

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

UNITED STATES OF AMERICA : CIVIL ACTION  
 :  
 v. : NO. 93-CR-00138-03  
 :  
 NEVILLE ANTHONY BLACK : (05-CV-05691)

Stengel, J.

March 23, 2006

**MEMORANDUM AND ORDER**

Petitioner Neville Anthony Black filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, asserting that he was denied his Sixth Amendment right to effective assistance of counsel. Black contends that his constitutional rights were violated when defense counsel advised him to enter a guilty plea and to accept a government plea agreement because he would have received a lower sentence if his case had proceeded to trial. I will deny Black's habeas petition because he has (1) waived the right to collaterally attack his conviction and sentence; and (2) failed to demonstrate that there has been a miscarriage of justice.

**I. BACKGROUND**

This case arises out of the federal prosecution of individuals comprising the Mark Anthony Brown Organization (the "Brown Organization"). The Brown Organization manufactured and distributed cocaine and cocaine base ("crack cocaine") in Philadelphia, Pennsylvania and throughout the eastern United States. Between 1987 and 2004, a

number of individuals (including Black) were convicted for their roles within the Brown Organization. The government charged Black with five counts of distributing crack cocaine in violation of federal law.

On April 29, 2004, Black entered into a negotiated written plea agreement with the government (the "Plea Agreement") at a change of plea hearing held before the Honorable James McGirr Kelly. Pursuant to the Plea Agreement, Black and the government agreed that Black would serve a 135 month prison sentence, receive five years of supervised release, be assessed a fine by the United States Probation Office, and pay a \$250.00 special assessment. The Presentence Investigation Report provided that the Plea Agreement decreased the applicable sentencing guideline range by a minimum of 157 months.<sup>1</sup> The Plea Agreement specifically provided that Black voluntarily waived nearly all of his rights to appeal or collaterally attack his conviction and sentence.

At the same change of plea hearing, Judge Kelly adopted the factual basis contained in the government's change of plea memorandum. Judge Kelly also (1) advised Black of the possible scenarios he faced at his sentencing; (2) engaged in a plea colloquy with Black regarding Black's waiver of the right to appeal or collaterally attack his conviction and sentence; and (3) inquired as to the voluntariness of Black's guilty plea. During the plea colloquy, the government read paragraph 8 of the Plea

---

<sup>1</sup>The government alleges that, had the case against Black proceeded to trial, it would have demonstrated *inter alia*, that Black (1) supplied drugs; (2) processed powdered cocaine into crack cocaine; (3) transported money proceeds from the sale of cocaine; and (4) acted as a bodyguard in the Brown Organization.

Agreement regarding Black's waiver of his rights to appeal and collaterally attack into the record. Immediately thereafter, Judge Kelly specifically asked Black if he understood that by pleading guilty and accepting the Plea Agreement he would surrender nearly all of his rights to appeal. Judge Kelly also asked Black if he had entered the guilty plea of his own free will. Black answered both questions in the affirmative.

On November 18, 2005, Black filed the instant habeas petition. Black's habeas petition contends that he has been denied his constitutional right to effective assistance of counsel because he would have received a lower sentence if his case had proceeded to trial. In particular, Black argues that defense counsel's failure to negotiate a more favorable plea agreement violated his Sixth Amendment rights.

## **II. STANDARD OF REVIEW FOR 28 U.S.C. § 2255**

Title 28 of United States Code section 2255 provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

"[A] motion to vacate sentence under 28 U.S.C. § 2255 is addressed to the sound discretion of the court." United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). However, "[s]ection 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors," United States v. Copes, Civ. A. No. 05-621, 2005 WL 2084351, at \*2 (E.D. Pa. Aug. 26, 2005), because habeas corpus is not a substitute for a direct appeal. See Reed v. Farley, 512 U.S. 339, 354 (1994); United States v. Addonizio, 442 U.S. 178, 184 (1979). An error that justifies reversal on a direct appeal may be insufficient to support habeas corpus relief. Addonizio, 442 U.S. at 185. Rather, a petitioner may only prevail on a section 2255 habeas claim by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962).

### **III. DISCUSSION**

#### **A. Waiver of Right to Collateral Attack**

As an initial matter, the Court must determine whether Black's waiver of the right to collaterally attack his conviction bars the instant habeas petition. Waivers of appeals are strictly construed by the Third Circuit. United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001). According to the Third Circuit, "waivers of appeals are generally permissible if entered into knowingly and voluntarily, unless there is a miscarriage of justice." Id. To conclude that there has been a "miscarriage of justice," district courts

consider "the clarity of the error, its gravity, its character . . . 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." Khattak, 273 F.3d at 573 (adopting the case-by-case approach for determining a miscarriage of justice established in United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001)).

The Third Circuit has not directly addressed the issue of waiver of the right to collateral attack. However, other courts in the Eastern District of Pennsylvania have held that the principles espoused by the Third Circuit in Khattak should apply to a waiver of the right to collaterally attack a federally-imposed conviction. See, e.g., United States v. Chanclay, Civ. A. No. 04-4902, 2006 WL 463389, at \*4 (E.D. Pa. Feb. 23, 2006). See also United States v. Fagan, Civ. A. No. 04-2176, 2004 WL 2577553, at \*3 (E.D. Pa. Oct. 4, 2004); United States v. Robinson, Civ. A. No. 04-884, 2004 WL 1169112, at \*9-10 (E.D. Pa. April 30, 2004).

The Plea Agreement in this case contains an express waiver of most of Black's rights to appeal or collaterally attack his conviction and sentence. Paragraph 8 of the Plea Agreement provides:

8. 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 other 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 this paragraph, 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.

Black has not cited to any evidence indicating that he did not sign the Plea Agreement knowingly and voluntarily. In fact, none of the evidence in the record even suggests that Black's acceptance of the Plea Agreement was anything other than intelligent and voluntary. Not only did Black consent to the terms of the Plea Agreement by signing it voluntarily, he also acknowledged his understanding and acceptance of the provision waiving the rights to appeal and collaterally attack his conviction and sentence under oath at the April 29, 2004 change of plea hearing. The following colloquy at the change of plea hearing between the Court, the Assistant United States Attorney, and Black addressed Black's waiver of both the right to appeal and the right to collaterally attack his conviction and sentence:

THE COURT: Counsel has a right to seek instructions from the Court to the jury which would be of assistance to you. In fact, in this case, the plea agreement, I notice if it's entered into knowingly and voluntarily, you waive your right to

appeal as long as the Court carries out the agreed sentence. You waive your right to appeal in this matter, to the Court of Appeals.

Do you know what page that waiver of the defendant is on?

MR. WRIGHT: With the Court's indulgence, if I may?

THE COURT: Yes.

MR. WRIGHT: It's on page five.

THE COURT: Okay.

MR. WRIGHT: Paragraph eight and goes on to page six, your Honor.

THE COURT: Thank you. I am thinking of the waiver of appellate review.

MR. WRIGHT: The waiver of appellate rights?

THE COURT: Yes.

MR. WRIGHT: "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. Section 3742, 28 U.S.C., Section 1291; 28 U.S.C., Section 2255 or any other provision of law."

And then it goes on to talk further about it:

"(A) Notwithstanding the waiver provision, if the government appeals from the sentence, the defendant may file a direct appeal."

"(B) If the Government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal, but may raise only claims

that the defendant's sentence exceed the mandatory maximum or the sentencing judge's unreasonably and unjustly departed upward from the otherwise applicable Sentencing Guideline range."

Further, it says: "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."

Q. In essence, I want you to understand, you don't waive everything, but for purposes of the - but if the Court acts in accordance with the agreement, the basic case, you waive your right to appeal and that's an important right that every defendant should consider carefully[.]

If you enter an appropriate guilty plea in this matter and waive the rights that I have told you about, you can't come into any court later and claim that you weren't guilty or that your rights were violated. You are going to be stuck with your plea.

Do you understand that?

Do you want to talk to your lawyer for a moment, go ahead.

MR. JALON: No sir; I was just directing his attention to the page, your Honor.

Q. All right. I understand from the plea agreement that the agreed sentence in this matter assuming you enter a guilty plea is 135 months in prison, five years supervised release, a fine commensurate with your ability to pay and a \$250 assessment.

So, if you plead guilty and I sentence you to that, your appellate rights are just about over.

Do you understand that?

A. Yes.

Q. Has anybody attempted to force you in any way to change your decision to enter a guilty plea in this matter or are you entering this plea of your own free will?

A. My own free will.

As a result of the evidence in the record, including the signed Plea Agreement and the plea colloquy described above, I find that Black knowingly and voluntarily waived the right to appeal or collaterally attack his conviction and sentence. However, as described above, even a knowing and voluntary waiver will not be enforced when there has been a miscarriage of justice. While Black has not expressly alleged that there has been a miscarriage of justice in this case, he does contend that he has received an excessive sentence due his counsel's ineffectiveness. Such a constitutional violation could potentially rise to the level of a miscarriage of justice. I will therefore determine whether Black was denied effective assistance of counsel in violation of the Sixth Amendment. If Black did not receive effective assistance of counsel, I will determine whether a failure to correct this error would constitute a miscarriage of justice allowing me to consider the instant habeas petition notwithstanding Black's waiver in the Plea Agreement.

**B. The Ineffective Assistance of Counsel Claim**

Black asserts that he was denied effective assistance of counsel in violation of the Sixth Amendment when his attorney recommended that he plead guilty and sign the Plea Agreement. Specifically, Black argues that (1) "[c]ounsel was required to negotiate a

much better plea [agreement] than he did;" (2) the government's case against him had weakened due to the passage of time; and (3) he would have received a lower sentence if his case had proceeded to trial. See Pet'r's Mem. of Law at 5-6.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court established a two-prong test for analyzing a Sixth Amendment claim of ineffective assistance of counsel. A habeas petitioner must satisfy both of the following elements to establish a Sixth Amendment violation:

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, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

### **1. Deficiency in Defense Counsel's Performance**

To establish a deficiency in counsel's performance, a convicted defendant must demonstrate that counsel's representation fell below an "objective standard of reasonableness" based on the particular facts of the case and viewed at the time of counsel's conduct. Strickland, 466 U.S. at 688, 690; Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir. 1989) (citation omitted). The first Strickland prong contains a "strong presumption" that counsel's performance fell within the wide range of the reasonable

professional competence demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 771 (1970). That is, the convicted defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689 (internal quotations and citations omitted).

With regard to the first Strickland prong, Black has not presented any evidence demonstrating that defense counsel's recommendation that Black plead guilty and accept the Plea Agreement did not meet the objective standard of reasonableness. To the contrary, viewing the evidence in the record at the time of defense counsel's actions supports the opposite conclusion—that he acted with reasonable professional competence.

A criminal defense attorney's decision to recommend that his client accept a plea agreement reducing potential sentencing exposure generally falls within the wide range of reasonable professional competence. See United States v. Gordon, 979 F. Supp. 337, 340-41 (E.D. Pa. 1997) ("Defense lawyer's duty to assist the defendant [to] make *informed* strategic choices requires the lawyer to canvass with the defendant the advantages and disadvantages of a guilty plea *if* the Government proffers a plea agreement") (internal quotation and citation omitted) (emphasis in original)). See also United States v. Hudson, Civ. A. No. 99-4817, 2003 WL 23162435, at \*7-8 (E.D. Pa. Dec. 31, 2003) (holding counsel's performance not deficient when defense counsel allegedly persuaded petitioner to plead guilty because counsel believed petitioner would

be sentenced at the bottom of the applicable guidelines). A finding that defense counsel's actions were reasonable is especially felicitous when, as here, accepting a plea agreement would guarantee the defendant a sentence of at least 13 fewer years of incarceration than if he had been convicted at trial.

A reasonable basis therefore existed for defense counsel's tactical decision to recommend that Black accept the Plea Agreement in lieu of proceeding to trial, and I find that defense counsel adequately functioned as the "counsel" guaranteed by the Sixth Amendment. I hold that Black has failed to present sufficient evidence to overcome the strong presumption that his counsel's performance fell within the wide range of reasonable professional competence. As a result, Black has not met the first prong of the Strickland test.

## **2. Prejudice to the Defense**

Even if Black had been able to demonstrate deficient performance by defense counsel, he is still unable to meet the second or "prejudice" prong of the Strickland test. To prove that counsel's conduct caused prejudice in a guilty plea context, a convicted defendant must "show that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Courts define a "reasonable probability" as a probability that confidence in the outcome of a case will be undermined. Stevens v. Del. Corr. Ctr., 295 F.3d 361, 369 (3d Cir. 2002) (citing Strickland, 466 U.S. at 694).

Here, Black has failed to present any facts demonstrating that there is a reasonable probability that, but for defense counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Rather, the evidence suggests that defense counsel's actions did not improperly influence Black's decision to enter a guilty plea. First, as discussed supra, Black signed the Plea Agreement knowingly and voluntarily after reviewing it at the change of plea hearing with defense counsel present. Second, Black stated at the change of plea hearing that he entered the guilty plea of his "own free will." Finally, Black had the opportunity to change his guilty plea at any time between the hearing and his sentencing but chose not to do so. These facts demonstrate that Black chose to plead guilty and sign the Plea Agreement of his own accord despite having the opportunity to proceed to trial. Accordingly, I find that the record does not support Black's assertion that he has been prejudiced even if defense counsel's performance had been deficient.

#### **IV. CONCLUSION**

For the reasons described above, I find that there has been no showing of ineffective assistance of counsel and consequently no miscarriage of justice based on the entire record in this case. As a result, I deny Black's habeas petition as barred by the waiver of the right to collaterally attack his conviction and sentence contained in the Plea Agreement. An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	NO. 93-CR-00138-03
	:	
NEVILLE ANTHONY BLACK	:	(05-CV-05691)

**ORDER**

**AND NOW**, this 23rd day of March, 2006, upon consideration of Black's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket No. 1405), the government's response thereto, and Black's reply, it is hereby **ORDERED** that the motion is **DENIED**. The Clerk of Court shall mark this case as closed for statistical purposes.

BY THE COURT:

/s Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.