

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
CECIL EVERARD WALTERS	:	NO. 90-296-2

ORDER - MEMORANDUM

AND NOW, this 8th day of March, 2000, the government's motion to dismiss Count I (conspiracy) of the indictment is granted, and the corresponding special assessment of \$50 is vacated. Defendant's motion for a resentencing de novo is denied.

On November 20, 1990, defendant Cecil Everard Walters pleaded guilty to Counts 1, 3 and 23 of an indictment charging conspiracy in violation of 21 U.S.C. § 846, conducting a criminal enterprise (CCE) in violation of 21 U.S.C. § 848, and using a facility of interstate commerce to facilitate narcotics trafficking in violation of 18 U.S.C. § 1952, respectively. On September 17, 1991, defendant was sentenced to 16 years incarceration on the conspiracy count, with a concurrent sentence imposed on the CCE count. On Count 23, the sentence was suspended. Defendant filed a writ of habeas corpus under 28 U.S.C. § 2255 alleging three grounds for relief: (1) breach of the plea agreement by the government; (2) ineffective assistance of counsel at sentencing; and (3) the denial of the right to appeal because of ineffective assistance of counsel. Defendant's first two claims were dismissed, and the sentence was vacated and reimposed, with credit given for time served, so as to allow a timely appeal. Order, March 17,

1998. On appeal, our Court of Appeals held a CCE conviction includes a finding of participation in a conspiracy under Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed.2d 419 (1996). Because the separate convictions violated the prohibition of double punishment, the action was remanded with instructions to dismiss either the conspiracy or CCE count.¹ See United States v. Walters, 98-1248, slip op. at 4 (3d Cir. Oct. 7, 1998).

While our Court of Appeals has not spoken to which count should be dismissed in this type of double punishment remand, other Courts of Appeal, since Rutledge, have held dismissal of the lesser included offense of conspiracy is appropriate. See Lanier v. United States, __ F.3d __, 2000 WL 201527 at *7 (7th Cir. 2000); United States v. Wilson, 135 F.3d 291, 303-04 (4th Cir. 1998); United States v. Dixon, 132 F.3d 192, 196 (5th Cir. 1997); United States v. Boyd, 131 F.3d 951, 954-55 (11th Cir. 1997). Judge Bechtel, of this district, has also done so. See United States v. Dawson, Civ. No. 97-7420, 1999 WL 997754 at *2-3 (E.D. Pa. Nov. 3, 1999); United States v. Hoskins, Civ. No. 97-2974, 1998 WL 717376 at *2 (E.D. Pa. Sept. 22, 1998).

Resentencing is required only when dismissal of one count disrupts the entire sentence. See Boyd, 131 F.3d at 955, citing United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985). Inasmuch as the sentences for conspiracy and CCE were to have run concurrently, dismissal of the conspiracy count does not

¹ On appeal, the government conceded the dismissal of one of the counts.

affect the sentence, and resentencing is not required.² See Dawson, 1999 WL at *3 (“Because the fifteen-year sentence for the conspiracy count was to run concurrently with the fifty-year sentence for the CCE count, the court need not resentence [defendant].”)

Edmund V. Ludwig, J.

² The Sentencing Guidelines calculation does not appear to be altered by dismissal of either count.