

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

|                                 |   |                                 |
|---------------------------------|---|---------------------------------|
| <b>UNITED STATES OF AMERICA</b> | : | <b>CRIMINAL NO. 99-280-02</b>   |
|                                 | : |                                 |
| v.                              | : |                                 |
|                                 | : |                                 |
| <b>ANTHONY JOHNSON CLARKE</b>   | : | <b>CIVIL ACTION NO. 02-2767</b> |

**DUBOIS, J.**

**JULY 23, 2002**

**MEMORANDUM**

Presently before the Court is defendant Anthony Johnson Clarke's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. For the reasons stated below, the Motion will be denied.

**I. BACKGROUND**

Defendant, Anthony Johnson Clarke, was indicted on May 18, 1999. Count One of the Indictment charged him with conspiring to make false statements to a federal firearms licensee in violation of 18 U.S.C. § 371. Counts Two and Three charged him with making false statements to a federal firearms licensee, in violation of 18 U.S.C. § 924(a)(1)(A). Count Four charged defendant with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The case was tried to a jury October 6-8, 1999. The jury convicted defendant on Counts One, Two and Three of the Indictment, and acquitted him on Count Four. On July 13, 2000, defendant was sentenced to consecutive terms of imprisonment of 48 months on Counts One and Two, and a 48-month term of imprisonment on Count Three to run concurrently with the sentences imposed on Counts One and Two.

Defendant appealed his conviction. The Court of Appeals affirmed the Judgment of the District Court on June 21, 2001. 259 F.3d 717 (3d Cir. 2001) (table). On May 9, 2002,

defendant filed the instant Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255.

## **II. DISCUSSION**

### **A. Standard of Review**

Defendant raises three claims of ineffective assistance of counsel in his § 2255 Motion – one claim of ineffective assistance of counsel at sentencing and two claims of ineffective assistance of counsel at trial. The standard for reviewing a claim of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Under Strickland, a defendant must first establish that his counsel made errors so serious that he was not functioning as the counsel guaranteed under the Sixth Amendment. To violate this prong of Strickland, counsel’s representation must fall “below an objective standard of reasonableness....under prevailing professional norms.” Id. at 688.

If a defendant establishes that his counsel’s representation fell below an objective standard of reasonableness, he must then show that counsel’s deficient performance resulted in prejudice. The prejudice prong of Strickland requires proof that counsel’s errors were so serious as to deprive the defendant of a fair trial – a trial whose result is reliable. The result of a trial is deemed to be unreliable if there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. Id. at 694.

### **B. Claimed Ineffectiveness of Counsel at Sentencing**

Defendant contends that his counsel was ineffective at sentencing because he failed to argue that imposition of 48-month consecutive sentences on the conspiracy count (Count One) and one of the substantive counts charging the making of false statements to a federal firearms

licensee (Count Two) pursuant to United States Sentencing Guidelines (“U.S.S.G.”) § 5G1.2(d) violated 28 U.S.C. §§ 994(l)(2) and 994(v) and 18 U.S.C. § 3584(a). Defendant’s contention is meritless, because consecutive sentences do not violate these statutes. United States v. Rahman, 189 F.3d 88, 158 n.36 (2nd Cir. 1999) (§ 3584(a)); United States v. Saccoccia, 58 F.3d 754, 787 (1st Cir. 1995) (§§ 994(l) and 994(v)).

At sentencing, the Court concluded that the sentencing range was 87 to 108 months (Offense Level 27, Criminal History Category III). That guideline range was arrived at after grouping together Counts One, Two and Three. The Court then determined that the appropriate sentence for the three counts of conviction was 96 months. Because the maximum sentence that could be imposed on each of the three grouped counts was 60 months, the Court referred to U.S.S.G. § 5G1.2(d), which provides as follows:

If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

To achieve a combined sentence equal to the total punishment of 96 months, the Court imposed consecutive 48-month sentences on Counts One and Two, and a 48 month sentence on Count Three to run concurrently with the consecutive sentences imposed on Counts One and Two. That sentence complied in all respects with the provisions of U.S.S.G. § 5G1.2 and did not violate applicable law. Moreover, on direct appeal, the Third Circuit rejected defendant’s same argument as to the propriety of the consecutive terms.

Defendant’s entire argument that his counsel was ineffective at sentencing is based on

counsel's failure to object to the imposition of consecutive sentences on Counts One and Two. Because such an objection would have been meritless, defendant's counsel was not ineffective in not making that objection.

**C. Claimed Ineffectiveness of Counsel at Trial: Cross-Examination of Oral Kidd and Decision Not to Call a Defense Investigator as a Witness**

Defendant claims that his counsel was ineffective on cross examination of a witness, Oral Kidd, and in not calling a defense investigator as a witness. Defendant first claims that defense counsel was ineffective because counsel's cross examination of Kidd opened the door to Kidd's explanation of his inconsistent testimony, that is, that Kidd was "scared" of Clarke. Defendant's second point, with respect to the investigator, is that counsel was ineffective because he failed to call the investigator to testify as to what Kidd told him in an interview. The Court rejects both arguments.

At trial, defense counsel questioned Kidd at length about inconsistencies between his out-of-Court statement to the defense investigator and his trial testimony. For example, Kidd's statement to the investigator that on August 28, 1996, he, not Clarke, purchased three guns, and that he purchased them for himself was favorable to defendant. Then, at trial, Kidd explained that statement by stating: "I was scared for my life." Trial Tr. 10/7/99 at 159. At another point in the trial, Kidd testified that "he never stated to the investigator that 'No money passed'" between Clarke and his co-defendant, Neal. Trial Tr. 10/7/99 at 160. This testimony was in contrast to the statement given to the investigator which recited that Clarke did not provide co-defendant Neal with any money. Kidd sought to explain these and other inconsistencies, but much of his explanation was difficult to comprehend. He said on numerous occasions that his

inconsistent statements were the result of being scared of Clarke and an acquaintance of Clarke's who had accompanied the investigator. Trial Tr. 10/7/99 at 148-50, 156, 159, 160, 164.

The gravamen of defendant's complaint with respect to the cross examination of Kidd is that his counsel elicited statements as to Kidd's fear of Clarke. Notwithstanding the arguably harmful nature of the answers, the Court finds that counsel was objectively reasonable in pursuing that line of questioning. Kidd's statement to the investigator was favorable to defendant. His inconsistent testimony undermined the favorable statement. Counsel thus made a strategic decision to impeach Kidd in an effort to preserve some of the benefit of Kidd's out-of-court statement. Counsel also made a strategic decision that impeachment of Kidd through cross examination was more valuable than impeachment through the testimony of the investigator. The Court concludes that defense counsel's cross examination of Kidd and decision to not call the investigator were appropriate and did not fall below an objective standard of reasonableness. Thus, defendant has failed to satisfy the first prong of Strickland.

Even if defendant could satisfy the first prong of Strickland, he would fail the prejudice prong. The evidence of defendant's guilt was substantial. The Court sees no need to summarize it in detail, except to point out that the testimony against Clarke came from gun store owners, the agents who surveilled Clarke, Kidd, co-defendant Neal, and Clarke's girlfriend. This leads the Court to conclude that the cross examination of Kidd, and the fact that counsel did not call the defense investigator as a witness, are insufficient to establish that there was a reasonable probability that, but for counsel's purportedly unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694. Thus, defendant has failed to establish the second prong of Strickland that he was prejudiced as a result of counsel's performance at trial.

### **III. CONCLUSION**

For the foregoing reasons, defendant's Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 will be denied. An appropriate order follows.

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

|                                 |   |                                 |
|---------------------------------|---|---------------------------------|
| <b>UNITED STATES OF AMERICA</b> | : | <b>CRIMINAL NO. 99-280-02</b>   |
|                                 | : |                                 |
| <b>v.</b>                       | : |                                 |
|                                 | : |                                 |
| <b>ANTHONY JOHNSON CLARKE</b>   | : | <b>CIVIL ACTION NO. 01-2767</b> |

**ORDER**

**AND NOW**, this 23rd day of July, 2002, upon consideration of the Motion of Defendant, Anthony Johnson Clarke, to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 (Document No. 85, filed May 9, 2002), and the Response of the Government, **IT IS ORDERED** that, for the reasons set forth in the foregoing, Memorandum, the Motion of Defendant, Anthony Johnson Clarke, to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 is **DENIED**.

**IT IS FURTHER ORDERED** that a certificate of appealability will not issue on the ground that defendant has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. §2253(c).

**BY THE COURT:**

---

**JAN E. DUBOIS, J.**