

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

LUIS RODRIGUEZ : CIVIL ACTION
Petitioner :
v. :
UNITED STATES OF AMERICA : NO. 01-2680

MEMORANDUM

ROBERT F. KELLY, Sr. J.

NOVEMBER 8, 2001

Luis Rodriguez has filed a motion under 28 U.S.C. §2255, seeking relief from a sentence imposed upon him by this Court. Rodriguez and Thomas Hall were each convicted on one count of conspiracy to possess with intent to distribute cocaine and one count of using or carrying a firearm in connection with a drug trafficking offense. These convictions arose out of defendant's attempted robbery of two DEA confidential sources of their cocaine.

In his motion, petitioner summarizes the issues raised as follows:

- (1) There was no sufficient evidence to sustain a verdict against the petitioner on the charge of using or carrying a firearm in connection with a drug trafficking crime in violation of title 21 U.S.C. Section 924(C), where petitioner was not present or had proximity nor accessibility.
- (2) The trial court committed prejudicial error in allowing the government to introduce evidence of a violent crime, that ran against the goals of the alleged conspiracy that created a variance from the indictment.
- (3) Whether the petitioner's Fifth and Sixth Amendment rights to effective assistance of counsel were violated, due to substantial deficient performances to call extremely critical witness to testify.

Issues one and two are dismissed for the reason that they were raised and denied in a direct appeal from this Court. See Memorandum Opinion of Judge Barry dated March 8, 2000.

Once a legal argument has been litigated and decided adversely to a criminal defendant at this trial and on direct appeal, it is within the discretion of the District Court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. §2255. U.S. v. Orejuela, 639 F.2d 1055, 1056 (3rd Cir. 1981). Rodriguez does not even allege any unusual circumstances that would justify this Court reconsidering issues one and two.

In the third issue raised by Rodriguez, he contends that his counsel was ineffective for failing to call crucial witnesses. While Rodriguez complains that counsel failed to call crucial “witnesses” to undermine the gun testimony, he identifies only one by name. Rodriguez’ petition included a handwritten note from Stephen Reed a/k/a “Frog”, which states that he did not sell a gun to Jerry. Rodriguez is referring to trial testimony from Jerry Brooks that he purchased a gun from a street addict named “Frog” to use in the robbery attempt, and that Rodriguez was there at the time”. Rodriguez cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness by supplying a scrap of paper on which is written words to the effect that he did not sell a gun to Jerry. Rather than restating the facts as testified to at trial, the Court adopts the Statement of Facts set forth in the Government Appellate Brief in great detail, which we find to be accurate. See Exhibit A

In view of the overwhelming evidence against Rodriguez, I find that Rodriguez has failed to demonstrate that his representation fell below the objective standard of reasonableness required.

For these reasons, I will deny the motion without a hearing.

I, therefore, enter the following Order.

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ORDER

AND NOW, this day of NOVEMBER 2001, after considering the Petition for Writ of Habeas Corpus and the Brief filed by the Government together with the record papers, it is hereby

ORDERED that the Petition for a Writ of Habeas Corpus is DENIED with prejudice. There is no probable cause to issue a Certificate of Appealability.

BY THE COURT:

ROBERT F. KELLY, J.