

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 99-0536-1
 v. :
 :
 JAMES BUTLER : (C.A. NO. 00-4377)

MEMORANDUM AND ORDER

HUTTON, J.

March 28, 2001

Currently before the Court is James Butler's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Docket No. 30).

I. FACTUAL BACKGROUND

On September 7, 1999, the Petitioner was indicted for distribution of cocaine in violation of 21 U.S.C. § 841(a)(1)(Count 1), possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1)(Count 2), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(Count 3), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1)(Count 4). The Petitioner moved to suppress the physical evidence and the Court held a suppression hearing on November 23, 1999. On January 7, 2000, the Court issued an order denying the Petitioner's motion to suppress and the Petitioner subsequently plead guilty to counts two, three, and four of the indictment with the government

dismissing count 1. Pursuant to that guilty plea, the Petitioner was sentenced on May 19, 2000 to a term of imprisonment of 70 months, a five year term of supervised release, a fine of \$500, and a special assessment of \$300. In addition, the Petitioner forfeited \$10,515 in United States currency and a Ruger .357 magnum handgun.

As a result of this sentence, the Petitioner filed the instant motion pursuant to 28 U.S.C. § 2255 on August 28, 2000. On September 6, 2000, pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999), the Petitioner was given the opportunity to amend his Motion to include all cognizable claims, or proceed with the Motion as filed. The Petitioner opted not to supplement his original motion. Therefore, the Court must address the two claims put forth by the Petitioner in his unamended section 2255 motion. First, the Petitioner claims that he was denied effective assistance of counsel because his trial counsel failed to investigate facts suggesting that the search warrant resulting in the seizure of the physical evidence was never sworn to, signed or sealed prior to the search. Second, the Petitioner asserts that he was denied effective assistance of counsel because his trial counsel failed to argue that the Court lacked subject matter jurisdiction because Congress did not have the power to pass the statutes under which the Petitioner was convicted. The Petitioner never raised these issues on direct appeal.

II. DISCUSSION

A prisoner who is in custody pursuant to a sentence imposed by a federal court who believes "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 the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255 (West 2001). Prior to addressing the merits of the petitioner's claims, the court should consider if they are procedurally barred. See United States v. Essiq, 10 F.3d 968, 976 (3d Cir. 1993). A petitioner under section 2255 is procedurally barred from bringing any claims on collateral review which could have been, but were not, raised on direct review. See Bousley v. United States, 523 U.S. 614, 621, 118 S.Ct. 1604, 1610 (1998)(exception to procedural default rule for claims that could not be presented without further factual development); United States v. Biberfeld, 957 F.2d 98, 104 (3d Cir. 1992). Once claims have been procedurally defaulted, the petitioner can only overcome the procedural bar by showing "cause" for the default and "prejudice" from the alleged error. See Biberfeld, 957 F.2d at 104 (stating "cause and prejudice" standard). In this context, "cause" consists of "something external to the petitioner, something that cannot be fairly attributable to him," and "prejudice" means that the alleged error "worked to [the petitioner's] actual and substantial disadvantage." See Coleman v. Thompson, 501 U.S. 722,

753, 111 S.Ct. 2546, 2566 (1990)(defining "cause"); United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1595 (1982)(defining "prejudice").

The Petitioner's two claims for relief allege that his counsel was ineffective in violation of his sixth amendment right to reasonably effective assistance of counsel. See U.S. Const. amend. VI. As these claims were never raised on direct appeal, they would normally be considered barred from collateral review. However, because an ineffective assistance of counsel claim often relies on matters outside of the factual record on appeal and the defendant is often represented on appeal by the same counsel as at trial, courts have held that "in general an ineffective assistance claim which was not raised on direct appeal is not deemed procedurally defaulted for purposed of habeas review." United States v. Garth, 188 F.3d 99, 107 n.11 (3d Cir. 1999)(citing United States v. DeRewal, 10 F.3d 100, 103 (3d Cir. 1993). Despite this general rule, the Third Circuit has also considered claims of ineffective assistance of counsel procedurally barred if they were not raised on direct appeal when the arguments advanced clearly go to the underlying merits of the claim instead of counsel's failure to challenge the sentence earlier and the claim could have been brought on direct appeal without further factual development. See id. at 107.

A claim of ineffective assistance of counsel is governed by

the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). In Strickland, the Supreme Court stated that an ineffective assistance of counsel claim requires the defendant to show that their counsel's performance was defective and that the deficient performance prejudiced the defense. See id., 104 S.Ct. at 2064. Counsel's performance will be measured against a standard of reasonableness. In analyzing that performance, the court should make "every effort . . . to eliminate the distorting effects of hindsight," and determine whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." See id. at 690, 104 S.Ct. at 2066. Once it is determined that counsel's performance was deficient, the court must determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. Only after both prongs of the analysis have been met will the petitioner have asserted a successful ineffective assistance of counsel claim.

A. Failure to Argue or Investigate that the Search Warrant was never Sworn To, Signed or Sealed prior to the Search

The Petitioner claims that the original search warrant was

incomplete and fatally defective because the Philadelphia Police had the warrant signed, sealed, and validated by a state bail commissioner after they performed the search. Despite trial counsel's efforts to vigorously contest the validity of the search warrant during a suppression hearing in this case, the Petitioner asserts that his representation was ineffective because counsel knew the police had the warrant executed post-search and performed no investigation to develop that theory. When assessing an ineffective assistance of counsel claim for a failure to investigate, the court must assess a decision not to investigate "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691-92, 104 S. Ct. at 2066.

In the instant case, the Court has the benefit of testimony from the suppression hearing in evaluating the Petitioner's claim. While the Petitioner claims that the Philadelphia Police searched without a proper warrant and then had a state bail commissioner sign it after they had seized physical evidence, the testimony from the suppression hearing contradicts that position. Officer Moore, who attempted to buy drugs from the Petitioner on the night of the search, testified that his unit "already had a search warrant for"

the Petitioner's residence at the time he approached the Petitioner and he approached the Petitioner "[a] few minutes before the search." See Suppression Hr'g Tr. at 38:16-24, 39:7-25, 40:1. In addition, Sergeant Jackson testified that at the time Officer Moore interacted with the Petitioner, the search warrant had already been obtained. See Suppression Hr'g Tr. at 30:13-15. Sergeant Jackson further testified that the search warrant was going to be executed that night regardless of the result of Officer Moore's interaction with the Petitioner. See Suppression Hr'g Tr. at 30:16-19. This testimony clearly contradicts the Petitioner's position.

In assessing trial counsel's performance, the Court must look at all of the circumstances. See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Despite trial counsel's zealous advocacy, this Court previously found that the search warrant in question "contain[ed] sufficient information to provide a judicial official with a substantial basis to conclude that there was a fair probability that contraband would be found." United States v. Butler, No. CIV.A.99-536-01, 2000 WL 19541, at *2 (E.D.Pa. Jan. 7, 2000). The Court further noted that it would be difficult to "conceive of a set of facts which would provide a more credible basis for the issuance of a warrant." Butler, 2000 WL 19541, at *2. With the overwhelming support for the issuance of the warrant, the officers involved would have no motivation to delay presentation of the search warrant to the bail commissioner. This

bolsters the credibility of the officers' testimony which already convincingly establishes that the search warrant was obtained prior to the search. Looking at all of "the circumstances, applying a heavy measure of deference to counsel's judgments," the Court finds that the Petitioner's trial counsel was clearly reasonable in limiting any investigation into this avenue of defense. See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066.

For the foregoing reasons, the Court finds that the Petitioner's claim of ineffective assistance of counsel for failure to further investigate the issuance of the search warrant must fail.

B. Lack of Jurisdiction

The Petitioner's second claim of ineffective assistance of counsel is that his counsel was ineffective for failing to argue that 21 U.S.C. § 841(a)(1), 18 U.S.C. § 924(c)(1), and 18 U.S.C. § 922(g)(1) are unconstitutional. The Petitioner asserts that it is beyond Congress' power under the Commerce Clause to pass these statutes and any sentence imposed pursuant to them is unconstitutional. While he couches his claim as one of ineffective assistance of counsel, this claim goes to the merits of his underlying argument and not to the quality of his counsel. In addition, this claim could have been brought on direct appeal without any further factual development. As the Petitioner did not assert any additional "cause" for the default, the Court finds that

the Petitioner's claim is procedurally barred for his failure to raise this issue on direct appeal. See Garth, 188 F.3d at 107.

Even if the Petitioner's claim was not procedurally barred, the Court finds that it fails on the merits. All three of the statutes under which the Petitioner was sentenced have been challenged as impermissible exercises of Congressional power pursuant to the Commerce Clause in the years following the Supreme Court's decision in United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995). Because Congress made specific findings when enacting the Controlled Substances Act that the distribution of a controlled substance has a substantial effect upon interstate commerce, courts addressing the issue have upheld both section 841(a)(1) and section 924(c)(1) as permissible exercises of Congress' Commerce Clause power. See 21 U.S.C. § 801 (West 2001); United States v. Walker, 142 F.3d 103, 111 (2d Cir. 1998); see also Dover v. United States, No. CRIM.A.96-181-1, 1999 WL 239281, at *3 (E.D.Pa. Apr. 8, 1999)(enumerating cases where various circuit courts have upheld both § 841(a)(1) and § 924(c)(1)). In addition, section 922(g)(1) has been upheld as a permissible exercise of the Commerce Clause power because the explicit language of the statute itself makes it applicable only when "interstate or foreign commerce" is involved. See 18 U.S.C. § 922(g)(1)(West 2001); United States v. Henson, 123 F.3d 1226, 1233 (9th Cir. 1997); see also Dover, 1999 WL 239281, at *3 (enumerating cases where various circuit courts have upheld § 922(g)(1)). Because the constitutionality of these statutes has been upheld, the Petitioner's attorney could not be ineffective for

failing to raise this fruitless argument. In addition, there can be no prejudice to the Petitioner because if the claim had been raised, it would have been rejected.

For the foregoing reasons, the Petitioner claim of ineffective assistance of counsel for failure to contest the constitutionality of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 924(c)(1), and 18 U.S.C. § 922(g)(1) must fail.

An appropriate Order follows.

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O R D E R

AND NOW, this 28th day of March, 2001, upon consideration of Petitioner James Butler's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Docket No. 30), IT IS HEREBY ORDERED that:

- (1) the Petitioner's Motion is **DENIED WITH PREJUDICE**; and
- (2) a certificate of appealability is not granted because Petitioner has not made a substantial showing of the denial of a Constitutional right.

BY THE COURT:

HERBERT J. HUTTON, J.