heroin, with the CS

[1]Because the facts of the offense are set out substantially the same in both the Pre-Sentence Report ("PSR") and Morel's § 2255 motion, the Court concludes that there is no dispute as to issues of fact.

stating that he would first take a sample, and if the sample was acceptable, he would purchase 500 grams. PSR ¶ 14; [Doc. #74] at 5.

After reaching a plea agreement with the Government, Morel entered a plea of guilty on August 29, 2001 to the sole count of an indictment charging him with conspiracy to possess with intent to distribute 500 grams or more of heroin. He was sentenced on December 12, 2001 to a sixty-six month term of imprisonment and an eight year term of supervised release. Although the plea agreement provided that the parties retained their respective rights to appeal the sentence, no appeal was filed.

On July 16, 2002, Morel filed the instant pro se motion under 28 U.S.C. § 2255, claiming that the Court should have granted him a two-level reduction for having a minor role in the conspiracy. The Government opposes the motion, arguing first that this claim cannot be reached because it was not raised on direct appeal, and alternatively that such a reduction is not warranted on the facts of this case.

II. Analysis

A. "Complete Miscarriage of Justice"

The rule in the Second Circuit is clear:

> Insofar as claims regarding a sentencing court's error in failing to properly apply the Sentencing Guidelines are neither constitutional nor jurisdictional, we join several other circuits in holding that, absent a complete miscarriage of justice, such claims will not be considered on a § 2255 motion where the defendant failed to raise them on direct appeal.

Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (citations omitted). In this case, there is no "complete miscarriage of justice" because the issue of a minor participant departure was specifically considered and rejected by defendant's counsel. Morel's attorney initially objected to the portion of the draft pre-sentence report that declined to recommend a downward departure, but then withdrew that objection after reviewing the transcripts of certain tape-recorded conversations between Morel and Vidal. See 12/4/01 PSR Addendum ("The defendant has withdrawn his previous objection to requesting a minor role. This is based on a review of the transcript."). Thus, not only was this issue waived by the absence of an appeal, it was specifically considered and rejected by defendant's attorney as not being supported by the record.[2] These circumstances do not amount

[2]The Court notes that Morel's motion raises no claim of ineffective assistance of counsel. Cf. Johnson v. United States, 313 F.3d 815, 817 (2d Cir. 2002) (district court erred in applying Graziano "complete miscarriage of justice" standard when claim raised in petition was ineffective assistance of counsel, based on counsel's failure to object to

to a "complete miscarriage of justice." Cf., e.g., Graziano, 83 F.3d at 589-590 (although defendant had a "colorable" claim that his $250,000 fine "exceeded the applicable range established by the Sentencing Guidelines in effect at the time he committed the offense," there was no "complete miscarriage of justice" when he "was explicitly informed that he faced a $250,000 fine, and so informed, he voluntarily entered a plea of guilty").

B. Entitlement to Reduction

In the alternative, even if the Court were to reach the merits of Morel's claim to a two-level downward departure for being a minor participant, such claim is unavailing, as Morel cannot establish, by the preponderance of the evidence, his entitlement to the departure. See United States v. Carpenter, 252 F.3d 230, 234 (2d Cir. 2001) ("The defendant bears the burden of establishing by a preponderance of the evidence that he is entitled to a mitigating role adjustment under section 3B1.2 of the Sentencing Guidelines.") (citing United States v. Castaño, 234 F.3d 111, 113 (2d Cir. 2000)). Thus, even if Morel's claim is liberally construed as one of ineffective assistance of counsel, see supra note 1, it is still without

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incorrect guidelines calculation).

merit.

Morel discussed heroin prices with the CS, introduced Vidal to the CS, and accompanied Vidal to the site where the purchase agreement was reached. Throughout this multi-day event, Morel was clearly aware of the scope of the conspiracy in question, as he quoted prices for 1000 grams of heroin and was present when the CS agreed to purchase (subject to the sample being acceptable) 500 grams of heroin. He was indispensable to the conspiracy because there could have been no agreement if Vidal had not been introduced to the CS. Taken together, the nature of Morel's relationship to Vidal and CS (facilitator of their introduction to each other), the importance of Morel's actions to the success of the venture, and Morel's awareness of the nature and scope of the criminal enterprise all counsel against a downward departure for minor role, even if Morel played a lesser role than Vidal. United States v. Yu, 285 F.3d 192, 200 (2d Cir. 2002) (quoting United States v. Garcia, 920 F.2d 153, 155 (2d Cir. 1990)).

Morel's argument that he is less culpable than Vidal, while perhaps colorable on these facts, does not suffice to show his entitlement a reduction for minor role, as the facts do not suggest that Morel is substantially less culpable than the average participant in a conspiracy such as the one

charged here. See United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) ("A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime.") (citing United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995)). Morel's reliance on United States v. LaValley, 999 F.2d 663 (2d Cir. 1993), is similarly unavailing. In LaValley, the Second Circuit reversed the district court's conclusion that, as a matter of law, a "steerer or a facilitator" could not be a minor participant. The Second Circuit concluded that the determination is fact-based, and remanded for consideration under the appropriate standards. Here, under the factors as set out in LaValley and other Second Circuit case law cited above, the Court has concluded that Morel would not be entitled to a minor role reduction. Thus, LaValley is of no assistance to Morel.

III. Conclusion

For the reasons set out above, Morel's § 2255 motion [Doc. #74] is DENIED. No certificate of appealability will issue, as Morel has not "made a substantial showing of the

denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 17th day of April, 2003.