

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 vs. :  
 :  
 KEVIN WHITAKER : NO. 02-90-03

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**OCTOBER 18, 2005**

Presently before the court is the motion for habeas corpus relief under 28 U.S.C. § 2255 filed by Kevin Whitaker. Whitaker was charged under Indictment No. 02-90 in this district and pled guilty under a plea agreement with the government to the following counts of that indictment: Count One, charging conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; Count Twelve, charging possession with intent to distribute approximately one kilogram of cocaine in violation of 21 U.S.C. § 841; Count Fourteen, charging felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); and Count Fifteen, charging possession with intent to distribute approximately 276 grams of cocaine, in violation of 21 U.S.C. § 841. Whitaker also pled guilty to an indictment from the Middle District of Pennsylvania under docket number 02-517. That indictment charged one count of conspiracy to distribute in excess of fifty grams of cocaine base (crack cocaine) in violation of 21 U.S.C. § 846. On November 4, 2002, Whitaker entered his guilty pleas. In his written plea agreement, Whitaker agreed that, with very limited exceptions, he would neither appeal nor present any collateral challenge to his conviction or sentence. The specific section with respect to appellate waiver in the plea agreement reads as follows:

11. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any provision of law.

a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.

b. If the government does not appeal, then notwithstanding the waiver provision set forth in paragraph 11 above, the defendant may file a direct appeal but may raise only claims that:

1. the defendant's sentence exceeds the statutory maximum; or
2. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

In addition to the plea agreement containing the above paragraph which was signed by Whitaker the following took place at the time his plea of guilty was entered:

THE COURT: Okay

I don't know whether I went over this, but also in that agreement you entered into with the Government, you agreed to waive or give up your right to appeal from the sentence; do you understand that?

THE DEFENDANT: Yes

THE COURT: And also you gave up your right to file a collateral action, such as a *habeas corpus*, do you understand that?

THE DEFENDANT: Yeah.

THE COURT: And the only exception to that would be if the Government appealed from the sentence, then you could appeal, okay.

Other than that, the only exceptions would be if your sentence exceeded

the statutory maximum and that would be unlikely or impossible or if the sentencing judge erroneously departed upward, which also would be almost impossible.

So, it's just - - I want you to understand that that also is part of the agreement; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay.

MR. GRAY: The original plea agreement is here, your Honor, Mr. Whitaker and counsel signed it this morning.

THE COURT: Okay.

(See change of plea hearing pages 19 and 20.)

On June 8, 2004, the defendant was sentenced to 160 months in prison. That term was within the range contemplated by the plea agreement. Whitaker had stipulated to an offense level of 32; the parties agreed, and the Court ruled, that Whitaker should receive a three offense level reduction for acceptance of responsibility. At a final offense level of 29, in Criminal History Category V, Whitaker faced a sentencing range of 140 - 175 months incarceration. Despite waiving his rights to do so, Whitaker has now filed a petition under 28 U.S.C. § 2255.

The government argues that the petition should be dismissed pursuant to Whitaker's plea agreement containing the waiver. In United States v. Khattak, 273 F.3d 557 (3d Cir. 2001), this Circuit held that waivers of appeal must be strictly construed but are valid so long as entered knowingly and voluntarily. Id. at 562. Such waivers extend even to meritorious claims. Id. at 561-62. And operate to divest the Court of Appeals of jurisdiction over a subsequent appeal. Id. at 563. We believe that the same ruling applies to a defendant's knowing waiver of the right to present a collateral attack.

The Khattak Court observed that “[t]here may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver.” Id. at 562. We agree with the government that no such circumstance exists in this case. The Court in Khattak did not provide a list of situations which amount to a “miscarriage of justice.” It did, however, embrace the view of the First Circuit, that a reviewing Court should evaluate appellate waivers case by case, considering the error claimed by the defendant and such factors as “the clarity of the error, its gravity, its character (e.g. whether it contains a fact issue, a sentencing guideline or statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government and the extent to which the defendant acquiesced in the result.” 273 F.3d at 563 (quoting United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001)).

This case, like Khattak, was a straight forward application of the defendant’s waiver. The defendant entered a valid guilty plea, we imposed a sentence within the range contemplated by the parties, and took no action which was not contemplated by the parties at the time the guilty plea was entered.

Even though we do not think it is necessary in view of the waiver we will review the grounds that Whitaker sets forth in his petition.

Ground 1: “Ineffective assistance of counsel for not objecting to sentencing issues on enhancement.” This refers to the sentencing enhancement for firearms possession and for the offense level for the narcotics violation. Whitaker pled guilty to being a felon in possession of a firearm, which led to the applicable two level enhancement under the sentencing guidelines, Section 2D1.1(c), and stipulated to the offense level applicable to the total narcotics involved in this case. His counsel could not be ineffective for failing to argue against a position to which

Whitaker stipulated.

Ground 2: “Counselor was ineffective for not appealing the argument for minor participation involved in conspiracy.” In other words Whitaker contends that his counsel was ineffective for not arguing for a two level minor participant role reduction in the offense level. However, Whitaker pled guilty to that portion of the Davis conspiracy and two substantive counts which charged his possession with intent to distribute one kilogram and 267 grams of cocaine. His plea to the Middle District conspiracy involved Whitaker’s sale of an ounce of crack cocaine to a third party who then sold it to a government informant. Whitaker’s direct involvement in the sale of crack cocaine and in the possession of cocaine with intent to distribute take him out of the minor participant category. Counsel was not ineffective for failing to make such an argument.

Ground 3: “Counselor was ineffective for not challenging count one (1) on the additional counts of the indictment. That the cocaine charged to me was actually crack.” I interpret this complaint to be that counsel was ineffective for not putting the government to the test to show that the substance he sold was crack cocaine. The problem with this argument is, that at the time he entered his plea of guilty Whitaker agreed with the government’s factual rendition that he had sold crack cocaine and because he stipulated to the offense level applicable to the amount of crack cocaine he sold and the amount of cocaine that he possessed with intent to sell. This argument has no merit.

Ground 4: “Counselor was ineffective for not arguing on appeal issues that were raised and objected to on appeal.” We conclude from the Memorandum accompanying this allegation that Whitaker is arguing that counsel was ineffective for not appealing on Booker grounds. In U.S. v. Booker, 125 S. Ct. 738 (2005). The Supreme Court disallowed mandatory

sentencing guidelines in which sentences were increased based upon factual findings by judges. Under paragraph 10 of the plea agreement Whitaker explicitly consented to being sentenced pursuant to the applicable sentencing guidelines and to have the sentence based upon facts found by the sentencing judge. An argument that counsel was ineffective for not appealing on Booker grounds is meritless. Moreover, as pointed out by the Assistant United States Attorney, this Circuit held in United States v. Lockett, No. 04-2244 (3d Cir. May 5, 2005) that where a criminal defendant voluntarily and knowingly entered into a plea agreement in which he waived the right to appeal, the defendant is not entitled to re-sentencing in light of Booker. Therefore, counsel was not ineffective for failing to take a meritless appeal.

The Khattak Court after holding that waivers of appeal, if entered into knowingly and voluntarily, are valid stated: “Nonetheless, we decline to adopt the blanket rule prohibiting all review of certain otherwise valid waivers of appeals. There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver.” The Court chose not to earmark specific situations. In the case at hand, there were no unusual circumstances that could have led to an unforeseen or unjust result. The resulting sentence was within the guidelines contemplated by the parties at the time the guilty plea was entered.

I therefore enter the following Order.

