

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : 02-111
 : :
 : CIVIL ACTION
SHAWN HERRING : NO. 03-6316

MEMORANDUM AND ORDER

McLaughlin, J.

February 22, 2006

Shawn Herring plead guilty on June 20, 2002, to Count I of an Information charging him with possession of a firearm by a convicted felon. I sentenced him on February 26, 2003, to one hundred twenty months imprisonment. Mr. Herring did not file a direct appeal. He now moves to have his sentence vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255. The Court appointed counsel for Mr. Herring and held a hearing on February 9, 2006.

The defendant in his pro se motion argued that his counsel was ineffective because of counsel's failure to file a motion to suppress, failure to inform the defendant of an entrapment defense, failure to object at sentencing to an improperly calculated offense level, and failure to file a notice of appeal. Mr. Herring also claims that he was not aware that he was facing a statutory maximum sentence of ten years. At the hearing on the motion, the defendant withdrew all claims except

the one based on the argument that his counsel was ineffective because of her failure to file a notice of appeal.

At the hearing on the motion, the defendant, his mother, and his former counsel, Jeanne K. Damirgian, Esquire, testified. There was some divergence of testimony as to the circumstances surrounding the filing of an appeal. The Court found Ms. Damirgian more credible than the defendant on the facts surrounding an appeal and, therefore, accepts her testimony. Ms. Damirgian is a very experienced criminal defense counsel who had a specific and detailed recollection of her discussions with the defendant about his appeal rights. Mr. Herring testified that Ms. Damirgian told him after the sentencing hearing that she would contact him to discuss an appeal. Apart from the fact that Ms. Damirgian denied making such a statement, it seems unlikely that she would do so. She had told the defendant that day that she saw no basis to appeal if the Court imposed a sentence of one hundred twenty months which the Court did.

Based on the testimony of Ms. Damirgian, the Court finds the facts as follows. On the day of sentencing, Ms. Damirgian met with Mr. Herring in the cell block before the sentencing hearing. She told him that unless the Court's sentence exceeded ten years, there would not be any basis on which to appeal. She also discussed with him the time frame in which he must appeal. They also discussed the fact that the

government was withdrawing its motion under 5K1.1. Ms. Damirgian explained to the defendant that there was no basis on which to challenge that because he had failed to appear for an earlier sentencing. She also told him that the government still had the option of charging him with the failure to appear. She also discussed with him the fact that the Guideline range exceeded the statutory maximum. She had earlier discussed with the defendant the fact that because she had negotiated a one count information, she had limited his exposure to the one hundred twenty months because that was the statutory maximum. Mr. Herring did not express any desire to appeal at that point.

After the Court imposed sentence, the defendant would not speak to Ms. Damirgian. He was very angry and Ms. Damirgian attempted to speak to him but he would not speak to her. Mr. Herring never told Ms. Damirgian that he wanted her to file an appeal. She had no telephone calls from Mr. Herring or any member of his family during the ten day appeal period. Some time after the appeal period expired, she had a call from Mr. Herring's mother. Ms. Damirgian did not make any effort to make any contact Mr. Herring during the ten day time period.

The controlling precedent in this matter is Roe v. Flores-Ortega, 528 U.S. 470 (2000). The Supreme Court held:

. . . counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal

(for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. See 466 U.S. at 690 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.

Id., at 480.

Applying Roe to the facts of this case, the Court concludes that there was no ineffective assistance of counsel with respect to the filing of a notice of appeal. Ms. Damirgian did consult with Mr. Herring prior to the appeal and explained her view that there would be no basis to appeal a sentence of one hundred twenty months or less. After the sentencing, the defendant was angry and refused to speak with her. At that point, I think Ms. Damirgian's obligations ended. I do not believe that she had an obligation to pursue Mr. Herring after sentence to see if he wanted her to file a notice of appeal. The defendant plead guilty knowing full well that there was a one hundred twenty month statutory maximum that was below the Guideline range. Before sentencing, he also knew that he had failed to appear for his first sentencing and that the government had withdrawn its 5K1.1 motion. Ms. Damirgian had advised Mr.

Herring that there was probably no legal basis to oppose that motion in view of his failure to appear.

Under all the circumstances, the Court finds no ineffective assistance of counsel.

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ORDER

AND NOW, this 22nd day of February, 2006, upon consideration of defendant's Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. 2255 (Docket No. 44), the government's opposition (Docket No. 53), the defendant's response thereto (Docket No. 55), and after a hearing on February 9, 2006, IT IS HEREBY ORDERED that said motion is DENIED. There is no basis to issue a certificate of appealability.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.