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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	Nos. 01-323-06
JUAN FRANCISCO BAUTISTA	:	01-447-02

MEMORANDUM AND ORDER

McLaughlin, J. August 15, 2005

Juan Francisco Bautista was charged in two separate indictments returned in Criminal Nos. 01-323 and 01-447. The two indictments alleged that Mr. Bautista was involved in separate conspiracies to distribute controlled substances. Other defendants varied from indictment to indictment. The defendant plead guilty to Counts 1 and 33 of the indictment in Criminal Action No. 01-323, charging him with a conspiracy to distribute more than five kilograms of cocaine (Count 1) and possessing cocaine with intent to distribute within 1,000 feet of a school (Count 33).

By the terms of the guilty plea agreement, the government agreed to the dismissal of all other counts in No. 01-323, and all counts in No. 01-447. Mr. Bautista agreed that he committed the acts described in each of the dismissed counts of both indictments, and agreed that under U.S.S.G. § 1B1.2 these offenses should be treated as if he had been convicted of

additional counts charging these offenses. Mr. Bautista also agreed to cooperate with the government.

The government ultimately did not file a motion for downward departure under U.S.S.G. § 5K1.1. The defendant was sentenced to ninety-seven months imprisonment, below the otherwise applicable one hundred twenty month minimum sentence required under the statute, because the defendant qualified for the "safety valve" provisions of U.S.S.G. § 5C1.2 and U.S.S.G. § 2D1.1(b)(6). The defendant appealed; his counsel filed an Anders brief, and the United States Court of Appeals for the Third Circuit affirmed. The defendant now seeks to vacate, set aside or modify his sentence under 28 U.S.C. § 2255.

The defendant's pro se motion raises the following arguments:

1. the District Court lacked jurisdiction over the defendant;
2. the drug trafficking crimes of which the defendant was convicted violate the Commerce Clause;
3. the District Court erred in including as relevant conduct for sentencing drug transactions that were the subject of dismissed counts under the plea agreement; and

4. the defendant should have received a "mitigating role" reduction in his offense level under U.S.S.G. § 3B1.2.

The defendant has not framed these arguments explicitly as allegations of ineffective assistance of counsel, but the Court will consider them as such. Otherwise, it is unlikely that they would be cognizable in a § 2255 proceeding. See United States v. Frady, 456 U.S. 152, 162-64, 167 (1982); Sanders v. United States, 373 U.S. 1, 15 (1963); United States v. Essig, 10 F.3d 968, 977 n. 25, 979 (3d Cir. 1993); United States v. DeRewal, 10 F.3d 100, 105 (3d Cir. 1993).

Whether or not counsel will be considered "ineffective" for habeas purposes is governed by the two-part test articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant must prove that (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 687-96; see also United States v. Nino, 878 F.3d 101 (3d Cir. 1989).

In evaluating the first prong, a Court must be "highly deferential" to counsel's decision and there is a "strong presumption" that counsel's performance was reasonable. United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997). (citing

Strickland). Counsel must have wide latitude in making tactical decisions. Strickland, 466 U.S. at 689. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. United States v. Gray, 878 F.2d 702 (3d Cir. 1989).

The conduct of counsel should be evaluated on the facts of the particular case, viewed as of the time of the conduct. Strickland, 446 U.S. at 690. The Third Circuit, quoting Strickland, has cautioned that the range of reasonable professional judgments is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. Gray, 878 F.2d at 711.

For the second prong, the courts have defined a "reasonable probability" as one which is sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. Put another way, whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial.

The Court will discuss each claim in order.[1]

[1]When considering a petition for post conviction relief under U.S.C. Section 2255, "the question of whether to order a hearing is committed to the sound discretion of the district court." United States v. Day, 969 F.2d 39, 41 (3d Cir. 1992). (In exercising this discretion, "the court

1. The Court had jurisdiction over the person of Mr. Bautista, who committed crimes in this district to which he pled guilty. Indictment, 01-323, counts 1 and 33; Guilty Plea Agreement, ¶ 1. United States v. Warren, 338 F.3d 262 (3d Cir. 2003) (jurisdiction under 18 U.S.C. § 3231 for violation of narcotics laws). "[T]he government must prosecute an offense in a district where the offense was committed." Fed.R.Crim. P. 18.

2. The defendant contends that the drug trafficking statutes under which he was charged are unconstitutional because they are beyond Congress' power to legislate under the Commerce Clause, citing United States v. Lopez, 514 U.S. 549 (1995). This argument has been rejected by the Third Circuit. United States v. Orozco, 98 F.3d 105, 107 (3d Cir. 1996).

3. The petitioner contends that the Court erred in considering conduct charged in dismissed counts as relevant conduct. The Court rejects this argument for two reasons. The plea agreement contained a stipulation that for purposes of the Guidelines, the defendant would be treated as if convicted of the additional counts. Second, a Court may consider conduct charged in dismissed counts as relevant conduct. United States v. Watts, 519 U.S. 148, 1523 (1997).

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must accept the truth of the movant's factual allegations, unless they are clearly frivolous on the basis of the existing record." Day, 969 F.2d at 41-42 (citing Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)). The Court has carefully considered whether a hearing is necessary or even would be helpful and concluded in the negative. The issues presented are straightforward and do not depend on the resolution of any facts.

4. The defendant contends that he should have received a reduction in offense level as a minor participant. U.S.S.G. § 3B1.2. On this point, the defendant would bear the burden of persuasion by a preponderance of the evidence at sentencing. United States v. Sabino, 274 F.3d 1053, 1073 (6th Cir. 2001).

"Application Note 3 (to Guideline Section 3B1.2] . . . explains that "a minor participant means any participant who is less culpable than most other participants, but whose roles could not be described as minimal." United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001).

The defendant was convicted of both a conspiracy to distribute cocaine and possession with intent to distribute cocaine within 1,000 feet of a school by his plea of guilty. He has acknowledged responsibility for 27 kilos of cocaine and approximately 194.7 grams of heroin in his plea agreement. He was not entitled to a minor role reduction. He arranged a half of kilo transaction with Theresa Rivera and procured a source for a substantial amount of cocaine. He negotiated numerous heroin and cocaine transactions with Rivera and others.

Mr. Bautista was at least as culpable or more culpable than most of the conspirators in the case. His culpability was equal to Diego Salazar and Hector Rodriguez, two middlemen who connected Jose Valdez and his brother, Reynaldo, with sources in Texas, but who did not profit significantly from these middleman

transactions. Mr. Bautista supplied Theresa Rivera with heroin and cocaine, so he cannot be viewed as less culpable than Rivera. His culpability with respect to the totality of the criminal activity described in the indictment exceeded that of David and Shannon Paynter, Jose Rodriguez, and Enelia Rolon, distributors downstream from Rivera. His culpability was also greater than that of James Rorke, Jonathan Orzco and Ronald Smith, distributors who received drugs from the Valdez brothers and Martinez, but who were responsible for less drug weight than Mr. Bautista. Only the defendants Reynaldo and Jose Valdez, Jorge Martinez and Hector Moncivais exceeded Mr. Bautista in culpability. The defendant does not meet the criteria established by Application Note 3, since he is not "less culpable than most other participants" in this case.

The defendant also was well aware of the nature and scope of the criminal enterprise; he negotiated frequently with Theresa Rivera over deliveries of heroin and cocaine, and was familiar with and distributed for Jorge Martinez, who lived with the Valdez brothers and made frequent trips to Texas to obtain marijuana and cocaine. Mr. Bautista sought out an alternative source of supply, Jose Rodriguez, when the Valdez brothers were put out of business toward the end of this conspiracy. The defendant was "up stream" in the conspiracy's drug flow with respect to most participants in the conspiracy, as discussed

above. As a local middleman in the Philadelphia area, Mr. Bautista served an important function in the conspiracy. Analysis of the three factors identified in United States v. Headley, 923 F.2d 1079, 1084 (3rd Cir. 1991), and Brown leads to the conclusion that a mitigating role adjustment was not warranted for Mr. Bautista.

Counsel, therefore, was not ineffective in failing to urge that the defendant receive a mitigating role reduction in offense level under U.S.S.G. § 3B1.2.

An appropriate order follows.

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ORDER

AND NOW, this 9th day of August, 2005, upon consideration of the defendant's motion to Vacate, Set Aside, or Correct Sentence, (Docket #412), and the government's opposition thereto, it is hereby ORDERED that said motion is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is denied because the petitioner has not made a substantial showing of the denial of a constitutional right.

BY THE COURT:

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MARY A. McLAUGHLIN, J.

[SAVE]

When considering a petition for post conviction relief under U.S.C. § 2255, "the question of whether to order a hearing is committed to the sound discretion of the district court." United States v. Day, 969 F.2d 39, 41 (3d Cir. 1992). (In exercising this discretion, "the court must accept the truth of the movant's factual allegations, unless they are clearly frivolous on the basis of the existing record." Day, 969 F.2d at 41-42 (citing Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)). The court's discretion is further limited by § 2255, itself, which states that:

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255.