

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
RUFUS STEWART,	:	
Petitioner.	:	NOS. 97-139-09, 97-329

MEMORANDUM

Padova, J.

July , 2000

Petitioner, Rufus Stewart, filed a Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C.A. §2255. For the following reasons, the Court will deny the instant Motion.

I. **BACKGROUND**

On August 7, 1997, Petitioner pled guilty to possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); and to distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). This Court sentenced him to 114 months imprisonment on December 11, 1998.

Petitioner filed the instant Motion on December 13, 1999. On January 18, 2000, he filed a Memorandum in support of his Motion. On February 15, 2000, he filed a Motion for Leave to Amend. By Order dated February 15, 2000, the Court construed these items as an Amended Petition. After Petitioner filed a Court-ordered affidavit and supplemental memorandum in support of his claim that counsel refused his request to file an appeal, the Court held an evidentiary hearing solely on this claim on June 30, 2000. Accordingly, all claims of Petitioner now are ready for decision.

II. LEGAL STANDARD

To prevail on a motion under 28 U.S.C. § 2255, the movant's claimed errors of law must be constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962).

III. DISCUSSION

Petitioner makes a total of six claims in his Motion and Amended Motion. Five of these claims are based on ineffective assistance of counsel. The sixth claim is based on extraordinary post-conviction rehabilitation under United States v. Sally, 116 F.3d 76 (3d Cir. 1997). The Court will examine each claim in turn.

A. Ineffective Assistance of Counsel

The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). In announcing what has come to be known as the Strickland test, the Court recognized that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U.S. at 686. The Strickland test has two prongs. 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. 466 U.S. at 687. 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. 466 U.S. at 687. Strickland further specifies that the appropriate test for prejudice is that “[t]he 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.” 466 U.S. at 694.

1. Failure to File Appeal Despite Petitioner’s Request

Petitioner claims that counsel was ineffective for failure to file an appeal despite his request that she do so. At the evidentiary hearing on June 30, 2000, Petitioner testified that he first apprised counsel, Christine Adair, Esq., of his desire to file an appeal in a telephone conversation that took place sometime after January 1, 1999. Ms. Adair disputed this contention. Rather, she testified that she explained to Petitioner her conclusion that filing an appeal was not in his best interests, given the lack of viable issues for appeal. Ms. Adair asserted that Petitioner agreed with her analysis. In addition, she produced a letter dated January 15, 1999, documenting their agreement not to file an appeal.

Counsel’s refusal of a petitioner’s request to appeal constitutes per se ineffective assistance of counsel. Collinson v. United States, Nos. Civ. 97-3026, Crim. 92-583-02, 1997 WL 602777, at *2 (E.D. Pa. Sept. 22, 1997) (citing Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994)). In the instant case, however, the Court finds Ms. Adair’s testimony credible, and concludes that Petitioner has not sustained his burden to prove that she refused his request. Therefore, Petitioner’s ineffectiveness of counsel claim for failure to heed his request to appeal must fail.

2. Failure to File Appeal to Preserve Petitioner’s Objection to Calculation of Criminal History Point Total

Petitioner claims that three prior convictions should have been consolidated for the purposes of the criminal history calculation. Counsel objected to the calculation at sentencing, but the Court overruled the objection. This Court did not err in its calculation of the criminal history score. Counsel cannot be faulted for failing to file an appeal based on an alleged miscalculation where the computation was in fact correct. Mayfield v. United States, 42 F.3d 1391, 1391 (7th Cir. 1994). Therefore, this claim must fail.

3. Failure to Object to the Assessment of Three Criminal History Points for a Prior Conviction

Petitioner contends that he should not have been assessed three criminal history points for a prior conviction whose sentence did not exceed one year and one month. However, the Presentence Investigation Report only assessed three points for prior convictions where the maximum pronounced sentence was greater than thirteen months. Criminal history points “are based on the sentence pronounced, not the length of time actually served.” U.S.S.G. §4A1.2 cmt., app. note 2 (1997). Thus, the Court correctly assessed three points for prior convictions with stated maximum sentences greater than thirteen months. Petitioner’s claim that counsel was ineffective for not objecting to such assessments, therefore, must fail.

4. Failure to Object to the Two-Level Enhancement for the Possession of a Firearm

Petitioner objects to this enhancement because “no firearm was possessed during the commission of the drug trafficking offense.” (Pet. at Section 12 (A).) The Sentencing Guidelines, however, mandate such an adjustment “if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” U.S.S.G. §2D1.1 cmt., app. note 3

(1997). The Court finds that the record supports the conclusion that a firearm was present, and accordingly the two-level enhancement was correct. Petitioner's claim that counsel was ineffective for not objecting to this enhancement, therefore, must fail.

5. Failure to Object to the Use of a Prior Conviction More than Ten Year Old in the Criminal History Calculation

Subsequent to filing his Motion, Petitioner withdrew this claim. (Pet. Mem. (Doc. No. 346) at 8.) The Court, therefore, need not address this claim.

B. Extraordinary Post-Conviction Rehabilitation

Petitioner claims that he is entitled to a downward departure of four levels because of his rehabilitation efforts. Such a departure, however, is not cognizable under 28 U.S.C. § 2255. United States v. Dugan, 57 F. Supp. 2d 1207, 1209 (D. Kan. 1999) (citing this Court's analysis in United States v. Gallagher, Nos. Civ. 97-6056, Crim. 95-502, 1998 WL 42282, at *5 (E.D. Pa. Jan. 9, 1998)). Accordingly, this claim also fails.

For the foregoing reasons, the Court will deny Petitioner's Motion filed pursuant to 28 U.S.C. § 2255. An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
RUFUS STEWART,	:	
Petitioner.	:	NOS. 97-139-09, 97-329

ORDER

AND NOW, this day of July, 2000, upon consideration of Petitioner's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 343), Government's Response thereto (Doc. No. 345), Petitioner's Memorandum in Support of his Motion (Doc. No. 346), Petitioner's Motion for Leave to Amend (Doc. No. 347), Government's Response thereto (Doc. No. 350), Petitioner's Reply to Government's Response (Doc. No. 351), Petitioner's Supplemental Memorandum (Doc. No. 353), Government's Response thereto (Doc. No. 354), and testimony at the evidentiary hearing on June 30, 2000, **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Motion (Doc. No. 343) as amended by subsequent submissions is **DENIED**; and
2. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2).

BY THE COURT:

John R. Padova, J.