

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 00-291
 vs. :
 : CIVIL ACTION
KENNETH STERNBERG : NO. 04-55

MEMORANDUM

ROBERT F. KELLY, Sr. J.

FEBRUARY 10, 2005

Presently before the Court is Kenneth Sternberg's petition for relief pursuant to 28 U.S.C. § 2255. The petition alleges generally that Sternberg's Constitutional rights were violated because his trial counsel was ineffective.

On May 24, 2000, a Grand Jury returned a 27 count indictment charging Kenneth Sternberg, Adam Clausen, Joel Casa, Franz Szawronski and Isaac Tillman with violations arising out of the armed robberies or attempted armed robbery of various businesses.

Prior to trial, pursuant to plea agreements, Isaac Tillman and Franz Szawronski pleaded guilty and testified at trial.

Clausen, Sternberg and Casa went to trial. Sternberg was charged with Hobbs Act robbery/attempted robbery in counts 17, 20, 23 and 26. He was charged with Hobbs Act conspiracy in counts 16, 19, 22 and 25. Finally, Sternberg was also charged with using a firearm during and in relation to a crime of violence in counts 18, 21, 24 and 27. On December 12, 2000, following a jury trial, Sternberg was convicted on all counts. Sternberg was sentenced to 70 months imprisonment on the Hobbs Act counts and a mandatory minimum sentence of 80 years to run consecutively to the Hobbs Act sentence as required by 18 U.S.C. § 924(c)(1).

The facts at trial established that between February 7, 2000 and February 26, 2000, two or more defendants robbed eight businesses in Philadelphia and one business in New Jersey, all at gun point. Kenneth Sternberg was involved in the following robberies.

Robbery of Sansom Studio (1112 Sansom St.) (Counts 16 through 18)

Tillman testified that on February 23, 2000 he, Clausen and Casa drove from New Jersey to a bar in South Philadelphia. There they met Kenneth Sternberg and planned a robbery of a massage parlor which they selected from an advertisement in one of the weekly newspapers. The four men, armed with three handguns, entered Sansom Street Studio at 1112 Sansom St. Immediately, Tillman's gun discharged as he struck one of the women on the head. Next, Sternberg fired his gun several times destroying a television set and some video equipment. The four men escaped with approximately \$300.00 in proceeds from this business.

In addition to co-defendant Tillman's testimony that Sternberg took part in this robbery, co-defendant Szawronski testified that, although he was not part of this robbery, Sternberg discussed in his presence, that he Sternberg was involved and admitted that he fired shots in the massage parlor including into the television set. N.T. 3-74. John W. Foley testified that he was at 1112 Sansom Street at the time of the robbery. N.T. 4-82. He stated that one of the robbers had a "tattoo above his eye" or near his eye. N.T. 4-189, 4-190. Co-defendant Tillman also testified that Sternberg had a teardrop tattoo on his face and a second on his neck. N.T. 18 & 19.

Robbery of 247 Studio (247 North Juniper Street) Counts 19 through 21

Both co-defendants' Tillman and Szawronski testified that all five defendants were present on February 23, 2000 at the time of this robbery. They both testified as to the details of

the robbery and specifically about Sternberg's part in the robbery.

Sun Woods testified that five men came into the massage parlor with guns demanding money. N.T. 4-220-221. She identified one of the robbers as having a tattoo under his eye but did not make any further identification. N.T. 4-222. As previously stated Tillman had testified that Sternberg had a teardrop tattoo on his face at N.T. 18 and Szawronski confirmed that testimony at N.T. 3-14 & 15.

Second Robbery of Shanghi Gardens Spa (42 South Third Street) Counts 22 through 24

Co-defendants' Tillman and Szawronski both testified that they along with co-defendants Clausen and Sternberg took part in this robbery. N.T. 106 and N.T. 3-86 to 89. Benjamin Fox testified that he was a customer at the above establishment on the night of February 26, 2000 when the robbery took place. N.T. 4-247. He identified tattoos on one of the robbers. N.T. 4-252-253. He also testified that he had the opportunity to observe this individual for 5 to 10 minutes at a distance of about 10 feet. N.T. 4-253, 254. He identified Kenneth Sternberg as that individual. N.T. 4-254. James Peightel also testified that he was present on the premises at the time of the robbery and identified Sternberg as the man who stood guard at the door. N.T. 4-235 to 238.

Robbery of Happiness Oriental Health Spa (1812 Ludlow Street) Counts 25 through 27

This robbery took place also on February 26, 2000. N.T. 5-12. Sun Park stated that one of the robbers had a tattoo on the side of his eye and on the neck. N.T. 13. She testified that he was about 2-3 feet from her and that she observed him for 10 to 15 minutes. N.T. 13, 14. Although she was not able to make an identification at the time of trial she did on the night of the robbery point out the robbers for the police when they arrived. N.T. 5-23 to 25.

Stephano Haviaras testified that he was present at the time of the above robbery

and identified one of the robbers as having a tattoo on the right side of the eye. N.T. 4-62, 4-64. He also identified Sternberg as the man with the eye drop tattoo. N.T. 4-65.

Mark Moore who was also present during the above robbery testified that one of the robbers had a dagger tattoo on his neck but could give no further identification. N.T. 5-92.

In addition to the above testimony there was the testimony of Tillman and Szawronski as to the part each played in the above robbery. Of course it was this robbery where these defendants were arrested at the scene.

After reviewing the original pro se motion of Kenneth Sternberg and the Government's response, a hearing was held on December 10, 2004. Prior to the hearing, counsel was appointed for Kenneth Sternberg. At the hearing Kenneth Sternberg and trial counsel Paul Hetznecker testified. From that testimony I make the following findings:

FINDINGS OF FACT

1. Paul Hetznecker is a very experienced criminal trial attorney who has practiced law since 1987. The first six years of his practice were with the Defender's Association of Philadelphia, the remainder in private practice. Hetznecker 33, 34.

2. Hetznecker met with Sternberg in court on the date of his appointment. He could not recall how many times he met with Sternberg after that, or how many hours he spent with him, but felt that it was enough to prepare the case. Hetznecker 34, 35. Hetznecker also met with Sternberg's prior counsel David Glanzberg and had detailed conversations with him.

3. Both Glanzberg and Hetznecker had tried to convince Sternberg to plead guilty and try for downward departure because of the amount of time Sternberg was facing and the strength of the evidence against him. Hetznecker 36.

4. In view of the testimony of two co-defendants Tillman and Szawronski and the testimony of other witnesses who either identified Sternberg as a robber or who described one of the robbers as having the same or similar tattoos as Sternberg's, I find that it is highly unlikely that any defense that attempted to convince a jury that Sternberg was not present at the scene of three of the four robberies had virtually no chance of success.

5. When it became clear to Hetznecker that Sternberg would not take counsel's advice with respect to a guilty plea counsel thought the best possible defense was that his client was present at the scene but that these were not robberies but rather they were extortion and therefore the government improperly charged the defendants with robbery. Hetznecker 38. There was a basis for this because there was some evidence that the FBI initially thought it was an extortion and at least at one of the crime scenes one of the defendants announced or made a statement indicating that it was an extortion. Hetznecker 38.

6. Hetznecker recommended to Sternberg two lines of defense: (1) that there was not sufficient connection under the Commerce Clause and therefore no federal jurisdiction. And (2) the extortion defense. Hetznecker 38, 39.

7. Sternberg was very enthusiastic about the extortion defense. Hetznecker 39. Sternberg was "He was excited like a little kid about it, [extortion defense] and I said there's nothing to be excited about [in] this case. You should be pleading guilty." Hetznecker 39.

8. Hetznecker would not have put on a defense without Sternberg's consent. Hetznecker 39.

9. During the trial Hetznecker and Clausen's attorney Rocco C. Cipparone, Jr. questioned witnesses about the alleged robbers mentioning street tax. Hetznecker 41. Sternberg

at no time objected to that line of questioning. Hetznecker 42. In his closing argument Hetznecker raised the defense, that Sternberg was present but some other crime not robbery had been committed. Sternberg did not raise an objection. Hetznecker 42. In fact Sternberg was very complimentary. Hetznecker 42.

10. Sternberg was the type of an individual who would not have allowed Hetznecker to advance this defense if he did not approve it. He would have stood up and objected. Hetznecker 42, 43.

11. When asked at the hearing if he ever had a conversation with Sternberg about the feasibility of filing a motion to sever with respect to other defendants Mr. Hetznecker responded as follows: "Well, I can tell you this. He was absolutely enamored with Mr. Clausen, and there would be no severance with Mr. Clausen at all. So there was never - - I don't remember a specific discussion about severance but there was never an issue of severance. He was going to be tried with Mr. Clausen regardless, so that wasn't an issue." Hetznecker 44.

12. There was a meeting of Sternberg, Hetznecker, Clausen and Cipparone about the use of the extortion defense because, "Kenny wanted to run it past Mr. Clausen because he seemed to be tied to Mr. Clausen very deeply." At that meeting it was agreed that the extortion defense would be used. Hetznecker 40-43.

13. The fact that Sternberg and Clausen agreed to an extortion defense and that their defenses were not conflicting is evident from the following quote of Clausen's attorney Mr. Cipparone in his closing argument to the jury:

"As Mr. Hetznecker emphasized, not one of the people alleged to have been in these various massage parlors ever wore a mask. And could there be any more distinctive features that Mr. Sternberg's

teardrop tattoos or the knife tattoo on his neck? Does it make sense that they would commit robberies and not mask those features? I'd submit to you, that that does not. But it's consistent with it being an extortion and it should give you a reasonable doubt as to whether it was robbery, because their identities are known, there's no need to wear masks, there is no need to control or hide your identity."

14. In view of the testimony of two co-defendants and the other witnesses as outlined on pages 2, 3 and 4 of this Memorandum, I find that any defense that attempted to convince a jury that Kenneth Sternberg was not present at the robberies, or if present, he was a customer not a robber, had absolutely no chance of success. This finding is supported not only by the overwhelming facts pointing to guilt, but is also supported by the excerpt from the closing argument of co-defendant's counsel set forth in paragraph 13 above.

15. I find that Kenneth Sternberg approved wholeheartedly the "extortion defense" as outlined by Paul Hetznecker.

16. This Court heard all of the trial testimony and I find that the evidence pointing to Kenneth Sternberg's guilt in the robberies was overwhelming.

17. I believe the testimony of Paul Hetznecker.

DISCUSSION

The legal standard applicable to petitioner's ineffective assistance of counsel claim is that articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984); see also United States v. Gray, 878 F.2d 702, 709-13 (3d Cir. 1989); Diggs v. Owens, 833 F.2d 439, 444-45 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988). In Strickland, the Supreme Court created a two-pronged test that a defendant must satisfy before his conviction will be overturned based on ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable.

Strickland, 466 U.S. at 687.

In assessing an attorney's performance, courts must be "highly deferential," and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption, under the circumstances, that 'the challenged action might be considered sound trial strategy.'" Id. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)). In Strickland, the Supreme Court cautioned that the courts must be careful to avoid second guessing counsel's decisions from the vantage point of hindsight. Id. at 689.

The Supreme Court clarified the second prong of the Strickland standard, the prejudice component, in Lockhart v. Fretwell, 113 S.Ct. 838 (1993). Lockhart held that to prove prejudice, a defendant must show that "the result of the proceeding was fundamentally unfair or unreliable." Id. at 842. The Court explained that "unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at 844.

This Court finds that Sternberg has failed to satisfy either prong of the Strickland standard. First, in light of the strength of the government's case, Hetznecker's defense strategy was not deficient. Second, Sternberg consented to the defense strategy. Nor has Sternberg established that any other defense strategy would have been successful. Accordingly, there can be

no prejudice.

In his post-hearing Memorandum at page 2 petitioner argues that trial counsel was ineffective “Through his defacto concession of Mr. Sternberg’s guilt during counsel’s closing argument to the jury.” I believe that petitioner is referring to defense counsel’s closing argument admitting that Kenneth Sternberg was present but it was extortion not robbery. As I have already found Kenneth Sternberg agreed to this defense, even attorney Hetznecker agreed that it was a weak defense (see finding of fact no. 7), but it was better than attempting to defend on the basis that he was not present at all. However, defense counsel never conceded the guilt of Kenneth Sternberg in his closing argument.

In Section III of the post-hearing memorandum of petitioner captioned “trial excerpts from counsel’s closing argument, the court’s sidebar conferences and the government’s rebuttal” petitioner recites a number of excerpts from the record of Paul Hetznecker’s closing argument. (See pages 3-6 of post-hearing memorandum.) The conclusion that counsel draws from these excerpts is that the prosecutor was objecting to Mr. Hetznecker’s closing argument because he was getting dangerously close to admitting Kenneth Sternberg’s presence during the robberies in question. He also argues that the Court appeared to recognize this and was agreeing with the objection. I believe petitioner’s counsel is misinterpreting what was going on during the closing argument.

The prosecutor was objecting because Mr. Hetznecker was arguing facts not in evidence. Mr. Hetznecker was arguing to the jury what Mr. Sternberg was “thinking” while those crimes were in progress even though Mr. Sternberg never testified as to what he was thinking or anything else for that matter.

I cautioned Mr. Hetznecker at that point because I knew if it continued the government on rebuttal would claim as a matter of fairness it had the right to point out to the jury, something to the effect that it was the defense attorney saying these things not the defendant. Thus causing a possible conflict with the law as stated in Griffin v. State of California, 380 U.S. 609 (1965). At no time did I think the prosecution was objecting because the defense attorney was making a harmful admission.

In addition to the above Sternberg contends that appellate counsel was ineffective because she misrepresented the facts, arguing that certain hearsay should not have been admitted when in fact it was not admitted. Sternberg 16. Even if this is a correct characterization of the record there was no harm caused.

Lastly, Mr. Sternberg alleges that appellate counsel was ineffective because she misread the trial record and reversed the defenses of the various defendants. First, I do not believe that the appellate brief misrepresented the trial record and secondly, the Appellate Court did not deal with this issue because it involved ineffective assistance of counsel which they specifically declined to treat on direct appeal.

Based on the record of this case, including the hearing on petitioner's motion, I find that petitioner is entitled to no relief. I decline to issue a Certificate of Appealability because Sternberg has failed to make a substantial showing of a Constitutional error.

I therefore enter the following Order.

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ORDER

AND NOW, this 10th day of February, 2005, the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255 be and the same is hereby **DENIED**. There is no probable cause to issue a Certificate of Appealability.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE