

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

THOMAS E. KELLY :
 :
 v. : CIVIL ACTION
 : NO. 00-3276
 : (Crim No. 98-0013)
 UNITED STATES OF AMERICA :

M E M O R A N D U M

WALDMAN, J.

April 27, 2001

Petitioner was found guilty by jury of conspiracy to transport stolen checks in interstate commerce, interstate transportation of stolen checks and money laundering. He was sentenced to imprisonment for a period of 72 months to be followed by a period of supervised release of three years. The conviction and sentence were affirmed on April 13, 2000.

Petitioner has filed a lengthy petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, supported by a somewhat meandering forty-four page brief. Virtually all of the discernible grounds for relief are predicated on alleged ineffective assistance of counsel at trial, sentencing or on appeal.

To demonstrate ineffective assistance of counsel, a petitioner must show that his counsel's performance fell below objective standards of reasonableness and that he was actually prejudiced by counsel's deficient performance. See [Strickland v. Washington](#), 466 U.S. 668, 691 (1984); [Werts v. Vaughn](#), 228 F.3d

178, 203 (3d Cir. 2000). To demonstrate prejudice, petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Petitioner claims that his counsel was ineffective for failing to seek a directed verdict on the money laundering count. The evidence presented at trial clearly satisfied the government's burden under the federal money laundering statute, 18 U.S.C. § 1956(a)(1)(B)(I). The government presented evidence from which one could quite reasonably find beyond a reasonable doubt that petitioner knowingly caused the transportation of stolen checks from Pennsylvania to Texas by Rowina Gassaway and then placed them in a bank account he maintained in the name of a fictional enterprise, "I & I Sling, Inc.," for the purpose of concealing their illegal origin. Counsel's decision not to seek a directed verdict was not professionally deficient and certainly did not prejudice petitioner.

Petitioner claims that his counsel was ineffective for failing to argue "effectively" for a downward departure on the ground that petitioner's money laundering activity involved conduct outside the heartland of the Sentencing Guidelines; failing to argue that petitioner was a minimal participant; failing to seek a reduction in petitioner's offense level for acceptance of responsibility; and, failing to object to the

inclusion of certain prior offenses in petitioner's criminal history calculation.

In fact, petitioner's counsel argued forcefully in a sentencing memorandum and at sentencing proceedings for a downward departure on the ground that petitioner's conduct fell outside the heartland of federal money laundering cases. Petitioner subsequently raised this issue on appeal and the Court of Appeals concluded that this sentencing argument was "clearly without merit." A § 2255 motion may not be used to relitigate matters raised on appeal. See United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981). Petitioner seeks to litigate this issue for the third time by recasting it as one for ineffective assistance of counsel. Counsel competently pursued a downward departure on petitioner's behalf. That petitioner is displeased with the outcome does not render counsel ineffective.

A minimal participant is someone who was "the least culpable of those involved in the conduct of a group," and a "minor participant" is someone who is "less culpable than most other participants." U.S.S.G. § 3B1.2, cmt. n. 1, 3.

Ms. Gassaway stole checks which she then conveyed to petitioner who laundered them through a sham bank account, withdrew the funds and then divided them between himself and Ms. Gassaway. Petitioner and Ms. Gassaway were equally culpable in the scheme to transport stolen checks and petitioner was the

principal participant with respect to the money laundering which was the basis of his offense level. Counsel was not ineffective in declining to argue for an offense level reduction for petitioner's role.

Counsel also was not ineffective in not seeking an offense level reduction for acceptance of responsibility. Petitioner never acknowledged culpability or responsibility for his criminal conduct which he characterized at his sentencing proceeding as a "trivial matter."

Petitioner claims that he should not have received criminal history points for three misdemeanor offenses. He contends that two misdemeanors on which the court deferred adjudication to allow petitioner to serve a term of probation and pay a fine followed by dismissal should be considered "expunged convictions" and thus not counted pursuant to § 4A1.2(j). There is a distinction, however, between sentences for convictions that are set aside for reasons unrelated to innocence such as "to remove the stigma associated with a criminal conviction" which are counted and sentences for expunged convictions which are not counted. See U.S.S.G. § 4A1.2, cmt. n.10. Petitioner's prior offenses are in the former category and were appropriately counted. See United States v. Griffin, 150 F.3d 778, 787 (7th Cir. 1998) (Texas conviction "set aside" for reasons other than innocence properly counted toward defendant's criminal history

score).

The third offense was theft by check for knowingly passing a check with insufficient funds which petitioner contends is sufficiently similar to "insufficient funds check," an offense enumerated in the Sentencing Guidelines as one that not to be counted. See U.S.S.G. § 4A1.2(c)(1). The offenses enumerated in § 4A1.2(c)(1), however, may be counted if the sentence "was a term of probation of at least one year." For this offense, petitioner was sentenced to one year probation.

Petitioner contends that venue was lacking in the Eastern District of Pennsylvania for his money laundering prosecution. He essentially argues that the failure of the court to dismiss petitioner's case for lack of venue was plain error; that petitioner's counsel was ineffective in mistakenly raising venue as a jurisdictional challenge; and, that the Court of Appeals should have excused the failure to object to venue in light of the Supreme Court's intervening opinion in United States v. Cabrales, 524 U.S. 1 (1998).

The Circuit Court found that petitioner's attorney mistakenly characterized a venue objection as a jurisdictional objection and noted that petitioner waived any venue objection by not raising it at trial. The Court acknowledged counsel's argument that this procedural default should be excused because of the intervening opinion in Cabrales but found that since this

argument was presented in the context of plain error, relief was inappropriate. The Court noted that it would be impossible to find that the court had committed plain error by failing to "sua sponte make a ruling predicated on an opinion that did not exist." The Court also made clear that "[i]n any event, we doubt that Kelly's venue objection is valid."

The Court of Appeals has already considered and rejected petitioner's plain error argument. Petitioner's other arguments are also unavailing as he has not demonstrated that venue was improper in the Eastern District of Pennsylvania.

Petitioner relies on Cabrales. In that case, the Court found that venue in a Missouri federal court was improper for defendant's money laundering prosecution when all of the conduct comprising the money laundering took place in Florida and the defendant was not charged with the underlying criminal drug trafficking conspiracy tied to Missouri. See Cabrales, 524 U.S. at 6-8. The Court found that defendant's mere knowledge of the anterior illegal activity in Missouri which generated the laundered funds was "of no moment" in the venue analysis. Id. at 8. The Court also found that the money laundering could not be labeled a "continuing offense" when Cabrales was not involved in the transportation of the laundered money from Missouri to Florida. Id. Petitioner argues that his case is indistinguishable from Cabrales. It is not.

In contrast to Cabrales, petitioner was charged with the underlying offense of transporting stolen checks in interstate commerce. See United States v. Aronds, 2000 WL 303003, *11 (6th Cir. 2000) ("Cabrales does not decide the appropriate venue when the defendant is charged both with money laundering and with the underlying crime."). Further, the underlying offense for which petitioner was also convicted charged him with knowingly transporting criminally generated property from Pennsylvania to Texas.¹ Petitioner was charged and convicted of the offense underlying the money laundering charge. Conviction of the predicate offense established his involvement in the transportation of the criminally generated funds from Pennsylvania to Texas. The Court of Appeals was well aware of Cabrales when it expressed its "doubt that Kelly's venue objection is valid."²

Petitioner contends his counsel was ineffective for failing to "protect [his] equal protection rights [under] the U.S. constitution to individual states' constitutions rights."

¹Counts two through four of the indictment charge that petitioner "did knowingly transport, transmit, transfer and cause to be transported, transmitted and transferred [stolen checks] in interstate commerce from Aston, Pennsylvania to Texas."

²As to the claim of ineffective assistance of counsel, there also has been no showing of prejudice, that is that the outcome of his trial would have been different had venue been moved to Texas. The government presented convincing evidence including the testimony of petitioner's confederate, all of which could likewise have been presented in Texas.

Petitioner explains that the Texas Constitution prohibits someone being prosecuted outside of Texas for a crime committed in Texas. Petitioner presumably refers to section 20 of article I of the Texas Constitution which states that "[n]o person shall be transported out of state for any offense committed within the same." Of course, all provisions of Texas law are subordinate to federal law by virtue of the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI §2. Petitioner was properly indicted in this District by federal authorities pursuant to federal law. As Texas itself has recognized, this state constitutional provision "has reference only to an offense against the constitution or laws of this State. This provision of the Texas constitution could not control the government of the United States in the enforcement of its penal laws." Robin v. Ely & Walker Dry Goods Co., 137 S.W.2d 164, 167 (Tex. App. 1940).³

Petitioner claims that his counsel was ineffective for failing to object to the composition of his jury which he asserts was comprised exclusively of white jurors.⁴ He contends that the trial of a black defendant by a white jury violates the dictates

³Petitioner's suggestion that his prosecution in Pennsylvania was incompatible with the Declaration of Independence also lacks merit.

⁴The court has no recollection of the racial composition of the panel or jury.

of Batson v. Kentucky, 476 U.S. 79 (1986). Batson held that a prosecutor's exercise of preemptory challenges deliberately to exclude members of a particular race from a jury is unconstitutional. Id. at 89. Neither Batson nor its progeny recognize a right to a jury of any specific racial composition. There is no evidence or averment that the prosecutor systematically used preemptory challenges to exclude non-whites from the petit jury.

Petitioner questions his counsel's effectiveness in advising him not to testify. Petitioner acknowledged this advice was based on the fact that the prosecutor would effectively impeach any testimony with three prior convictions for felonies involving dishonesty.⁵ It was in fact a far more effective strategy for the defense to keep the focus on the credibility of the key prosecution witness, the cooperating coconspirator, than to let the focus shift to petitioner's credibility.

Petitioner claims that his counsel was ineffective in not attempting to eliminate any reference to petitioner in his co-conspirator's confession. Petitioner relies on cases applying the Bruton rule. See Bruton v. United States, 391 U.S. 123, 127-28, 134 n. 10 (1968). That reliance is misplaced. Bruton and its progeny address the admission of an extrajudicial

⁵Petitioner was convicted of aggravated theft in 1990, of felonious misuse of a stolen credit card in 1992 and of theft in 1995.

statement of a non-testifying collaborator which incriminates the aggrieved defendant. In the instant case, Ms. Gassaway testified and was subject to cross-examination regarding all aspects of that testimony - those which were self-incriminating and those which inculpated petitioner.

Petitioner particularly decries as "hearsay" and violative of the "confrontation clause" testimony of Ms. Gassaway about petitioner's statement to her regarding his involvement with stolen credit cards. Ms. Gassaway testified that she telephoned petitioner and told him she had been referred to him as someone who might be able to help her liquidate some checks. She testified that he responded that he had been in a situation similar to hers when he had fifty or so stolen credit cards.

A statement made by a defendant that is offered against him at trial is not hearsay. See Fed. R. Evid. 801(d)(2). It is evident that the Confrontation Clause, which grants a criminal defendant "the right to be confronted with the witnesses against him," cannot be used by a defendant to exclude his own statements. As noted, Ms. Gassaway was subject to cross-examination on the totality of her testimony including her recitation of what petitioner said to her during the criminal venture.

Insofar as petitioner suggests that this testimony should have been excluded as inadmissible evidence of a prior bad

act, it was admissible to show knowledge and intent. See Fed. R. Evid. 404(b). See also United States v. Mickens, 926 F.2d 1323, 1329 (2d Cir. 1991) (testimony that drug dealer visited defendant in jail relevant to show that defendant knew laundered money was derived from drug profits); United States v. Miroff, 606 F.2d 777, 780 (7th Cir. 1979) (testimony that defendant previously attempted to sell stolen property admissible to prove defendant was knowingly transporting stolen merchandise in interstate commerce); United States v. Lester, 282 F.2d 750, 754 (3d Cir. 1960)(testimony that defendant admitted to stealing property not included in the indictment for conspiracy to transport stolen property in interstate commerce admissible to show guilty knowledge). The probative value of this testimony was not substantially outweighed by any unfair prejudice. See Fed. R. Evid. 403. The government could properly show that Ms. Gassaway had not selected petitioner by chance from a telephone directory and the testimony about petitioner's statement was highly probative to show that he knew he was discussing the transport and laundering of stolen funds. The thrust of petitioner's defense was the purported insufficiency of proof that he knew the checks he received and funneled through the I & I Sling account were stolen.

Petitioner contends that his counsel was ineffective for not objecting to two statements by the court which petitioner

suggests were prejudicial. Neither statement was made in the presence of the jury and neither statement was prejudicial. Petitioner suggests that the court referred to him as a "bum and crook." It did not. Petitioner lifts these words from a colloquial summary during a recess of the inferences each party hoped would be drawn from the testimony of Ms. Gassaway and a discussion of the then rather obvious centrality of her testimony. The other remark was made during a post-trial hearing on the government's request to revoke petitioner's bail and detain him pending sentencing. In considering petitioner's counsel's suggestion that strict conditions could be imposed to obviate any risk which could be enforced by the pretrial services office in San Antonio, the court referred to statements that "suggested they were pretty accommodating and loosey-goosey" about enforcing conditions of release. The court continued that "if it were this district, I have confidence that the office would enforce electronic monitoring and would do all the other things." There was nothing prejudicial about this observation. It reflected undeterred infractions by petitioner of pretrial release. Ultimately, the court allowed petitioner to return to Texas on release pending sentencing.

Petitioner contends that his counsel was ineffective for failing to question the jury about the reasons for their verdict. If petitioner is suggesting that the jury should have

been polled, it was. Following the rendering of their verdict, the jury was polled as to each count. The verdict was clear and unambiguous. If petitioner is suggesting that counsel should have inquired into the jurors' statements or mental processes during deliberations, this is prohibited. See Fed. R. Evid. 606(b).

Petitioner claims that his counsel was ineffective for failing to call witnesses and conduct more investigation. The witnesses specified are petitioner's wife, parents and pastor. He does not specify what admissible exculpatory testimony they would have given. Petitioner's wife was initially present and elected not to testify after consulting with counsel and petitioner and considering the risk of self-incrimination.⁶ As to further investigation, petitioner specifies only that more diligent investigation into Ms. Gassaway's "family affairs" would have provided evidence to further discredit her. Petitioner does not specify what admissible evidence of Ms. Gassaway's "family affairs" he is alluding to. In any event, Ms. Gassaway was found credible despite an admitted significant criminal history. It is difficult to discern anything about her "family affairs" which would have further materially affected her credibility. There is no basis on which one could find that there is any reasonable

⁶It appeared that petitioner's wife also had access to the fictitious "I & I Sling, Inc." account.

probability that the result of the trial would have been different had such witnesses been called or such additional investigation been undertaken.

Petitioner claims that his counsel was ineffective for failing to argue prosecutorial misconduct on appeal. Insofar as he suggests that it was misconduct for the prosecutor to state that a question of venue had not been properly raised, the short answer is that petitioner himself presents this as a basis for ineffective assistance of counsel. In fact, a question of venue was not properly raised and the government made no misrepresentation to the Court of Appeals. Insofar as petitioner suggests that it was misconduct for the prosecutor to refer in closing argument to evidence admitted (without objection) at trial, it plainly was not.

Petitioner finally claims that if each purported act of ineffective assistance of counsel does not warrant relief, the aggregate of the conduct complained of does. Petitioner has not demonstrated any deficiency or combination of deficiencies by counsel which would have resulted in a different outcome.

It clearly appears from the petition and record that petitioner is not entitled to the relief he seeks. The petition will be denied. An appropriate order will be entered.

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

THOMAS E. KELLY	:	
	:	CIVIL ACTION
v.	:	NO. 00-3276
	:	(Crim No. 98-0013)
UNITED STATES OF AMERICA	:	

O R D E R

AND NOW, this day of April, 2001, upon consideration of petitioner's petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said petition is **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.