

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

UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 03-6615
	:	
v.	:	CRIMINAL ACTION NO. 96-90
	:	
JESSE KITHCART	:	

MEMORANDUM AND ORDER

Kauffman, J.

March 6, 2006

Defendant Jesse Kithcart (“Defendant”) has moved the Court to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow the Motion will be denied.

I. Factual and Procedural Background

On March 5, 1996, Defendant was charged by indictment with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g). Prior to trial, Defendant moved to suppress the firearm because the search during which it was found was unlawful. After a hearing, the Honorable Marjorie O. Rendell concluded that the police had probable cause to conduct the search and denied the motion to suppress. Defendant thereafter pled guilty, subject to the condition that he be allowed to challenge on appeal the district court’s denial of his motion to suppress.

On February 20, 1997, Judge Rendell sentenced Defendant to 224 months imprisonment to be followed by a term of supervised release of five years. Defendant appealed on the suppression issue. The Third Circuit reversed and remanded, holding that “the district court erred in concluding that there was probable cause to arrest and search Kithcart prior to the discovery of the guns.” United States v. Kithcart, 134 F.3d 529, 531 (3d Cir. 1998) (“Kithcart I”). The matter was remanded for a determination of “whether the officers had reasonable suspicion for an investigative stop and weapons search of Kithcart’s person.” Id. at 532.

This Court held an evidentiary hearing during which it allowed the Government to reopen its case and present additional testimony. After considering all of the evidence presented at the hearing, the Court concluded that “both the search and the initial stop were justified under the Terry exception to the warrant requirement of the Fourth Amendment.” United States v. Kithcart, 1998 WL 962095, at *5 (E.D. Pa. Dec. 23, 1998). Accordingly, the Court denied Defendant’s Motion to Suppress. Defendant appealed. Without reaching the reasonable suspicion issue, the Third Circuit reversed on the grounds that the district court had erred in allowing the prosecution to present additional testimony at the evidentiary hearing. United States v. Kithcart, 218 F.3d 213, 219 (3d Cir. 2001) (“Kithcart II”). The panel remanded with instructions that the district court hold an evidentiary hearing, but that testimony should be limited to the arresting officer. Id. at 221.

After the hearing, this Court found that the arresting officer had reasonable suspicion to conduct a Terry stop and that the seizure of the firearm did not violate Defendant’s Fourth Amendment rights. Defendant appealed. In a per curiam opinion, the Third Circuit affirmed, finding that there was “sufficient evidence in the record to conclude that the pat-down of Kithcart did not exceed the scope of Terry.” United States v. Kithcart, 2002 WL 1041123, at *5 (3d. Cir. May 23, 2002).

On December 9, 2003, Petitioner filed the instant Motion to Vacate pursuant to 28 U.S.C. § 2255.¹

II. Analysis

Defendant seeks relief on the following grounds:

- (1) His guilty plea was defective because the facts he admitted at the hearing did not satisfy the requirement under 18 U.S.C. § 922(g) that the gun in question was “in or affecting commerce.”

¹ Because the Court has rejected Defendant’s claims on the merits, it declines to reach the Government’s contention that Defendant’s motion was untimely by a day.

- (2) The Court lacks subject matter jurisdiction over this matter because the same commerce requirement was not met;
- (3) At sentencing, Judge Rendell improperly classified Defendant as a career offender under 18 U.S.C. § 924(e), thereby subjecting him to an unwarranted mandatory minimum prison sentence;
- (4) He should be allowed to withdraw his plea, since the condition on which it was based has not been met;
- (5) Defense counsel rendered constitutionally ineffective assistance in not allowing Defendant to testify at the suppression hearing; and
- (6) Defense counsel rendered constitutionally ineffective assistance in failing to raise the foregoing arguments.

A. The Factual Basis of Defendant's Plea

18 U.S.C. § 922(g) makes it unlawful for a convicted felon to “possess in or affecting commerce, any firearm or ammunition[.]” Defendant argues that the facts the Government recited at the plea hearing did not establish that the gun he possessed was “in or affecting commerce.” Consequently, Defendant argues, his guilty plea was defective under Fed. R. Crim. P. 11(b)(3), which requires a court accepting a guilty plea to “determine that there is a factual basis for the plea” before entering judgment.

However, the facts Defendant pled to clearly satisfy the “in or affecting commerce” element of the crime. At the plea hearing on July 1, 1996, Judge Rendell asked the prosecutor to state the factual basis for Defendant's plea. Plea Hr'g Tr. 70, 7/1/96. In response, the prosecutor summarized the facts the Government would be prepared to prove at trial. Among the facts recited was that the firearm seized from Defendant's person “was manufactured by the Rossi Company in Saint San Lopaldo, Brazil, and that the gun had been transported from Brazil into the United States, and accordingly had passed in interstate or foreign commerce.” *Id.* at 70-71. Defendant then agreed that the Government had accurately summarized the facts. *Id.* at 74.

The prosecution need only show that the firearm in question traveled through interstate commerce at some point prior to the defendant's possession to satisfy the commerce requirement. See Scarborough v. United States, 431 U.S. 563, 564 (1977) (holding that "proof that the possessed firearm traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce."); United States v. Singletary, 268 F.3d 196, 205 (3d Cir. 2001) ("[W]e conclude that the proof in this case that the gun had traveled in interstate commerce, at some time in the past, was sufficient to satisfy the interstate commerce element [of 18 U.S.C. § 922(g)], and therefore, we will affirm the judgment of the District Court.").

Accordingly, the Court concludes that Judge Rendell correctly determined that there was a factual basis for Defendant's guilty plea, and Defendant's first claim is without merit.

B. Subject Matter Jurisdiction

Defendant's second claim is also based on the "in or affecting commerce" element of § 922(g). He contends that his possession of the firearm was limited to Pennsylvania and, consequently, the criminal judgment against him represents an attempt by the federal government to regulate intrastate rather than interstate commerce. This, he argues, is a direct violation of the Commerce Clause of the United States Constitution. See U.S. Const., art. I, cl. 3. He concludes that the Court therefore lacks subject matter jurisdiction and the indictment should be dismissed.

Well-established case-law is to the contrary. The Third Circuit has held that applying § 922(g) to a defendant who remained in one state during the entire period he possessed the firearm in question does not violate the Commerce Clause so long as the possessed firearm previously had traveled in interstate commerce. Singletary, 268 F.3d at 205; United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996) (holding that Congress' regulation of firearms that had traveled in interstate commerce was a "valid exercise of the commerce power"). Accordingly, Defendant's second claim will be denied.

C. Defendant's Status as a Career Offender

Defendant next contends that Judge Rendell erred in enhancing his sentence under 18 U.S.C. § 924(e). Section 924(e) provides a sentencing enhancement for career offenders who violate 18 U.S.C. § 922(g) (the offense to which Defendant pled guilty). Specifically, it imposes a fifteen year mandatory minimum on any person who violates 18 U.S.C. § 922(g) “and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both[.]” 18 U.S.C. § 924(e). At sentencing, Judge Rendell found that Defendant qualified as a career offender based on three previous violent felonies and that he was therefore subject to the fifteen year mandatory minimum. See Sent. Hr’g Tr. 38-42, 2/20/97.

Defendant first contends that the § 924(e) enhancement was improper because it was not set forth in the indictment, which charged him only with a violation of § 922(g). While Defendant is correct that the indictment mentions neither § 924(e) nor the predicate violent felonies, that omission does not preclude the application of the mandatory minimum. There is no requirement that an indictment cite to an applicable penalty provision; the indictment is sufficient so long as it sets out the specific offense the defendant is accused of violating. Almendarez-Torres v. United States, 523 U.S. 224, 239-41 (1998) (holding that no due process violation occurs when prior convictions are used to increase a statutory maximum without being charged in an indictment and proved to a jury beyond a reasonable doubt); United States v. Weaver, 267 F.3d 231, 250 (3d Cir. 2001); United States v. Dunn, 946 F.2d 615, 619 (9th Cir. 1991) (“The three prior violent felonies required as a predicate for sentence enhancement need not be included in the indictment and proved at trial.”). Accordingly, the absence of any reference to § 924(e) in the indictment does not undermine Judge Rendell’s finding that Defendant qualified as a career offender.

Defendant also contends that the Government failed to provide adequate notice of its intention to seek an enhanced penalty under § 924(e) as required by the Due Process Clause. However, “due process does not require the government to provide formal, pretrial notice of its intention to seek a sentence under the [Armed Career Criminal Act.]” United States v. Mack, 229 F.3d 226, 231 (3d Cir. 2000). The Court thus rejects this argument as well.

Defendant bases his next argument on the fact that two of the convictions Judge Rendell relied on in classifying him as a career criminal preceded the enactment of the Armed Career Criminal Statute. He contends he could not have known how these convictions would affect a future federal sentence at the time they occurred, and that consequently, by considering these convictions in the § 924(e) determination, Judge Rendell violated his due process rights under the Fifth Amendment.

Defendant's argument is without merit. In United States v. Salmon, 944 F.2d 1106 (3d Cir. 1991), the Third Circuit considered and rejected precisely the same claim: "Due process does not require that a defendant be advised of 'collateral, but foreseeable,' adverse consequences of the entry of a plea The effect of a conviction on sentencing for a later offense under a career offender law is such a collateral consequence." 944 F.3d at 1130.

Defendant's final argument regarding § 924(e) is based on the ex post facto clause: he contends that insofar as the Armed Career Criminal Act was not in effect at the time he committed two of the predicate violent felonies, using those convictions for the career criminal calculation constitutes an ex post facto violation. Once again, the case-law does not support his argument. See United States v. Springfield, 337 F.3d 1175, 1178 (3d Cir. 2003) ("[I]t has been settled law for more than half a century that there is no ex post facto problem in using a prior conviction to enhance a sentence, so long as the offense for which the sentence is being imposed was committed after the effective date of the statutory provision setting forth the conditions for enhancement.").

D. Whether Defendant should have been Allowed to Withdraw his Conditional Plea

Defendant argues that he should have been granted an opportunity to withdraw his guilty plea given the Third Circuit's decision in Kithcart I regarding his suppression motion. As noted above, Defendant's guilty plea was conditional: the plea was to remain in effect on condition that the Third Circuit upheld Judge Rendell's decision on the motion to suppress. Defendant argues that to the extent that the Third Circuit reversed Judge Rendell's finding that the arresting officer had probable cause to search him, the condition of his guilty plea

was not met. Accordingly, he argues, he was entitled to withdraw the guilty plea.

The Court disagrees. Defendant's argument assumes that his guilty plea was conditioned on the Third Circuit's upholding Judge Rendell's reasoning. In fact, the plea depended on the Third Circuit's affirming Judge Rendell's result, namely that Defendant's motion to suppress was denied and the gun could come into evidence. The result on the suppression motion rather than the reasoning used to reach that result was the significant factor in Defendant's decision to plead guilty. While the Third Circuit rejected Judge Rendell's finding that the arresting officer had probable cause to conduct the search, it ultimately affirmed her result (though on other grounds). Accordingly, the Court finds that the condition on which Defendant's guilty plea depended was satisfied and he is not entitled to withdraw that plea now.²

E. Ineffective Assistance of Counsel

Defendant's final two claims allege that his trial counsel was constitutionally ineffective. In order to establish a Sixth Amendment violation, the petitioner must show (1) that his "counsel's performance was deficient" and (2) that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).

A petitioner's burden under the first prong is to show that his counsel's representation fell below an "objective standard of reasonableness." Id. In assessing the reasonableness of counsel's conduct, a court 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 that under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. The inquiry under the prejudice prong of the Strickland test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

² The Court notes that Defendant did not seek to withdraw the plea after the Third Circuit reversed.

probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

Defendant first argues that trial counsel was ineffective in not allowing him to testify at the suppression hearing. Defendant states that had he been given the opportunity, he would have testified that (1) the arresting officer initially did not see him in the car because of “high backed bucket seats” and his size, not because he was “trying to conceal himself”; and (2) “his hands were placed on the top of his head as a reactionary and uncontrollable response and not raised in the air as a gesture of surrender.”

Even if trial counsel’s decision not to put Defendant on the stand at the suppression hearing fell below an “objective standard of reasonableness,” Defendant would not be able to meet the prejudice prong of the Strickland test. Defendant’s proposed testimony would not have altered the Court’s determination that the officer had reasonable suspicion to conduct a Terry stop, which was based on the traffic infraction the officer had observed. Because Defendant cannot establish prejudice, his first ineffectiveness claim will be denied.

Finally, Defendant contends that his trial counsel was ineffective in failing to raise the claims discussed above. Trial counsel’s decision not to raise meritless claims, however, is not ineffectiveness. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”).

III. Conclusion

For the foregoing reasons, the Court will deny Defendant’s Motion to Vacate.

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ORDER

AND NOW, this 6th day of March, 2006, upon consideration of Defendant's Motion to Vacate Sentence (case no. 96-cr-90, docket no. 84), and the Government's response thereto, it is **ORDERED** that:

- (1) The Motion is **DENIED**.
- (2) The Clerk of the Court shall mark Civil Action No. 03-6615 **CLOSED**.
- (3) Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.