

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

UNITED STATES OF AMERICA :
 :
 v. : CR. NO. 00-483-03
 : C.A. NO. 01-5381
 GERALD WATERS :

MEMORANDUM

ROBERT F. KELLY, Sr. J.

APRIL 11, 2002

Gerald Waters was tried and convicted on seven counts of making false statements in connection with the acquisition of firearms. On February 23, 2001, he was sentenced to 18 months custody plus a fine and a period of supervised release. He has now filed a motion pursuant to 28 U.S.C. § 2255 requesting relief from that conviction and sentence.

Mr. Waters first argues that his conviction was obtained by the use of evidence gained pursuant to an unconstitutional search and seizure when his car was stopped by the Philadelphia Police and searched without his consent. According to the Defendant, the police recovered a pistol and papers with respect to the purchase of firearms from the car. This argument is without merit. The Government did not introduce any evidence at trial that was seized from the car on February 7, 2000. The Government agreed at the pre-trial hearing on the Motion to Suppress that it would not use at trial any of the evidence seized from the car pursuant to the stop on February 7, 2000. (Tr., Nov. 20, 2000, at 3).

Defendant also argues that his conviction resulted from the use of evidence obtained pursuant to an unlawful arrest on February 7, 2000 because he was handcuffed, taken into custody against his will and never provided his Miranda rights prior to giving a statement.

This argument is also without merit because no evidence was used as a result of the Defendant's arrest. The Government agreed at the pre-trial hearing on the motion to suppress not to use the statement provided by the Defendant following his arrest on February 7, 2000. (Tr., Nov.20, 2000 at 3).

Defendant also argues that his attorney, Lawrence Watson, Esquire, was incompetent at trial because his counsel "clearly wasn't prepared for my trial date." Defendant has the burden of showing: 1) that his counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms; and 2) that counsel's deficient performance prejudiced the defense, that is, that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1994); Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999). Defendant has failed to meet his burden pursuant to Strickland, supra, because he has failed to set forth sufficient facts to support his contention of ineffective assistance of counsel. Vague, general and conclusory allegations set forth in Defendant's 28 U.S.C. § 2255 motion are insufficient. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991). (Defendant cannot meet his burden to show that counsel made errors so serious that counsel's representation fell below an objective standard of reasonableness based upon vague and conclusory allegations). For these reasons, the claim of ineffective assistance of counsel is without merit.

Defendant also alleges that he instructed his attorney to appeal his case within the ten (10) day period, and that his attorney, Mr. Watson, failed to do so. A hearing was held at which testimony was taken on that issue from Gerald Waters and Lawrence R. Watson, Esquire.

Defendant Waters testified that on the same day of the sentencing, outside of the Courtroom, he asked Mr. Watson to file an appeal and that he, Watson, said he would do so. (N.T. 7, 8)¹ Waters also testified that he later wrote to Mr. Watson and inquired as to the status of his appeal, and that he first learned at that time that there was no appeal, that he, Mr. Watson, did not do appeals. Waters was asked if he had a copy of his letter to Mr. Watson in which he asked about the progress of his appeal, and he said that he did not.

Fortunately, Mr. Watson brought the original letter he received from Waters to Court and it was admitted as Exhibit G-1. The letter was read into the record and reads as follows:

“Re: Lawrence Watson

Could you please send a letter to the U.S. District judge and ask Him for a reduction in the sentence or ask for house arrest, I asked you should I testify and you said it was up to me and It couldn't hurt. Well it did because of you saying you wouldn't ask me what happened to the missing guns and it happened to be the second question that you asked me. I stuttered and the jury thought I was lieing (sic) and also I received a letter from the u.s. probations that asked if there were any rebuttles (sic) and you didn't respond at all so this sounds like a case of the (Bars Association) please try to get me a reduceion (sic) because right now I am not satisfied with what I paid you for I could have took an (sic) plea with an (sic) public defender and saved myself \$6000.00 instead I am sitting in a prison and the reason that you did make any rebuddles (sic) is cause you thought I wasn't going to give you the last \$200.00 and that is not bussiness (sic) minded at all.. I have a lot of time to think about the whole thing and I get angry when I could have gotten a jewish lawyer for a thousand dollars cheaper and I know I would have at lease (sic) come out with either a lower sentence or nothing.. I look forward to your return letter within this week.

Thanks:

Gerald Waters”

¹All references to testimony are to the hearing held on this motion February 22, 2002.

It is obvious that the letter supports Mr. Watson's version of the extent of his representation of Mr. Waters. The letter was postmarked March 28, 2001 and makes absolutely no reference to an appeal. Mr. Watson testified that he was retained for trial only. He also testified that prior to the sentencing he had a conversation with Mr. Waters with regard to appeals, and he told him that he did not do appeals. (N.T. 18).

After the sentencing, Mr. Watson had a conversation with Mr. Waters and his mother, but was not asked to appeal the case. Mr. Watson testified that he was berated by Mr. Waters and his mother for his handling of the case and that Waters indicated "he was not satisfied with my services". (N. T. 19). That was the last time Mr. Watson saw Mr. Waters or his mother. (N.T. 20).

After the sentencing on February 23, 2001, this Court advised the Defendant that he had ten (10) days to appeal his sentence and that if he could not afford an attorney to represent him, one would be appointed to file and argue the appeal, free of cost to the Defendant. The Court was never asked to appoint counsel for an appeal. Based upon the letter that was marked G-1 which supports Mr. Watson's testimony and contradicts Mr. Waters' version, I find that Mr. Watson was engaged for trial and sentence only, and not for appeal, and that he advised Mr. Waters of this fact at the time he was engaged and again prior to the sentencing.

For these reasons, I enter the following Order.

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ORDER

AND NOW, this 11th day of APRIL, 2002, the Defendant's Motion pursuant to 28 U.S.C. § 2255 is DENIED. There is no probable cause to issue a Certificate of Appealability.

BY THE COURT:

ROBERT F. KELLY, Sr. J.