

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MARKWANN LEMEL GORDON	:	NO. 99-348-02
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MARKWANN LEMEL GORDON	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 03-6515

MEMORANDUM AND ORDER

Dalzell, J.

August 17, 2004

Before us is Markwann Gordon's petition for a writ of habeas corpus brought under 28 U.S.C. § 2255. After careful consideration of both Gordon's pro se petition and counseled memorandum of law, we conclude that an evidentiary hearing is unnecessary. Furthermore, we deny all of his claims and decline to issue a certificate of appealability.

Factual and Procedural Background

On December 13, 1999, after a three-day trial, a jury found Gordon guilty of some twenty-one counts stemming from his involvement in seven bank robberies in the Philadelphia area between 1995 and 1997. Gordon received a mandatory sentence of 1688 months, and our Court of Appeals affirmed his conviction on May 10, 2002. See United States v. Gordon, 290 F.3d 539 (3d Cir. 2002) (Sloviter, J.). The Supreme Court denied Gordon's petition for a writ of certiorari on December 2, 2002, and he filed the § 2255 petition now before us exactly one year later.

Discussion

Gordon's petition asserts that his trial counsel, Thomas A. Bello, Esq., was ineffective for (1) failing to file a motion for severance of the counts relating to the various robberies and then failing to seek appropriate cautionary instructions concerning the joinder of offenses, (2) failing to explain to him that he had a right to testify in his own defense and that he could overrule counsel's decision that he would not testify, and (3) inadequately impeaching the Government's cooperating witnesses and then failing to object to prosecutorial "vouching" in closing argument.

To prevail on these claims, Gordon must first show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). We evaluate counsel's conduct with deference, making every effort "to eliminate the distorting effects of hindsight." Id. at 689. Moreover, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Second, Gordon must show that his counsel's deficient performance resulted in prejudice, which the Supreme Court has defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

With Strickland's standard in mind, we consider each of

Gordon's claims.

1. Failure to file motion for severance

Gordon first argues that Mr. Bello was ineffective for not filing a motion to sever counts relating to the various robberies. Had counsel filed such a motion, it would have been governed by Fed. R. Crim. P. 8(a) and 14(a). At the time of Gordon's trial, Rule 8(a) provided, in relevant part, that

[t]wo or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Our Court of Appeals has noted that "[t]he obvious purpose of Rule 8(a)'s liberal joinder provision is to promote judicial and prosecutorial economy by the avoidance of multiple trials."

United States v. Niederberger, 580 F.2d 63, 66 (3d Cir. 1978).

While it is true, as Gordon notes, that the Government did not charge him with being a member of a conspiracy encompassing all of the robberies, joinder was proper here under Rule 8(a). Each robbery took place at a federally-insured bank in the Philadelphia area and involved the use of a police scanner. Gordon took part in each robbery along with Todd Brown, Gary Hutt, Darnell Jones, and/or George McLaughlin. See Gordon, 290 F.3d at 541-52 (summarizing participants in the seven robberies); see also United States v. Chambers, 964 F.2d 1250, 1251-25 (1st Cir. 1992) (noting, inter alia, that joinder was proper where robberies all took place in Boston area and targets

were all federally-insured banks). Moreover, all but one of the robberies took place in the relatively short period between October of 1996 and August of 1997, and the one exception -- the 1995 robbery -- was similar to the others because it involved Gordon and all four of his confederates.¹

Rule 14(a) provides a remedy for prejudicial joinder. A trial court is most likely to grant a motion to sever where there is a risk that the jury will impute a criminal disposition to the defendant on the basis of the evidence or will "cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find." Bradley v. United States, 433 F.2d 1113, 1117 n.12 (D.C. Cir. 1969). These risks were not present at Gordon's trial. Although the jury heard evidence concerning seven separate robberies, the trial was not lengthy, and the Government's case as to each robbery was straightforward. Moreover, we mitigated any potential prejudice by instructing the jury to consider each count in the Superseding

¹ Gordon has cited a raft of decisions holding that joinder was proper in multiple robbery cases in view of the distinctive similarities between the various robberies. He points to the humdrum nature of the robberies for which he was indicted and convicted to argue that joinder was inappropriate at his trial. See Pet.'s Mem. at 4-6. However, Rule 8(a) does not require the Government to show that a series of robberies all employed clown masks, an unusually worded demand note, or a particular weapon. Instead, the Government need only show that the offenses are of the "same or similar character", however prosaic the defendant's modus operandi may have been. The trial court must then focus on whether joinder will be prejudicial, the issue we address above.

Indictment separately.²

Counsel is never obliged to file a futile or meritless motion. Here, it is apparent from Mr. Bello's omnibus pre-trial motion that he considered seeking severance of charges and concluded, on the basis of the evidence, that it would have been fruitless. See Def.'s Mot. of 11/4/99, at 7 (noting that "the government appears to have joined Mr. Gordon and Jones in the superseding indictment merely because the . . . bank robberies are of the same or similar character."). In view of the characteristics of the robberies that we have detailed above, Mr. Bello's decision to forego filing a motion to sever charges easily fell within the wide range of strategic decisions that trial counsel is entitled to make.

Finally, we note that Gordon benefitted from Mr. Bello's attention to joinder issues. In refreshing contrast with the boilerplate pre-trial motions that some criminal defense lawyers file as a matter of rote, Mr. Bello crafted a highly specific motion to sever Gordon's trial from that of co-defendant Darnell Jones. Id. Mr. Bello persuaded us that severance was appropriate, and Gordon was not tried with Jones. See Order of 12/3/99.

2. Failure to advise defendant of right to testify

Gordon next argues that Mr. Bello never advised him

² Given this instruction, there is no merit to Gordon's claim that Mr. Bello was ineffective for failing to seek appropriate jury instructions concerning joinder.

that he had the right to testify on his own behalf and to overrule counsel's decision that he would not testify.

At the threshold, we note that this habeas claim is the third time that either Mr. Bello or Gordon himself has raised the question whether Gordon knowingly and voluntarily waived his right to testify. Gordon's trial occurred one year after our Court of Appeals's decision in United States v. Leggett, 162 F.3d 237 (3d Cir. 1998), which reiterated its earlier holding in United States v. Pennycooke, 65 F.3d 9 (3d Cir. 1995), that a district court has no duty to ascertain whether a defendant waived his right to testify at trial and "not only has no duty to make an inquiry but, as a general rule, should not inquire as to the defendant's waiver of the right to testify." Leggett, 162 F.3d at 246 (emphasis in original). At a sidebar conference, Mr. Bello asked that we colloquy his client as to whether he wished to testify, presciently noting that "I just don't want it to come back later." Pursuant to Leggett, we refused Mr. Bello's request, noting that such colloquies are "inherently coercive." See N.T. of 12/10/99, at 514.

On direct appeal, Gordon argued we erred in failing to take corrective action to ensure that he had knowingly relinquished his right to testify. The Court approved our decision not to colloquy Gordon, and it also noted that

[d]efense counsel's request that the court "colloquy the defendant" does not lead to the conclusion that defense counsel made a unilateral decision that Gordon was not going to testify. Gordon never raised any objection at trial indicating his interest in

testifying or that his right to testify was not explained.

Gordon, 290 F.3d at 546.

Gordon has now couched the issue as a claim of ineffective assistance of counsel. He has averred that Mr. Bello never explained that he had the right to testify and made the decision that Gordon would not testify without consulting him. See Pet.'s Aff. ¶¶ 7-9. Mr. Bello, however, has averred that he discussed the issue of taking the stand with Gordon on several occasions, the last of which was at trial, and that Gordon chose not to exercise his right to testify in part because he had a prior felony conviction. Bello Aff. ¶ 3. To the extent that our Court of Appeals did not entirely dispose of the testimony issue on direct appeal, Gordon's and Mr. Bello's conflicting memories of the trial would ordinarily necessitate an evidentiary hearing. However, the unusual facts of this case render further inquiry unnecessary.

The 1999 robbery trial was not Gordon's first visit to federal court. In 1992, he pleaded guilty to a variety of drug offenses, and at his change of plea hearing, our colleague, Judge Padova, specifically advised him that he was waiving his right to take the witness stand:

The Court: Do you understand that at . . . a trial, while you would have the right to testify, if you so chose, you would also have the right not to testify and no inference or suggestion of guilt could be drawn from the fact that you did not testify. Do you understand that?

The Defendant: Yes.

N.T. of 11/18/92, at 13-14, United States v. Markwann Gordon, No. 02-395-12 (E.D. Pa. Nov. 18, 1992) (Padova, J.).

Thus, even if Mr. Bello failed to advise Gordon of his right to testify and to overrule his counsel's decision on this issue, Gordon was not prejudiced because he was already well aware, after Judge Padova's tutorial, that he could take the stand in his own defense.

3. Cross-examination of cooperating witnesses and failure to object to prosecutorial "vouching"

Gordon's final claim is that his trial counsel was ineffective in cross-examining three cooperating witnesses because he failed to elicit that, should the Government not file a motion for downward departure, the Court would be unable to impose a sentence below the applicable Guidelines range or statutory mandatory minimum. He also complains that Mr. Bello compounded the deficiencies of his cross-examination by failing to object when the prosecutor, Assistant United States Attorney Ewald Zittlau, improperly "vouched" for these witnesses' credibility in his closing argument.

Both aspects of this claim are meritless. As the Supreme Court noted more than fifty years ago,

[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

On Lee v. United States, 343 U.S. 747, 757 (1952).

While it is true that Mr. Bello did not elicit from these witnesses the fact that a sentencing judge cannot sua sponte grant a downward departure under U.S.S.G. § 5K1, his cross-examinations gave the jury ample reason to conclude that the three cooperators had an incentive to lie on the witness stand. Under cross-examination, each confirmed his understanding that a reduced sentence was contingent on his cooperation, and Mr. Bello elicited from Todd Brown and Gary Hutt that they were in contact in prison and had discussed the concept of a U.S.S.G. § 5K1 motion. Finally, even if Mr. Bello's cross-examinations were deficient, there would have been no prejudice to Gordon because we instructed the jury that "the testimony of an informer who provides evidence against a defendant for immunity from punishment or for personal advantage or vindication must be examined and weighed by the jury with greater care than the testimony of an ordinary witness." Jury Instr. at 11.

Gordon's assertion that Mr. Bello was ineffective for failing to object when Mr. Zittlau vouched for the credibility of the cooperating witnesses is similarly meritless. Our Court of Appeals has held that vouching occurs when (1) the prosecutor assures the jury that a Government witness's testimony is credible, and (2) "this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." United States v. Brennan, 326 F.3d 176, 183 (3d Cir. 2003).

In his closing argument, Mr. Zittlau noted that Gordon is well over six feet in height and that one of the victim-witnesses who testified at trial described the robber as a tall, thin man. He then argued as follows:

Coincidence? Is this all a matter of coincidences? What it is [,] is corroboration of the Government's witnesses, Todd Brown and Gary Hutt and George McLaughlin saying: "Look, we're involved in a whole bunch of bank robberies. I have a Plea Agreement." And you read the Plea Agreements. The Plea Agreements provide that they are to provide truthful, accurate and complete testimony.

The Plea Agreements are in evidence and you can read them. The Plea Agreements say that the defendant will not falsely implicate any person. That means that Gary Hutt . . . Todd Brown and George McLaughlin are not to say someone was involved in the bank robbery that wasn't. That's in their Plea Agreement and they signed these Plea Agreements before they pled Guilty after they had these series of interviews with the FBI Agent.

. . .

Again, read the Plea Agreements and what they require. I submit, as the Government stated in the Opening Statement, the evidence is overwhelming.

N.T. of 12/13/99 at 529-30, 541.

There was no "vouching" here because Mr. Zittlau never assured the jury that the witnesses were credible on the basis of his personal knowledge or other information not in the record. Instead, he merely asserted that the plea agreements, which the Government had introduced into evidence, provided some assurance of the witnesses' credibility because each required the signatory to testify truthfully. While this argument may not be the strongest in the prosecutorial arsenal, there was no basis for Mr. Bello to label it as vouching.

Conclusion

For the reasons provided above, we conclude that Gordon has not met his burden of showing that his counsel was ineffective. Because Gordon has not made a substantial showing of a denial of his constitutional rights, there is no basis for issuing a certificate of appealability.

It is hereby ORDERED that:

1. The petition is DENIED; and
2. The Clerk of Court shall CLOSE this action statistically.

BY THE COURT:

Stewart Dalzell, J.