

The underlying facts concern an incident where officers went to an apartment building with a warrant to arrest William Kearney. Investigator Orest Zachariasevych (“Zachariasevych”) and Officer Dennis F. Bauer (“Bauer”), covered the rear of the property while the warrant was executed by Investigator Samuel Turner (“Turner”), Detective John L. Maddox (“Maddox”) and other officers at the front door. While Turner, Maddox, and the others were knocking on the front door and announcing that they were police, a man later identified as Banks, leaned out the rear third floor window and pointed a handgun in the direction of Zachariasevych and Bauer. Banks then ducked back inside after the two officers drew their weapons and yelled for Banks to drop his weapon.

Zachariasevych notified Turner, Maddox, and the others by radio that a male with a gun appeared at the third floor rear window. After Maddox, Turner and the other officers heard the radio broadcast, they forced the door to the apartment building open and entered. Maddox went directly to the third floor and entered the rear room. In the room was an open window facing the rear of the property, a bed and a pile of clothes. No one was in the room when Maddox entered. However, Maddox did discover on the bed the handgun which was later identified as the one Banks pointed at Zachariasevych and Bauer. Also discovered in the room were another handgun, a shotgun and Banks’ photo identification card. Banks, dressed only in a t-shirt and boxers, then identified himself to Maddox and asked if he could retrieve clothes from his bedroom, which was the room in which Maddox had found the guns and identification.

At the trial, Elbert Corbin (“Corbin”), the owner of the property, testified that Kevin Banks rented the rear third floor room from him. However, Banks presented a witness who testified that Banks did not live at the apartment building and that he had only recently arrived there. Banks also testified that he did not live at the property and had only recently

arrived there to talk with Corbin. Banks also presented a witness who stated that she heard a police officer at the front of the building say he could see a gun. Banks did not appeal his conviction.

II. STANDARD

A *pro se* petitioner's pleadings should be liberally construed in order to do substantial justice. Irrizari v. U.S., 153 F. Supp.2d 722, 726 (E.D. Pa. 2001)(citing Lewis v. Attorney Gen., 878 F.2d 714, 722 (3d Cir. 1989)). A prisoner, 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; U.S. v. Rodriguez, 153 F. Supp.2d 590, 593 (E.D. Pa. 2001). The district court has discretion in determining whether to hold an evidentiary hearing on a prisoner's motion under Section 2255. Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989); Rodriguez, 153 F. Supp.2d at 593. In exercising that discretion, the court must determine whether the petitioner's claims, if proven, would entitle him to relief and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. Gov't of the Virgin Islands v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994); Irrizari, 153 F. Supp.2d at 726.

In U.S. v. Essig, the United States Court of Appeals for the Third Circuit (“Third Circuit”) stated that the district court should utilize a two step approach in determining whether a petitioner has raised an issue of material fact that necessitates a hearing. U.S. v. Essig, 10 F.3d 968, 976-977 (3d Cir. 1993). First, if the petitioner is raising an issue for the first time, the court should inquire whether the petitioner's failure to raise any objection at sentencing or on direct appeal constitutes a procedural waiver which would bar the petitioner from bringing the claims.

Id. Second, if there is no waiver, the court should inquire into whether the petitioner has alleged an error serious enough to warrant consideration under Section 2255. Id. Only if these two steps are met must the district court hold a hearing to determine if the factual allegations are true. Irrizari, 153 F. Supp.2d at 726.

Under the first step, a petitioner is procedurally barred from bringing any claims on collateral review which could have been, but were not, raised on direct review. Bousley v. U.S., 523 U.S. 614, 622 (1998); U.S. v. Biberfeld, 957 F.2d 98, 104 (3d Cir. 1992). Once claims have been procedurally defaulted, the petitioner may only overcome the procedural bar by showing “cause” for the default and “prejudice” from the alleged error. Biberfeld, 957 F.2d at 104. “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.’” U.S. v. Rodriguez, 153 F. Supp.2d 590, 594 (E.D. Pa. 2001)(quoting Coleman v. Thompson, 501 U.S. 722, 753 (1991)(defining “cause”) and U.S. v. Frady, 456 U.S. 152, 170 (1982)(defining “prejudice”)).

Under the second step, if the petitioner waived the alleged errors by failing to raise them on direct review, then the court does not determine whether the errors are serious enough to permit collateral review under Section 2255. Id. at 976-77. However, even if the alleged errors were not waived, the errors must be quite serious in order to be actionable. In fact, the Third Circuit has stated that “[h]abeas corpus relief is generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.” U.S. v. DeLuca, 889 F.2d 503, 506 (3d Cir. 1989)(citing Hill v. U.S., 368 U.S. 424, 428 (1962)).

III. ALLEGATIONS/ANALYSIS

Banks asserts eight grounds under which he alleges that the sentence should be vacated, set aside, or corrected. Specifically, Banks alleges: (1) that evidence was gained by an illegal search and seizure; (2) that the officers did not satisfy the “knock and announce” rule; (3) that the officers’ statements contradict each other on various issues; (4) ineffective assistance of counsel; (5) that the judge incorrectly answered the jury’s question; (6) that the felon in possession of a firearm statute is not suitable for the federal court to adjudicate, but should be brought in the state court; (7) that a government witness was threatened by the government; and (8) that Maddox, during the hearing on the Motion to Suppress, described the wrong room as belonging to Banks. Banks has waived Grounds 1, 2, 3, 5, 7, and 8 because he has failed to raise them on direct review. Essig, 10 F.3d at 976. Furthermore these Grounds are also without merit. Ground 4, ineffective assistance of counsel, is also without merit because Banks cannot show that his attorney’s, Edson Bostic (“Bostic”), performance fell outside “the wide range of professionally competent assistance” or that he was prejudiced by Bostic’s actions. Strickland v. Washington, 466 U.S. 668, 689 (1984). Lastly, Ground 6, that “a convicted felon in possession of a firearm is not suitable for federal court but usually punished by the state”, is frivolous and without merit. (§ 2255 Mot., Ground 6).

A. The Search and Seizure of Evidence.

Banks alleges that the police improperly entered the apartment building because they only had a bench warrant and not a search warrant. Thus, Banks claims that the evidence found in his room was illegally obtained. This issue was raised and rejected in the hearing on the Motion to Suppress. Moreover, Banks did not raise the issue on direct review and thus he has waived it. Essig, 10 F.3d at 976.

Also, Banks has not shown cause for the default or prejudice from the alleged error as the Ground is without merit. Biberfeld, 957 F.2d at 104. The police had probable cause to enter the building and arrest Banks after Banks pointed the handgun at Zachariasevych and Bauer. See e.g. 19 Pa. C.S.A. §§ 908 and 2705. Bank's actions also created exigent circumstances which allowed the police to arrest Banks and search for weapons. Exigent circumstances "include those in which officers fear for their safety, where firearms are present, or where there is a risk of a criminal suspect's escaping or fear of destruction of evidence." U.S. v. Rico, 51 F.3d 495, 501 (5th Cir. 1995). Therefore, the officers were justified in entering the building to arrest Banks and to seize the firearms and ammunition.

B. The Knock and Announce Rule.

Banks further claims that the police did not satisfy the "knock and announce" rule when they entered the apartment building. Banks also did not raise the issue on direct review and thus he has waived it. Essig, 10 F.3d at 976. Moreover, Banks has not shown cause for the default or prejudice from the alleged error as the Ground is without merit. Biberfeld, 957 F.2d at 104. Banks admitted that he heard the police knock on the door and identify themselves before entering the residence. (Resp. to § 2255 Motion, Ex C. at 229). Also, the exigent circumstances that were created when Banks pointed the handgun at Zachariasevych and Bauer allowed the officers to force entry into the building without waiting for an occupant to open the door. See Richards v. Wisconsin, 520 U.S. 385, 391 (1997); Bodine v. Warwick, 72 F.3d 393, 397 (3d Cir. 1995). Therefore, the "knock and announce" rule was satisfied in this case.

C. Contradictory Statements.

Banks alleges that some of the officers' testimony regarding what Zachariasevych said in the radio transmission is contradictory and thus the Motion to Suppress should not have

been denied. Banks also did not raise this issue on direct review and thus he has waived it. Essig, 10 F.3d at 976. Moreover, Banks has not shown cause for the default or prejudice from the alleged error. Biberfeld, 957 F.2d at 104. After a review of the relevant transcripts, this Court is unable to locate any prejudicial contradictions. Although the various officers' accounts of the radio transmission are not identical, they do not contradict each other. Rather, while some of the officers simply gave less or remembered less information about the transmission, all generally testified that the transmission concerned a male with a firearm at the third floor rear window of the building. Therefore, there is no merit to this claim.

D. Ineffective Assistance of Counsel.

Banks alleges that the assistance of his counsel, Bostic, was ineffective because Bostic failed to: (1) move for a mistrial after a juror may have seen Banks while handcuffed; (2) have the firearms fingerprinted after Banks requested him to do so; (3) question Maddox about one particular document; and (4) advise Banks of his right to appeal from the hearing on the Motion to Suppress. Generally an ineffective assistance of counsel claim which was not raised on direct appeal is not deemed procedurally defaulted for purposes of *habeas* review and such a claim is properly raised for the first time in the district court under Section 2255. U.S. v. Garth, 188 F.3d 99, 107 n. 11 (3d Cir. 1999).

In Strickland, the Supreme Court stated that an ineffective assistance of counsel claim requires a two prong inquiry. Banks must first establish that Bostic's performance was deficient and that he made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment. Strickland 466 U.S. at 687. Banks must demonstrate that Bostic's representation fell below an objective standard of reasonableness. Id. at 687-88. Attorney competence is measured by "reasonableness under prevailing professional norms." Id.

at 688. In analyzing counsel's 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." Id. at 690. Furthermore, it is Banks who must overcome the strong presumption that his attorney's actions constituted sound trial strategy. Id. at 689-690. Therefore, simply because one of the attorney's tactics in retrospect appears unsuccessful, does not necessarily indicate that the tactic was unreasonable. See Strickland, 466 U.S. at 689; U.S. v. Soto, 159 F. Supp.2d 39, 44 (E.D. Pa. 2001).

Second, Banks must show that he was actually prejudiced. Id. at 694. This prong requires that Banks show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The American Bar Association Standards for Criminal Justice may be employed as an advisory guideline in determining the reasonableness of an attorney's performance. Soto, 159 F. Supp.2d 39, 44 (citing Weatherwax, 20 F.3d 572, 579). The ABA Standard for Criminal Justice § 4-5.2 (3d ed. 1993), describes what decisions are ultimately for the client to decide and which are within the attorney's sphere. "Specifically, strategic and tactical decisions such as which witnesses to call, whether to conduct cross-examination, and what trial motions to make are within the province of the attorney after consultation with the client." Id. (citing the ABA Standard for Criminal Justice § 4-5.2(b)). The commentary to the Standard states that when the attorney makes strategic or tactical decisions, "[o]nly when [his or her] behavior reveal[s] ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles [will these] actions amount to ineffective assistance of counsel." Weatherwax, 20 F.3d at 579 (citing

ABA Standard for Criminal Justice commentary at 4.67-68).

First, Banks alleges that Bostic's assistance was ineffective because he failed to move for a mistrial when a juror allegedly observed Banks in handcuffs when Banks was being escorted from the courtroom. Bostic asked the Court to question the juror about the incident, which the Court proceeded to do. The juror stated that he did not notice anything unusual and that he did not see anything that would affect his ability to be a fair and partial juror. The juror did not mention whether he saw the handcuffs or not, and Bostic stated at sidebar that he was hesitant to specifically ask about the handcuffs for fear of prejudicing the juror. Bostic did ask the court to strike the juror, but the Court refused to do so. Bostic's representation did not fall below an objective standard of reasonableness. Bostic identified and addressed the issue immediately. After the Court refused to strike the juror, it would have been a futile effort to ask the Court to declare a mistrial.

Furthermore, there is no evidence that Banks was prejudiced because the juror stated that he did not see anything that would have affected his ability to be a fair and partial juror. Moreover, "[e]xposure of the jury to a defendant in shackles requires a mistrial only when the exposure is so 'inherently prejudicial' as to deny the defendant's constitutional right to a fair trial." U.S. v. Moreno, 933 F.2d 362, 368 (6th Cir. 1991)(citation omitted). Here, even if the juror did see the handcuffs, it was only briefly and was not so inherently prejudicial as to deny Banks a fair trial. Therefore, Bostic did not provide ineffective assistance of counsel on this claim.

Second, Banks alleges that Bostic provided ineffective assistance because he did not have the firearms fingerprinted upon Banks' request. The decision was a strategic decision and thus within the province of the attorney. Soto, 159 F. Supp.2d at 44. Bostic extensively

cross-examined the government witnesses regarding their failure to properly handle the firearms or preserve them for fingerprinting. Because the government failed to fingerprint the firearms, Bostic was able to argue to the jury that the government did not carry its burden of proof beyond a reasonable doubt. Furthermore, if Bostic had had the firearms fingerprinted, he would have run the risk that Banks' fingerprints would have been recovered. Therefore, Bostic's decision not to honor Banks' request to have the firearms fingerprinted fell "within the wide range of reasonable professional assistance" and may be considered "sound trial strategy." Strickland, 466 U.S. at 688.

Third, Banks alleges Bostic was ineffective because he did not cross-examine Maddox on one particular document. Again, it is within the attorney's realm to decide who to cross-examine and upon what to cross-examine. Soto, 159 F. Supp.2d at 44. Bostic's behavior did not reveal any "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles", and thus his actions did not amount to ineffective assistance of counsel. Weatherwax, 20 F.3d at 579. Bostic vigorously cross-examined Maddox on a number of issues, and Banks has not established that he was prejudiced by Bostic's failure to cross-examine Maddox on one specific document.

Last, Banks alleges that Bostic provided ineffective assistance because he failed to advise Banks of his right to appeal the Court's decision denying the Motion to Suppress. However, Bostic did send a letter to Banks dated February 14, 2001, specifically advising Banks of his right to appeal his case. The letter references previous conversations in which Banks and Bostic discussed his appeal rights. The letter also states Bostic's advice against an appeal because Banks most likely would not prevail and an appeal could trigger a cross-appeal by the government regarding the downward departure granted by the Court at Banks' sentencing.

Bostic however goes on to state in the letter that Banks had an absolute right to appeal. Banks checked a box at the bottom of the second page of the letter indicating that he did not wish to appeal, signed it, and dated it February 15, 2001. Banks was aware of his right to appeal and it was his ultimate decision not to appeal. Furthermore, neither Bostic nor this Court was required to advise Banks specifically of his right to appeal the decision on the Motion to Suppress, or any other specific decision during the trial. It was fully sufficient that Banks was aware that he could appeal his case, which would necessarily include all of the decisions made during his case. Therefore, Banks has failed to establish that Bostic rendered ineffective assistance of counsel or that he suffered prejudice as a result.

E. The Jury Question.

Banks alleges that the Court incorrectly answered the question asked by the jury during deliberations. Again, Banks did not raise this issue on direct review and thus he has waived it. Essig, 10 F.3d at 976. Banks alleges that the jury asked “the judge even if the room was mine that the guns was found in do that mean that the guns are mine.” (§2255 Mot. Ground 5). Banks further alleges that the Court answered this question in the affirmative. However, after reviewing the record, the question actually asked by the jury was, “Does Kevin Banks staying in the room the morning of December 16, 1999 constitute control of the contents of the room?” (Jury Question, Dkt. No. 40). In response to this question, with the agreement of both counsel, this Court properly re-instructed the jury on actual and constructive possession and on knowing possession. The foreperson then told the Court that the jury’s question had been answered and the Court instructed the jury to submit further questions as necessary. We cannot find any action which was improper or prejudicial to Banks. Therefore, this claim is without

merit.

F. The Suitability of Federal Court to Adjudicate the Case.

Banks states that his “conviction was unconstitutional because a convicted felon in possession of a firearm is not suitable for federal court but usually punished by the state.” (§ 2255 Mot., Ground 6). On its face, this Ground is frivolous as there is a comprehensive body of law dealing with federal gun violations and it is completely appropriate to charge an individual with a federal offense in a federal court. To the extent that Banks is claiming that the “felon in possession of a firearm” statute, 18 U.S.C. § 922(g)(1), is unconstitutional, this argument also fails. In U.S. v. Singletary, the Third Circuit held that 18 U.S.C. § 922(g)(1) is a constitutional exercise of the congressional power to regulate commerce. U.S. v. Singletary, 268 F.3d 196, 200-205 (3d Cir. 2001).

G. Government threats to a Witness.

Banks alleges that one of the government’s witnesses (presumably Corbin) told him and others that he stated to the government that Banks did not live in the room where the weapons were found or in the apartment building. However, the witness allegedly told Banks that the government threatened to revoke his parole, seize his house, and charge him with weapons violations if he did not testify that Banks did live in the room. Again, Banks did not raise this issue on direct review and thus he has waived it. Essig, 10 F.3d at 976. Furthermore, the claim is without merit. Banks testified at trial that Corbin related this information to him. By virtue of a guilty verdict, the jury apparently did not believe these allegations and/or they were countered by other evidence.

H. The Wrong Room.

Lastly, Banks alleges that at the hearing on the Motion to Suppress, while Maddox stated that the firearms were found in the third floor rear bedroom, he wrongly described the location of the room. Again, Banks did not raise this issue on direct review and thus he has waived it. Essig, 10 F.3d at 976. Also, during the trial Maddox and Turner both testified that the firearms, ammunition and Banks' photo identification card were found in the third floor rear bedroom. There does not appear to be any ambiguity or confusion as to which room contained the evidence. Therefore, this ground is not sufficient to vacate, set aside, or correct the sentence.

IV. CONCLUSION

In Banks' *Habeas Corpus* Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, six of the eight Grounds alleged by Banks are waived as they were not raised on direct review. Furthermore, these six Grounds are also without merit. The two remaining Grounds, ineffectiveness of counsel and unsuitability of a federal court to hear the claims against him, are also without merit. Banks has not alleged any "fundamental defect which inherently result[ed] in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." DeLuca, 889 F.2d at 506 (quoting Hill, 368 U.S. at 428). Therefore, a hearing is not required and the Motion is denied.

An appropriate Order follows.

