

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
STEVEN B. ZATS	:	NO. 97-590-01
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 26th day of October, 2001, upon consideration of Motion Under 28 U.S.C. § 2255 to Modify the Sentence filed by defendant, Steven B. Zats, on August 31, 2001 (Document No. 82), Supplemental Memorandum for Section 2255 Motion (Document No. 85), Government's Response to Section 2255 Petition (Document No. 86), Defendant's Reply to Government's Response to Section 2255 Motion (Document No. 89), and letters from Steven B. Zats to the Court dated October 9, October 15, and October 19, 2001,¹ for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant, Steven B. Zats', Motion Under 28 U.S.C. § 2255 to Modify the Sentence, as supplemented, is **DENIED WITHOUT PREJUDICE** to defendant's right to file an appropriate motion after the United States Court of Appeals for the Third Circuit rules on the defendant's pending appeal.

MEMORANDUM

I. BACKGROUND

Defendant, Steven B. Zats, was charged in a sixteen-count Indictment with fraud and tax

¹Copies of defendant's letters of October 9, October 15, and October 19, 2001, to the Court shall be docketed.

offenses. The charges arose from his conduct as an attorney collecting debts on behalf of numerous clients. On October 9, 1998, defendant pled guilty to Count One, charging conspiracy to commit mail fraud, wire fraud, and a tax offense, in violation of 18 U.S.C. § 371, and to Count Sixteen, charging tax evasion, in violation of 26 U.S.C. § 7201.

On September 11, 2000, defendant was sentenced, inter alia, to incarceration of thirty-three (33) months. Thereafter, defendant filed a Notice of Appeal; the appeal is presently pending.

On August 31, 2001, defendant filed a Motion under 28 U.S.C. § 2255, seeking revision of his sentence to permit him to spend the remainder of his term in home detention rather than prison. The claim for sentence reduction is based on defendant's argument that the Government acted in bad faith in failing to file a motion for downward departure under Federal Rule of Criminal Procedure 35(b) for substantial assistance provided after sentencing. In addition, defendant contends he is entitled to a reduction in his sentence for humanitarian and financial hardship reasons. For the reasons stated below, the Motion is denied without prejudice to defendant's right to file an appropriate motion after the United States Court of Appeals for the Third Circuit rules on his appeal.

II. DISCUSSION

Defendant states in his papers that he filed his Motion under § 2255 while his appeal was pending because he concluded such a motion had to be filed within one year of sentencing. According to defendant, the time for filing his Motion expired on September 11, 2001.

Defendant's argument with respect to the one-year deadline for the filing of a § 2255 motion is in error. To the contrary, the one-year statute of limitations set forth in § 2255 has not

begun to run in this case. That one-year statutory period begins to run at the expiration of the time for filing a direct appeal. Kapral v. United States, 166 F.3d 565 (3d Cir. 1999).

The appeal in this case involves the propriety of the two-level enhancement adopted by this Court under § 3A1.1 of the Sentencing Guidelines based on its conclusion that the offense of conviction affected vulnerable victims. If defendant is successful in his appeal, his conviction will stand, but his Guideline Sentencing Range will be reduced. In that event, this Court, on remand, would be required to correct the sentence. On the other hand, if the appeal is unsuccessful, and defendant files a petition for writ of certiorari to the Supreme Court, the one-year period for filing a § 2255 petition begins to run when the Supreme Court rules on the petition. If defendant does not seek review in the Supreme Court, the one-year period will begin to run ninety days after the Third Circuit renders its decision. Id. at 577.

There is no doubt this Court has jurisdiction to consider defendant's § 2255 Motion. However, the Third Circuit cautioned in Kapral that: “[A] collateral attack [on a sentence] is generally inappropriate if the possibility of further direct review remains open.” Id. at 570. The Court also considered the Advisory Committee Note to Rule 5 of the Rules Governing Section 2255 Proceedings which provides, inter alia, “. . . that the orderly administration of criminal justice precludes considering such a motion absent extraordinary circumstances. . . .” Id. at 572.

The Court, taking all of the underlying factors into consideration, concludes that the orderly administration of the criminal justice system in this case precludes consideration of defendant's § 2255 Motion while his appeal is pending. Defendant is asking this Court to reduce his sentence. He is, in essence, asking the Court of Appeals to do the same thing for different reasons. Until the Court of Appeals has ruled, this Court will not know whether defendant's

Guideline Sentencing Range determined at sentencing will be affirmed. Ruling on defendant's request for a reduced sentence under those circumstances is, in the judgment of this Court, inappropriate.

The Third Circuit has cautioned that a collateral attack on a sentence while the sentence is at issue in a direct appeal is generally inappropriate absent extraordinary circumstances. This Court finds no extraordinary circumstances in this case and, to the contrary, concludes that the relationship between the issues presented on appeal and the issues presented in defendant's § 2255 Motion make consideration of a § 2255 motion on the present state of the record totally inappropriate.

III. CONCLUSION

For all of the foregoing reasons, defendant's Motion under 28 U.S.C. § 2255 to Modify the Sentence, as supplemented, is denied without prejudice to defendant's right to file an appropriate motion after the United States Court of Appeals for the Third Circuit rules on defendant's pending appeal.

BY THE COURT:

JAN E. DUBOIS, J.