

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

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UNITED STATES OF AMERICA,	:	
	:	
Respondent,	:	
	:	
v.	:	CRIMINAL NO. 96-592
	:	
LEONARD EDWARDS,	:	
	:	
Petitioner.	:	

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MEMORANDUM

R.F. KELLY, J.

MAY 8, 2000

Before this Court is Petitioner Leonard Edwards' ("Petitioner") pro se Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. section 2255 ("section 2255"). The relevant procedural history in this case is as follows. On December 11, 1996, the grand jury returned a five-count indictment charging Petitioner with: (1) distributing a controlled substance in violation of 21 U.S.C. section 841 (a)(1); (2) possessing with the intent to distribute a controlled substance, in violation of 21 U.S.C. section 841 (a)(1); (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922 (g)(1); (4) possession of a firearm from which the manufacturer's serial number had been removed and obliterated, in violation of 18 U.S.C. section 922(k); and (5) for forfeiture pursuant to 21 U.S.C. section 853.

The facts adduced during a jury trial on May 19-20,

1997 established that on October 25, 1996, Petitioner sold crack cocaine to an undercover police officer, Alban Ventour ("Officer Ventour"), after having been introduced to Officer Ventour by Larry Alston ("Alston"), a confidential informant. During the next two weeks, Officer Ventour had one in-person meeting as well as several telephone conversations with Petitioner for the purpose of arranging another drug transaction with Officer Ventour, as well as the sale of a handgun. Petitioner was arrested on November 14, 1996 while en route to a scheduled meeting with Officer Ventour.

Pursuant to Petitioner's arrest, quantities of crack cocaine and a handgun with an obliterated serial number were discovered in his vehicle. Petitioner's defense at trial to the above facts was that he was coerced by Alston, also a convicted felon, to engage in the transactions because Alston threatened that he would harm Petitioner and Petitioner's family if he did not. Petitioner did not deny participating in the initial sale of the drugs to Officer Ventour, or that he had arranged for a second transaction to sell drugs and a handgun to Officer Ventour.

Petitioner was found guilty of Counts one through four.<sup>1</sup> Subsequently, on November 7, 1997, Petitioner was

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<sup>1</sup> Following trial, the government withdrew the forfeiture count, which was therefore dismissed.

sentenced to the mandatory statutory minimum sentence of ten years imprisonment each on Counts 1 and 2, and the mandatory statutory minimum sentence of fifteen years imprisonment on Count 3.<sup>2</sup> All three sentences were to run consecutively. Petitioner was also sentenced to 120 months imprisonment on Count 4, to run concurrently with the other sentences.

Petitioner filed a timely Notice of Appeal of his convictions and sentence through trial counsel, Michael J. Holston, Esquire ("Mr. Holston" or "trial counsel"), appointed by this Court for purposes of appeal.<sup>3</sup> Petitioner's convictions and sentence were affirmed by the United States Court of Appeals for the Third Circuit by Memorandum and Order dated August 19, 1998.

On August 18, 1999, Petitioner filed the present pro se section 2255 motion ("Petitioner's § 2255 Mot.") challenging his sentence based upon eight grounds. This Court held an evidentiary hearing ("the 4/20/00 hearing") on the motion on

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<sup>2</sup> As will be discussed later, under the United States Sentencing Guidelines ("the Sentencing Guidelines"), Petitioner's sentence would have been 360 months to life. However, because of Petitioner's eleven criminal history points and the fact that he was in possession of a firearm, U.S.S.G. section 5C1.2, which would, under other circumstances, allow this Court to impose sentence according to the Sentencing Guidelines, rather than the statutory mandates, was not applicable.

<sup>3</sup> Mr. Holston filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), presenting five arguments which might constitute colorable issues on appeal. In addition, Petitioner filed a pro se brief in support of his appeal raising two additional issues.

April 20, 2000. During the hearing, Petitioner, who was represented by counsel, narrowed his motion to the following two arguments: (1) trial counsel was ineffective for failing to interview or call Alston as a witness at the trial, and (2) trial counsel was ineffective due to erroneously informing this Court that Petitioner stipulated that the substance involved in his offenses was crack cocaine, resulting in a higher sentence. For the reasons which follow, Petitioner's Motion with respect to both of these claims is denied.

#### **DISCUSSION**

The relevant portion of section 2255 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 that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.<sup>4</sup> Petitioner challenges his sentence on the

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<sup>4</sup> Petitioner asserts that none of the claims raised in his section 2255 motion were raised on direct appeal. (Petitioner's § 2255 Mot. at 5.) As a result, the Government, citing United States v. Frady, 456 U.S. 152, 165 (1982), claims that "an issue not raised before the trial court or on direct appeal has been waived and cannot be litigated on a § 2255 motion unless the movant can show both 'cause' excusing the procedural default, as well as 'actual prejudice' resulting from the alleged error." (Government's Resp. to Def.'s Mot. Under 28 U.S.C. § 2255 at 4.) However, this reasoning was rejected by the United States Court of Appeals for the Third Circuit in United States v. DeRewal, 10 F.3d 100 (3d Cir.), cert. denied, DeRewal v. United States, 511 U.S. 1033 (1994), in which the court held that "the 'cause and

grounds that his Sixth Amendment rights were violated by the ineffective assistance rendered by trial counsel. In Strickland v. Washington, the Supreme Court of the United States set forth a two-prong test for evaluating a claim of ineffective assistance of counsel. Strickland, 466 U.S. 668 (1984). A finding against the petitioner under either prong is sufficient to find for the government. United States v. Ciancaglini, 945 F. Supp. 813, 816 (E.D.Pa. 1996).

First, Petitioner must show that counsel's performance was deficient, meaning that counsel made errors so serious as to deprive Petitioner of the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. This evaluation must be based upon the facts of the case at the time of counsel's conduct. Id. at 690. "[T]he right to effective assistance of counsel does not guarantee that an attorney will never err." Diggs v. Owens, 833 F.2d 439, 446 (3d Cir.), cert. denied 485 U.S. 979 (1988). Therefore, to satisfy this prong, Petitioner must show that counsel's performance fell below an objective standard of reasonableness under the prevailing professional

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prejudice' standard set out in Frady does not apply to an ineffective assistance of counsel claim asserted in a Section 2255 motion." DeRewal, 10 F.3d at 101. Part of the rationale behind this holding is that where, as here, trial counsel also represents a defendant on direct appeal, trial counsel is unlikely to raise the issue of her own effectiveness on appeal.

Moreover, as will be discussed later, Petitioner did, in fact, raise the claim regarding the stipulation on direct appeal.

norms. Id. at 688. However, “[a]n attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial.” Diggs, 833 F.2d at 444-445.

Consequently, great deference is given in evaluating counsel’s performance, and there is a strong presumption that counsel’s challenged actions constitute sound trial strategy. Strickland, 466 U.S. at 689.

Second, even if the court finds counsel’s conduct to have been deficient, Petitioner must nevertheless show that his defense was prejudiced by the deficient performance in order to justify setting aside the verdict. United States v. Griffin, No. Crim. 91-612, 1993 WL 34927, at \*5 (E.D.Pa. Feb. 9, 1993). To establish the requisite prejudice under this second prong, Petitioner must show that counsel’s errors were so serious as to deprive him of a fair trial, i.e., one having a reliable result. Strickland, 466 U.S. at 694. In order to do so, Petitioner must establish a reasonable probability that but for counsel’s errors, the result of the trial would have been different. Id. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. Id. This second prong must be evaluated by a totality of the circumstances existing at the time of the trial since “a verdict or conclusion only weakly supported by the record is more likely to have been affected by

errors than one with overwhelming record support." Griffin, 1993 WL 34927, at \*5 (quoting Strickland, 466 U.S. at 696). Guided by the above principles, we will address each of petitioner's claims separately.

### **I. The Stipulation.**

Petitioner first claims that trial counsel was ineffective for erroneously informing this Court that Petitioner had stipulated that the drug involved in his offenses was crack cocaine, resulting in this Court imposing a higher sentence than if the drug had been cocaine powder. The stipulation that trial counsel submitted to Petitioner prior to trial ("the stipulation") provided, in relevant part, that

1. The defendant and the government agree that government's exhibit #2 is approximately 127 grams, of a mixture or substance containing a detectable amount of cocaine base ("crack"), a Schedule II narcotic drug controlled substance.

2. The government's exhibit #16, is approximately 191 grams, of a mixture or substance containing a detectable amount of cocaine base ("crack"), a Schedule II narcotic drug controlled substance.

(Petitioner's § 2255 Mot. Ex. 2-B.) Petitioner claims that, upon review of the stipulation, he told Mr. Holston that he would not stipulate that the substance was "crack cocaine," but would stipulate that the substance was "cocaine base powder." (N.T. 4/20/00 p. 9). Mr. Holston crossed out the words "cocaine base ('crack')"

he had made.<sup>5</sup> The stipulation was signed by Petitioner, Mr. Holston, and the government. The purpose of the stipulation was to avoid calling the chemist as a witness during trial. At the time it was entered into, the parties determined that the nature of the substance was irrelevant for purposes of trial, and would be taken up at sentencing. (N.T. 4/20/00 p. 39).

At Petitioner's November 7, 1997 sentencing, Mr. Holston explained to this Court that petitioner objected to his base offense level, claiming it should have been lower because, per the stipulation, the substance involved in his offenses was cocaine powder, rather than crack cocaine, requiring a lower sentence. At the 4/20/00 hearing, counsel for Petitioner conceded that this is the basis for Petitioner's claim regarding the stipulation. (N.T. 4/20/00 p. 37). However, this issue has already been decided on direct appeal by the United States Court of Appeals for the Third Circuit ("the Third Circuit"). While it is true that the stipulation could have affected Petitioner's

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<sup>5</sup> Pursuant to these changes, the stipulation was left to read as follows

1. The defendant and the government agree that government's exhibit #2 is approximately 127 grams, of a mixture of a substance containing a detectable amount of a Schedule II narcotic drug controlled substance.
2. The government's exhibit #16, is approximately 191 grams, of a mixture or substance containing a detectable amount of a Schedule II narcotic drug controlled substance.

sentence if this Court has sentenced him according to the Sentencing Guidelines, in its August 19, 1998 Memorandum in United States v. Edwards, No.97-2008 (3d Cir. Aug. 19, 1998), the Third Circuit explained that due to Petitioner's criminal history and the fact that he had possessed a firearm, he was sentenced according to the statutory minimum sentences for his offenses, and not the Sentencing Guidelines. Accordingly, the Third Circuit concluded that "any alleged error committed by the district court in determining Edwards' offense level under the United States Sentencing Guidelines ('U.S.S.G.') based upon the sale of cocaine base, not cocaine, was harmless insofar as Edwards' sentence was ultimately determined in accordance with the mandatory statutory minimum sentence provisions and not the Sentencing Guidelines." Therefore, this claim is not properly before this Court. See United States v. Syrkett, No.Crim.A. 95-307, 1997 WL 419621, at \*5 (E.D.Pa. July 3, 1997)(holding that issues raised on direct appeal may not be relitigated in section 2255 motion); Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1995)(dismissing ineffectiveness claim in section 2255 petition since "'section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal'")(quoting Barton v. United States, 791 F.2d 265, 267 (2d Cir. 1986); United States v. Galloway, 56 F.3d 1239, 1242 (10th Cir. 1995)(holding ineffective assistance of counsel claim on direct appeal does not

bar assertion of subsequent ineffectiveness claim in section 2255 petition, so long as subsequent claim is based on different grounds, since "identical reasons in support of ineffectiveness of counsel cannot be litigated twice . . . . That is prevented by the doctrine of issue preclusion"). Accordingly, this claim is denied.

## **II. Failure to call Alston as a witness.**

Petitioner next argues that trial counsel rendered ineffective assistance of counsel by failing to call Alston, the confidential informant who introduced Petitioner to Officer Ventour, as a witness at trial. "Under the United States Constitution, trial counsel need not call every witness suggested to him." Griffin, 1993 WL 34927, at \*5 (citing United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990)). Moreover, "[d]ecisions on which witnesses to call to testify are normally strategic decisions left to counsel." United States v. Merlino, 2 F.Supp.2d 647, 662 (E.D.Pa. 1997); Griffin, 1993 WL 34927, at \*5 (citations omitted). Generally, the "expertise [of counsel] leads them to choose only those witnesses likely to assist the case." Ciancaglini, 945 F. Supp. at 823. As such, the decision of which witnesses to call "is precisely the type of strategic decision which the Court in Strickland held to be protected from second-guessing." Id. (quoting Sanders v. Trickey, 875 F.2d 205, 212 (8th Cir.), cert. denied, 493 U.S. 898 (1989)). In fact,

"[t]he decision to call or bypass particular witnesses is peculiarly a question of trial strategy, which courts will practically never second guess." Collier v. United States, No.00-CV-115, 2000 WL 382044, at \*3 (N.D.N.Y. Apr. 11, 2000) (quoting United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1314 (2d Cir.), cert. denied, 417 U.S. 972 (1974)).

In his motion, Petitioner's only support for this claim is that trial counsel was ineffective for

failure to interview Mr. Alston who would have provided exculpatory evidence/testimony; failure to subpoena Mr. Alston so the fact-finders could assess the veracity of his (Mr. Alston's) testimony, credibility, his demeanor, knowledge of the facts bearing on movant's guilt or innocence, and the opportunity for counsel to clearly establish the defense of entrapment - duress defense, which counsel clearly abandoned. Counsel knew or should have known that Mr. Alston's testimony was material and favorable to his defense . . . . In this instant case, the record clearly and unequivocally establishes that counsel was ineffective for not investigating, interviewing and failing to subpoena Mr. Alston; who would have, with all probabilities, provided exculpatory evidence/testimony, thereby, putting the adversarial process to its proper testing . . . . If Mr. Holston would have investigated, interviewed and subpoenaed Mr. Alston, the trial would have resulted in different (sic) outcome, with all probabilities. Movant's entrapment defense - duress defense, which counsel abandoned, would have, with all probability, been established and movant would have received a judgment of acquittal.

(Petitioner's § 2255 Mot. at 7-9.)

Mr. Holston, however, through his testimony at the 4/20/00 hearing, articulated sound reasons for not calling Alston as a defense witness. Mr. Holston stated that he concluded that

it would be unwise to call Alston at trial because there was no reason to believe Alston's testimony would be consistent with Petitioner's testimony at trial. (N.T. 4/20/00 p. 28.) Moreover, Mr. Holston stated that Alston would likely have testified that Petitioner was a drug dealer and had entered into the drug transactions with Officer Ventour voluntarily. Id. at 28-29. Accordingly, Mr. Holston stated that he advised Petitioner that it would be to Petitioner's benefit not to call Alston, and Mr. Holston claims Petitioner agreed to this strategy. Id.

We find that Mr. Holston's strategic decision not to call Alston as a witness was reasonable and professionally competent. See Haley v. Armontraut, 924 F.2d 735, 740 (8th Cir. 1991) (holding that trial counsel's decision not to call witnesses who would have cast defendant in the role of a fellow drug dealer was the sort of strategic choice which is "virtually unchallengeable" under Strickland); Collier, 2000 WL 382044, at \*3 (holding that "given that the witness's testimony would have implicated Petitioner in the robbery and thus, was more harmful than helpful to petitioner, trial counsel had a sound strategic reason for deciding not to call the witness as a trial witness"). Therefore, Petitioner had failed to satisfy the first prong under Strickland.

Moreover, Petitioner is unable to establish the

necessary prejudice to his case resulting from Mr. Holston's alleged deficient conduct. "A mere conclusory allegation is insufficient to substantiate a § 2255 motion." Matura v. United States, 875 F. Supp. 235, 237 (S.D.N.Y. 1995) (citing United States v. Romano, 516 F.2d 768, 771 (2d Cir), cert. denied, 423 U.S. 994 (1975)). Further, "[w]here a petitioner claims his trial counsel failed to call a witness, he must make a specific, affirmative showing as to what the evidence would have been, and prove that this witness's testimony would have produced a different result." Patel v. United States, 19 F.3d 1231, 1237 (7th Cir. 1994)(citing United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1014 (7th Cir. 1987)). Otherwise, the prejudice prong under Strickland is not satisfied. See United States v. Hatcher, No. 94-173-1, 1997 WL 698488, at \*2 (E.D.Pa. Nov. 17, 1997)(section 2255 petitioner did not establish prejudice based upon trial counsel's failure to call witnesses where petitioner failed to show what the witnesses might have said or how their testimony would have affected the outcome of the trial); United States v. Gaskin, No. 93-187, 1997 WL 312202, at \*5 (E.D.Pa. June 2, 1997)(denying portion of petitioner's section 2255 motion with regard to his claim that trial counsel rendered ineffective assistance of counsel by failing to call certain witnesses, where petitioner failed to offer any reliable evidence as to what witnesses knew or the testimony they would have given);

Ciancaglini, 945 F. Supp. at 823-824 (holding that trial counsel was not ineffective for failing to call witness where, inter alia, there was no indication that witness could contribute any exculpatory evidence and would merely have called attention to defendant, and where defendant provided no evidence to support contention that trial counsel should have called witness); Patel, 19 F.3d at 1237 (holding no prejudice to petitioner who failed to make specific, affirmative showing that absent witness's testimony would have affected outcome of trial); United States v. DeBango, 780 F.2d 81, 86 (D.C.Cir. 1986) (denying appellant's claim on direct appeal that trial counsel was ineffective for failing to interview informant since appellant, in failing to offer evidence of what the informant would have said at trial, had not established prejudice under Strickland); Dees v. United States, 789 F.2d 1521 (11th Cir. 1986) (holding no prejudice was shown where defendant failed to offer contents of witnesses' purported testimony); Buckelew v. United States, 575 F.2d 515 (5th Cir.1978) (finding trial counsel was not ineffective for failing to call witness where appellants failed to establish prejudice by stating what helpful testimony the witness could have provided); United States v. Mallard, No.Civ.99-0998AHS, No.Crim.9500193AH, 2000 WL 360237, at \*2 (S.D.Ala. Mar. 27, 2000) (section 2255 petitioner had not established prejudice due to counsel's failure to call witnesses where he failed to establish

what the witnesses would have said or how their testimony would have assisted his defense); Sims v. United States, 71 F.Supp.2d 874, 880 (N.D.Ill. 1999) (no prejudice under Strickland shown where section 2255 petitioner failed to establish what helpful testimony witnesses would have offered at sentencing hearing, or how the testimony would have resulted in a lesser sentence); Grice v. United States, No. 98-CV-622, 1998 WL 743718, at \*3 (N.D.N.Y. 1998)(holding that even if the petitioner's section 2255 claim of ineffective assistance of counsel for failure to call four witnesses was not procedurally barred, it was substantively meritless since the petitioner failed to provide the court with any evidence regarding what the witnesses would have said on the petitioner's behalf).

In the instant case, during his testimony at the hearing, Petitioner was unable to describe how Alston's testimony would have helped his case. Rather, the only support Petitioner offered for his claim that he was prejudiced by Alston's absence is contained in the following excerpt from Petitioner's testimony at the 4/20/00 hearing:

THE COURT: Aside from that, what is it Larry Alston was going to say at trial that was going to help your case? What do you say he was going to say that was going to help your case? That's the issue.

THE DEFENDANT: His pursuing, the way he was pursuing me, his reasons for pursuing me, the length of time, the year or the two - or the year and a half that it -

THE COURT: No. You're just speaking in generalities. Now, specifically, how many times did he pursue you? What was the reason you say he was pursuing you?

THE DEFENDANT: This testimony I feel would have been helpful. It would also shed a little bit more light to the fact-finders of the jurors at the time.

THE COURT: In what way?

THE DEFENDANT: Testing his demeanor, his credibility, his knowledge of events so that I would have had the opportunity to have a fac to face encounter with him before the fact-finders and let them test his veracity, his demeanor, his credibility. All these things I think would have been very helpful.

There's no fact, I mean there's no doubt that this individual pursued me for I would say at least four months prior to what even happened. I think this was something for the fact-finders to hear, to hear his side of the story.

I felt as though I was deprived of that, Mr. Holston and his lack of investigation. Even pretrial, his pretrial investigation, that was pretrial, that was a critical stage though.

THE COURT: Well, we're not talking - we're talking about what Mr. Alston was going to say at trial that was going to help you.

THE DEFENDANT: The fact that the fact-finders were denied. I was denied the chance for them to test his veracity, his credibility, to see his demeanor, these things were deprived.

BY MR. WALKER: So you're speculating on what he would have said, but you have no evidence as to what he would have said would have proved your innocence?

THE DEFENDANT: My evidence is his role in the whole offense. He was very much a participant in the offense, he was the participant.

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MR. WALKER: Would you admit that when you took the stand at trial that you did not identify other than saying he visited you and was going to sic his dog on your girlfriend, there was nothing in your testimony that would have proven your innocence regarding anything that Larry Alston did?

THE DEFENDANT: There's nothing else that would have proved innocence?

MR. WALKER: I have no further questions.

THE DEFENDANT. No, I -

MR. WALKER: I'm finished. Thank you.

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(N.T. 4/20/00 pp.20-22).

Based upon the above, Petitioner has failed to make a specific, affirmative showing of what Alston would have said had he been called to testify.<sup>6</sup> Moreover, Petitioner has failed to support his conclusory assertion that Alston's testimony would likely have led to an acquittal. As such, even assuming that Mr. Holston's failure to call Alston as a witness was deficient,

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<sup>6</sup> Petitioner's motion contains no additional support for the claim of prejudice, but is merely duplicative of his arguments at the hearing. Moreover, notably, counsel for Petitioner at the 4/20/00 hearing pointed out that "[t]his Court obviously will have to resolve whether or not the defendant has made his case because of the fact that he does not know what exactly that witness would have testified to." (N.T. 4/20/00 p. 35).

Petitioner has not pointed to any record evidence which would establish that this deficiency was prejudicial as required by Strickland. Accordingly, Petitioner's ineffectiveness of assistance claim with regard to Mr. Holston's failure to call Alston as a witness is without merit and is therefore denied.

An appropriate Order follows.