

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

UNITED STATES OF AMERICA : CIVIL ACTION
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ROBERT ALLEN EDWARDS : (Criminal No. 97-117)

MEMORANDUM

Ludwig, J.

September 7, 2000

Defendant Robert Allen Edwards, pro se, moves to vacate, set aside or correct his sentence, 28 U.S.C. § 2255.¹

On July 25, 1997, defendant pleaded guilty to single counts of conspiracy, bank fraud, and forfeiture, and eight counts of money laundering. Under a plea agreement, the remaining counts of the 24-count indictment were dismissed. On December 23, 1997, defendant was sentenced to 84 months custody, five years supervised release, and restitution. On appeal, the Court of Appeals reversed and remanded for re-sentencing on the issue of restitution,² and on May 20 1999, the original sentence was re-imposed excepting as to restitution, which was excluded.

¹ “[A] pro se petitioner’s pleadings should be liberally construed to do substantial justice.” United States v. Garth, 188 F.3d 99, 108 (3d Cir. 1999).

² Prior to re-sentencing, defendant also filed a pro se “motion to consider adequate remedy of criminal history” and an “amended motion to consider adequate remedy.” United States v. Edwards, Cr. A. No. 97-117, docket entries 55, 56 (E.D. Pa.). Because the remand was for re-sentencing on restitution, the hearing was limited to that issue. United States v. Edwards, 162 F.3d 87 (3d Cir. 1998). Defendant’s pro se motions were denied without prejudice to reinstatement. Sentencing tr., May 20, 1999, at 3.

Defendant now challenges his sentence on three grounds — 1) his guilty plea was unlawfully induced — it was not made voluntarily or with an understanding of the nature of the charge and potential consequences, 2) the sentence was enhanced improperly by a constitutionally invalid prior state conviction, and 3) ineffective assistance of counsel. Def.’s mem. at vii-viii.

The first ground and part of the third³ are procedurally barred having not been raised on direct appeal. United States v. Frady, 456 U.S. 152, 167, 102 S. Ct. 1584, 1594, 71 L. Ed.2d 816 (1982); United States v. Essig, 10 F.3d 968, 979 (3d Cir. 1993)(“If defendants could routinely raise, in a § 2255 collateral proceeding, errors in sentencing not raised on direct appeal which the sentencing court had not had an opportunity to correct, Congress’s intent of encouraging direct appellate review of sentences under the Sentencing Guidelines would be frustrated.”); United States v. Leeper, Civ. A. Nos. 97-274, 98-4002, 98-4312, 1999 WL 200669, at *2 (E.D. Pa. April 7, 1999). To overcome the procedural bar, both cause and prejudice must be shown. “In procedural default cases, the cause standard requires petitioner to show that ‘some objective factor external to the defense impeded counsel’s efforts to raise the claim’” McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, 113 L. Ed.2d 517 (1991)(quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed.2d 397 (1986)).

³ Counsel ineffectiveness assertedly occurred at the change of plea hearing, sentencing, and on direct appeal. Def.’s mem. at viii. Since ineffective assistance of appellate counsel could not have been raised on appeal, it is not procedurally barred on this first collateral attack of the sentence.

Here, the third ground for collateral attack — ineffective assistance of appellate counsel — may excuse failure to raise other grounds on direct appeal. According to defendant, the representation he received from was “below professional standards and prejudice should be presumed.” Def.’s mem. at 19. “Ineffective assistance of counsel is cause for a procedural default.” Murray v. Carrier, 477 U.S. at 488, 106 S. Ct. at 2645.

To prevail on a claim for ineffective assistance, it must appear “(1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s error, the result would have been different.” United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997)(citations omitted). “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984). Under the Sixth Amendment, effective assistance applies throughout the proceedings. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 836, 83 L. Ed.2d 821 (1985).

The motion asserts that at the guilty plea hearing and at sentencing counsel was inadequate because of: 1) refusal to file pre-trial motions, 2) failure to assert ex post facto use of 1997 Sentencing Guidelines, 3) failure to present oral argument in support of downward departure from money laundering guidelines, and 4) insufficiency of challenge to application of “organizer or leader in a criminal

activity” enhancement. Def.’s mem. at 14-19. Appellate counsel’s failure to argue the enhancement as sentencing error is also raised. Id. at 19.

However, the record shows that pre-trial motions were heard prior to the guilty plea. The retroactivity issues were the basis for the remand for re-sentencing without mandatory restitution. See United States v. Edwards, 162 F.3d 87 (3d Cir. 1998). A motion for downward departure based on conduct outside the heartland of the money laundering guidelines was made, briefed, and argued. The sentencing hearing also included role in criminal activity, use of a prior state murder conviction in calculating criminal history category, and post-arrest rehabilitation. Sentencing tr. (Dec. 23, 1997). Both sides presented evidence. Defense counsel cross-examined the government’s witnesses, called defendant to testify, and presented argument. At counsel’s request, the downward departure motion was incorporated by reference, as was the government’s opposition. Id., at 70.

Neither cause nor prejudice resulting from defense counsel’s asserted ineffectiveness has been demonstrated.⁴ Defendant filed a direct appeal pro se.

⁴ Defendant himself moved for appointment of new counsel on the day of trial. At his instance, his original appointed counsel had previously been replaced. The motion was denied, and he was given the option to go forward with current counsel or to represent himself with counsel as standby. Defendant was dissatisfied because counsel had not filed certain pre-trial motions that he had requested. Defense counsel stated that he believed they were meritless. See hearing tr., July 25, 1997, at 8. The motions were to dismiss the indictment for vagueness and for failure to make out the elements of the crime, a motion in limine to preclude introduction of evidence of a prior crime, a motion to dismiss the indictment for multiplicity of overlapping
(continued...)

Subsequently, appointed appellate counsel argued, successfully, that restitution under the MVRA could not be assessed retroactively. According to the appellate record, no other aspects of the guilty plea or sentencing were submitted for review. Nevertheless, appellate counsel is not constitutionally ineffective simply because one argument was raised on appeal and not others. Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L. Ed.2d 987 (1983)(“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.”). Here, appellate counsel cannot be said to have been constitutionally ineffective, for which reason cause has not been shown to excuse procedural default of the previously unraised issues in the present motion.

Moreover, the defaulted issues are without merit. The guilty plea was voluntary and knowing, as required by Fed. R. Crim. P. 11. The government presented the facts of its case, see change of plea hearing tr., July 25, 1997, at 31-42, and defendant stated that he understood those facts were sufficient to prove him guilty of conspiracy, bank fraud, and money laundering. Id. at 42. He was also advised of the essential elements of each crime and the necessity of proof

⁴(...continued)

counts, and a motion for a continuance. Argument was heard, id. at 13-19, and rulings were deferred until defendant decided whether he would proceed with or without counsel. Id. at 27-28. He chose to be represented by counsel, entered into a guilty plea agreement, and pleaded guilty, mooting the motions, as reviewed with him in the guilty plea colloquy. Id. at 46.

beyond a reasonable doubt. He now claims that “it was not petitioner’s intentions [sic] to plea [sic] guilty and [sic] was willing to go to trial in order to challenge the use of the money laundering statute as applied to his conduct.” Def.’s mem. at vii. “Government proffered the District Court [sic] the record was silent as to the essential elements to prove money laundering.” *Id.* This last assertion is belied by the hearing record.⁵ Nothing in the extensive guilty plea colloquy suggests that the plea was unknowing or involuntary.

Defendant also contests the use of the money laundering Sentencing Guidelines, on the ground that his conduct was outside the heartland of money laundering activities. U.S.S.G. § 2S1.1. The government’s response is that, in addition to the procedural default, defendant agreed to the application of the money laundering guidelines in the guilty plea agreement, and the money

⁵ The transcript of the change of plea hearing is as follows:

Court: As to the crime of money laundering, the essential elements are that the person knows the property involved in a transaction represents the proceeds of some form of unlawful activity.

And the person would be — knowing that the transaction is designed in whole or in part, knows that the transaction is intended to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity.

The term knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, means that the person knew the property involved in the transaction represents proceeds from some form of activity that constitutes a felony under state or federal or foreign law, that is a crime punishable by more than a year imprisonment.

Change of plea tr., July 25, 1997, at 45-46.

laundering guidelines properly apply to his conduct. Gov't.'s mem. at 15.

Defendant cites the recent case of United States v. Smith, 186 F.3d 290 (3d Cir. 1999) for the position that his conduct was outside the heartland of the money laundering guidelines. According to Smith, “the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime.” Id. at 300. Defendant’s monetary resource was not drug trafficking; but his three bank fraud conspiracies for stolen and counterfeit checks with laundered proceeds totaling \$384,965.50 constitute “serious crime.”⁶

As to the addition of three points to the criminal history category computation for a 1973 murder conviction, there appears to be no basis for affording the relief sought.⁷ At sentencing, defendant disputed the use of the state court conviction to enhance his criminal history category; he testified that he was a gang member who was only peripherally involved in the homicide. Sentencing

⁶ Smith did not define “serious crime.” 186 F.3d at 300. Other Courts of Appeals have found non-drug related conduct within the money laundering guidelines. See United States v. Nguyen, 46 F.3d 781, 783 (8th Cir. 1995)(defendant acknowledged in plea agreement that § 2S1.1 applied; upheld use of § 2S1.1 where underlying activity was interstate gambling); United States v. LeBlanc, 24 F.3d 340, 347 (1st Cir. 1994)(gambling).

⁷ On November 30, 1973, a jury convicted defendant of first degree murder and aggravated robbery. See § 2254 proceeding, Edwards v. Commonwealth, Civ. A. No. 98-1022 (E.D. Pa.)(report and recommendation of Chief Magistrate Judge Melinson). He was sentenced to life imprisonment on the murder conviction and to a concurrent 10-20 years on the robbery. Id. The Pennsylvania Supreme Court affirmed. Id. Three criminal history points were added to defendant’s criminal history category under U.S.S.G. § 4A1.1(a). See presentence investigation report, at ¶ 54.

tr. at 51-52. On April 27, 1999, subsequent to sentencing, his § 2254 petition was denied with prejudice as untimely. See Edwards v. Commonwealth, supra.⁸

The assertability of the unconstitutionality of a state court conviction at a federal court sentencing was outlined this year in United States v. Escobales, 218 F.3d 259, 261 (3d Cir. 2000)(appropriate to challenge constitutionality of state court conviction used for enhancement purposes only if “the statute under which the defendant is sentenced explicitly provides the right to attack collaterally prior convictions used to enhance the sentence;’ or ‘the constitutional challenge to the underlying conviction is based on a claim that ‘the defendant’s right to counsel has been denied.’”)(quoting United States v. Thomas, 42 F.3d 823, 824 (3d Cir. 1994)). The decision clarified that —

[t]he defendant’s remedy in such a case is to challenge the conviction in state court or to file a 28 U.S.C. § 2254 petition to attack collaterally the underlying state conviction. See Custis v. United States, 511 U.S. 485, 497, 114 S. Ct. 1732, 1739, 128 L. Ed.2d 517 (1994). Should either of these challenges prove successful, the defendant can then ‘apply for reopening of any federal sentence enhanced by the state sentence’ or file a 28 U.S.C. § 2255 petition challenging his federal sentence. Id.

Escobales, 218 F.3d at 621. Under U.S.S.G. § 4A1.1, there is no right at sentencing to a review of the constitutionality of a sentence, excepting where a defendant was denied the right to counsel. Id. at 262-63 (no right to collaterally

⁸ The § 2254 petition included the following: 1) conviction obtained by use of a coerced confession, 2) denial of effective assistance of counsel (at trial, appeal, and on PCRA petition), 3) insufficient evidence to support conviction, 4) unconstitutional burden shift to disprove malice as an element of first-degree murder, 5) unconstitutional removal of jury’s right to find voluntary manslaughter. Edwards v. Commonwealth, supra.

attack prior convictions under U.S.S.G. § 4A1). Here, defendant's unconstitutionality claims were rejected by the state's highest court and also upon habeas corpus petition (not on the merits). While Escobales does not explicitly say so, by implication there are no conviction invalidity avenues available to a § 2255 movant beyond direct review and § 2254.

Other Courts of Appeals appear to have reached the same conclusion. Dicta in United States v. Clark, Fifth Circuit Court of Appeals, suggests that where a § 2254 petition has been denied relief other than for meeting the "in custody" requirement, "then that would end the matter" as to a § 2255 claim relative to the enhancement. United States v. Clark, 203 F.3d 358, 370 n.13 (5th Cir. 2000), petition for cert. filed, __ U.S.L.W. __ (U.S. July 21, 2000)(No. 00-122). In the Seventh Circuit, it was held, collecting cases from other circuits, "A sentence imposed following the approach of Custis is lawful and thus not subject to collateral attack under 28 U.S.C. § 2255 as long as the prior convictions remain undisturbed."⁹ Ryan v. United States, 214 F.3d 877, 877-78 (7th Cir. 2000). For

⁹ In support of this conclusion, Ryan stated:

Any convicted person has ample opportunities to seek review. Requiring defendants to use these opportunities, rather than tarry and then launch indirect collateral attacks during or after sentencing for some other offense, has significant benefits. It sends the persons to the rendering court, which have the records necessary to determine whether a conviction is invalid or not. It requires them to act promptly, while the information necessary to determine validity is available (and while reprosecution is possible, at least in theory, if the conviction is flawed).

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these reasons, defendant is now unable to question the use of the state court conviction in a motion to alter, amend or vacate his sentence.

Because defendant's procedural default has not been shown to be excusable or, in the alternative, no error has been shown in his sentence, his motion to vacate, alter or amend sentence must be denied. 28 U.S.C. § 2255.

An order accompanies this memorandum.

Edmund V. Ludwig, J.

⁹(...continued)
Ryan, 214 F.3d at 881-82.

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	No. 99-4414
	:	
ROBERT ALLEN EDWARDS	:	(Criminal No. 97-117)

ORDER

AND NOW, this 31st day of August, 2000, defendant Robert Allen Edwards's motion to alter, amend, or vacate his sentence is denied with prejudice. 28 U.S.C. § 2255. Because defendant has not made a substantial showing of denial of a constitutional right, a certificate of appealability is inappropriate. 28 U.S.C. § 2253(c)(2).

Edmund V. Ludwig, J.