

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

UNITED STATES OF AMERICA

v.

GEORGE MARTORANO

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CRIMINAL NO. 83-314-01

MEMORANDUM AND ORDER

PRATTER, J.

OCTOBER 19, 2007

Twenty-three years after pleading guilty to various drug-related offenses, and 19 years after he was sentenced for those crimes, George Martorano now moves to correct his sentence pursuant to former Federal Rule of Criminal Procedure 35.¹ Mr. Martorano claims that his sentence is illegal and must be vacated. For the reasons discussed below, Mr. Martorano's motion will be denied.

PROCEDURAL BACKGROUND

In September 1983, a federal grand jury issued its indictment charging George Martorano with various narcotics offenses. The indictment charged that Mr. Martorano had been a wholesale distributor of large amounts of cocaine, methamphetamine, methaqualone, and marijuana. Thereafter, on June 4, 1984, Mr. Martorano pled guilty to 19 separate counts of the

¹ Mr. Martorano makes this motion under former Federal Rule of Criminal Procedure 35(a), which is available to individuals whose offenses were committed prior to November 1, 1987. As described herein, in June 1984 Mr. Martorano pleaded guilty to certain offenses committed prior to that date. Therefore, former Rule 35(a) is available to him. That Rule allowed an individual to bring a motion to correct an illegal sentence at any time. Rule 35(a) currently provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). Because Mr. Martorano's motion addresses only former Rule 35(a), the Court's reference to Rule 35(a) in this Memorandum is to the former Rule.

indictment, including, inter alia, conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846, and supervising a continuing criminal enterprise, in violation of 21 U.S.C. § 848. On April 26, 1988, after many procedural delays and appellate practice, Mr. Martorano was sentenced to life imprisonment without parole.²

Mr. Martorano again appealed his sentence, and on January 11, 1989, the Court of Appeals for the Third Circuit denied his appeal. United States v. Martorano, 866 F.2d 62, 71 (3d

² Mr. Martorano was first sentenced to a term of life imprisonment without parole on September 20, 1984. (See United States Mem. Opp'n Ex. C, Sept. 21, 1984 Judgment and Commitment Order.) Mr. Martorano successfully appealed that sentence. The Court of Appeals found that district court did not comply with Federal Rule of Criminal Procedure 32 pertaining to the Defendant's opportunity to review and comment on the presentence report (see United States Mem. Opp'n Ex. D, United States v. Martorano, No. 84-1568 (3d. Cir. Jan. 6, 1986) (slip. op.)), and, on January 6, 1986, vacated the sentence and remanded the action to the district court for resentencing.

On November 6, 1987, the district court again resentenced Mr. Martorano to life imprisonment. At the resentencing hearing, defense counsel argued that Mr. Martorano was mentally ill and of subnormal intelligence. (United States Mem. Opp'n 3 n.1.) Accordingly, in addition to imposing a sentence of life imprisonment, the district court also ordered that Mr. Martorano should undergo a study pursuant to 18 U.S.C. § 4205 (West 1976) to assist in determining whether his sentence should be modified due to his alleged mental incapacities. Section 4205 was repealed in 1984, see Act of Oct. 12, 1984, Pub. Law No. 98-473, title II, ch. II, § 218(a)(5), 98 Stat. 2027, but prior to its repeal, it provided that the court may commit a defendant to the custody of the Attorney General to undergo a study in order to gather information that would be helpful to the sentencing court in determining whether the defendant is suitable for parole. See 18 U.S.C. §§ 4205(c), (d). Section 4205(c) provided that after the court receives and considers the study, the court may "affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law." Id. § 4205(c).

After the § 4205 study was conducted as to Mr. Martorano, the district court held two hearings to determine whether it would be appropriate to modify Mr. Martorano's sentence due to his mental state. (United States Mem. Opp'n 3 n.1.) On April 27, 1998, the district court affirmed the sentence of life imprisonment without parole. (See United States Mem. Opp'n Ex. E, Apr. 27, 1988 Judgment and Commitment Order.)

Cir. 1989).³ On February 20, 1990, the Supreme Court denied Mr. Martorano's petition for writ of certiorari. Martorano v. United States, 493 U.S. 1077 (1990). Thereafter, Mr. Martorano moved for a reduction of sentence pursuant to Federal Rule of Criminal Procedure 35(b). On September 20, 1991, after a hearing on the issue of whether Mr. Martorano's sentence should be reduced, the district court denied that motion.

In September 1994, Mr. Martorano filed his first motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. On March 20, 1995, the district court denied Mr. Martorano's first § 2255 motion. On January 5, 1996, the Court of Appeals affirmed,⁴ and on June 3, 1996 the Supreme Court denied Mr. Martorano's petition for a writ of certiorari. United States v. Martorano, 77 F.3d 465 (3d Cir.), cert. denied, 517 U.S. 1235 (1996).

On August 11, 1996, Mr. Martorano filed another motion for a reduction of sentence pursuant to Rule 35(b). The district court denied that motion on October 28, 1996 because the court determined that it lacked jurisdiction. That decision was affirmed on appeal, and the Supreme Court again denied Mr. Martorano's petition for a writ of certiorari. United States v. Martorano, Crim. No. 83-314-1, 1996 U.S. Dist. LEXIS 15981 (E.D. Pa. Oct. 28, 1996), aff'd, 114 F.3d 1173 (3d Cir.), cert. denied, 522 U.S. 854 (1997).

On June 15, 2000, Mr. Martorano filed a second motion to vacate, set aside, or correct sentence under § 2255, which was denied on August 8, 2001. United States v. Martorano, No. 00-3040, 2001 U.S. Dist. LEXIS 11656 (E.D. Pa. Aug. 8, 2001). Mr. Martorano then moved for

³ The Court of Appeals also denied Mr. Martorano's request for a rehearing as well as a rehearing en banc.

⁴ In addition, on February 2, 1996, the Court of Appeals denied Mr. Martorano's petition for rehearing en banc.

the district court to reconsider its decision to decline to issue a certificate of appealability, which the court denied. United States v. Martorano, No. 00-3040, 2001 U.S. Dist. LEXIS 20883 (E.D. Pa. Dec. 11, 2001).

Now, six years after his last attempt to seek relief was denied, Mr. Martorano, through his counsel, brings the instant motion pursuant to former Rule 35(a) of the Federal Rules of Criminal Procedure, claiming that his sentence is illegal and that he is entitled to a new sentencing hearing.

DISCUSSION

A. Former Federal Rule of Criminal Procedure 35(a)

Former Federal Rule of Criminal Procedure 35(a) provided that “the court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” Fed. R. Crim. P. 35(a) (West 1976). As a procedural matter, a Rule 35(a) motion is part of the direct appeal of the criminal conviction. United States v. Little, 392 F.3d 671, 677 (4th Cir. 2004). A motion brought under Rule 35(a) is limited to requesting the correction of an illegal sentence. Id. (citing Hill v. United States, 368 U.S. 424, 430 (1962)).

Courts have “uniformly construed” Rule 35 “to be limited to consideration of the validity of a sentence itself,” and have consistently held that Rule 35 could not be used to challenge the merits of the underlying conviction. United States v. Smith, 839 F.2d 175, 182 (3d Cir. 1988) (stating that because the defendant’s argument challenged the validity of his conviction, not that of his sentence, it was not within the ambit of Rule 35); see also Little, 392 F.3d at 678 (“By its plain language, Rule 35(a) is limited to claims that a sentence itself is illegal, not that the conviction underlying a sentence is infirm.”); United States v. Cumbie, 569 F.2d 273, 274 (5th

Cir. 1978) (noting that motions brought under former Rule 35 “constitute pleas for leniency, and presuppose valid convictions”); United States v. Colvin, 644 F.2d 703, 705 (8th Cir. 1981) (“Former Rule 35(a) is limited to the correction of an illegal sentence; it does not cover arguments that the conviction itself is improper, for such arguments must be raised under [28 U.S.C. § 2255].”); cf. Hill, 368 U.S. at 430 (“[A]s the Rule’s language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.”); id. at 432 n.2 (Black, J., dissenting) (“Rule 35 applies to any ‘illegal sentence,’ not to any illegal conviction, and thus by its terms the Rule protects only those rights which a defendant retains even if the judgment of guilt against him is proper.”); Green v. United States, 365 U.S. 301, 306 n.3 (1961) (“Rule 35 does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself.”).

B. Mr. Martorano’s Claims

Mr. Martorano argues that his sentence is illegal because (1) it is ambiguous and internally contradictory; (2) it was imposed in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution; and (3) the district court that accepted his guilty plea never adjudicated him guilty. Mr. Martorano argues that his sentence must be vacated, and that he is entitled to a new sentencing hearing. Upon review of Mr. Martorano numerous prior proceedings in this Court, it appears that Mr. Martorano has not raised these precise claims before.

1. Ambiguous and Internally Contradictory Sentence

Mr. Martorano first argues that his sentence is ambiguous and internally contradictory. Mr. Martorano pleaded guilty to 19 separate offenses, each of which carries a distinct sentence. However, Mr. Martorano argues that his sentence is ambiguous because it was meted out generally, i.e., the district court did not impose a specific punishment for each separate offense. Instead, he received a sentence of life imprisonment (plus forfeiture of certain properties) for all of his offenses in the aggregate.

Mr. Martorano also claims that his sentence is internally contradictory because, he argues, the criminal statutes he violated contain conflicting provisions. For example, Mr. Martorano pleaded guilty to violating 21 U.S.C. § 841(b)(1)(A), § 846, and § 960, all of which require that any sentence imposing a term of imprisonment “shall . . . impose a special parole term of at least 3 years in addition to such term of imprisonment.” Notwithstanding those provisions, Mr. Martorano also pleaded guilty to violating 21 U.S.C. § 848, which carries a sentence of up to life imprisonment without parole.

Mr. Martorano argues his sentence is internally contradictory for a second reason. Mr. Martorano notes that even though the district court sentenced Mr. Martorano to a term of life imprisonment without parole, the court also ordered that a study be performed under 18 U.S.C. § 4205.⁵ A § 4205 study was indeed conducted and, after two hearings to determine whether Mr. Martorano was suitable for parole, the district court affirmed Mr. Martorano’s previous sentence of life imprisonment without parole. (See United States Mem. Opp’n Ex. E, Apr. 27, 1998 Judgment and Commitment Order.)

⁵ See supra note 2.

Although Mr. Martorano purports to challenge his sentence, which was permitted under former Rule 35(a), even a liberal reading of his motion indicates that he actually challenges the validity of his conviction, which is not permitted under the former (or current) Rule. While Mr. Martorano argues that his sentence is ambiguous and “internally contradictory,” his sentence, in fact, is straightforward: he was sentenced to life imprisonment without parole. This sentence was imposed for all of the offenses to which Mr. Martorano pleaded guilty in the aggregate. The penalty of life imprisonment without parole was imposed within the range authorized by 21 U.S.C. § 848.

Therefore, Mr. Martorano’s contention must lie with the offenses to which he pleaded guilty, rather than his sentence. He correctly notes that certain offenses for which he was convicted carry conflicting sentences, namely, one offense – conspiracy – requires that the court impose a term of special parole, while the other (greater) offense – supervising a continuing criminal enterprise – permits the court to impose a maximum sentence of life imprisonment without parole. However, because the sentence imposed comported with the punishment authorized by 21 U.S.C. § 848, and because, following the § 4205 study, Mr. Martorano was afforded a hearing – albeit not culminating in the result he desired – Mr. Martorano’s argument is without merit.⁶

⁶ A sentence is not illegal within the meaning of Rule 35(a) if “the punishment meted out was not in excess of that prescribed by the relevant statute, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.” Hill, 368 U.S. at 430; Little, 392 F.3d at 677. As explained herein, Mr. Martorano does not argue that his sentence exceeded the statutory maximum or that multiple terms were imposed for the same offense. Mr. Martorano attempts to argue that his sentence is “illegally or constitutionally invalid” because, he claims, it is ambiguous and internally contradictory. As described above, however, Mr. Martorano’s claims challenge the convictions underlying his sentence, but fail to properly challenge the sentence itself. Even if the Court were

2. Violation of the Double Jeopardy Clause

Secondly, Mr. Martorano has alleged that his sentence, which was imposed for both conspiracy, pursuant to 21 U.S.C. § 846, and supervising a continuing criminal enterprise, pursuant to 21 U.S.C. § 848, is illegal under Rutledge v. United States, 517 U.S. 292, 307 (1996). In Rutledge, the Supreme Court held that conspiracy, as defined in § 846, is a lesser included offense of the continuing criminal enterprise offense, and that a criminal defendant cannot be convicted of violating both statutes. Invoking Rutledge, Mr. Martorano now argues that because he pleaded guilty to both offenses, and was sentenced for both offenses, his sentence is illegal and must be vacated.⁷

Mr. Martorano misunderstands the Double Jeopardy Clause, at least as it pertains to a defendant's motion under Rule 35(a). As explained above, under Rule 35(a) a defendant can only challenge the sentence imposed and not the underlying conviction. In this case, while Mr. Martorano was convicted for violating both § 846 and § 848, only one sentence was imposed. In his motion papers, he acknowledges that one sentence was meted out generally for all crimes to which he pleaded guilty. Therefore, Mr. Martorano cannot reasonably be perceived as arguing that he was sentenced twice on the basis of a single conviction, or that multiple terms of

to read Mr. Martorano's claims as presenting a challenge to the sentence, as the Court explains above, his sentence was neither ambiguous or internally contradictory.

⁷ In Rutledge, the Supreme Court was presented with the question of whether it was improper for the district court to sentence a criminal defendant to two concurrent life sentences based on convictions for two offenses – conspiracy in violation of 21 U.S.C. § 846, and supervising a continuing criminal enterprise in violation of 21 U.S.C. § 848. Rutledge, 517 U.S. at 294. Because the Supreme Court found that a guilty verdict on the § 848 charge necessarily includes a finding that the defendant participated in a conspiracy in violation of § 846, the Court found that one of the defendant's convictions, as well as the concurrent sentence for that conviction, must be vacated. Id. at 307.

imprisonment were imposed for the same offense, in violation of the Double Jeopardy Clause. Because his “Double Jeopardy” claim reasonably can only be read as challenging his convictions for certain crimes underlying his sentence, Mr. Martorano’s claim is not actionable under Rule 35(a).

3. Mr. Martorano’s Claim that He Was Never Adjudicated Guilty

Finally, Mr. Martorano argues that his sentence is illegal because, he claims, the district court that accepted his guilty plea did not adjudicate him guilty orally or in writing.⁸ Mr. Martorano points to the verdict form that was filed in the district court on April 27, 1998, and notes that the space on that form where the court should have stated its verdict was left blank.

Mr. Martorano’s argument that he was not adjudicated guilty is an explicit challenge to proceedings that occurred “prior to the imposition of sentence,” Hill, 368 U.S. at 430, and, therefore, do not constitute a challenge to the sentence itself. As discussed above, Rule 35(a) is not to be used to challenge a sentence based on an improper conviction.

For all of the reasons provided above, Mr. Martorano’s Rule 35(a) Motion must be denied. Under certain circumstances, it may be appropriate to treat Mr. Martorano’s claims

⁸ The Government states that the district court orally accepted Mr. Martorano’s guilty plea at least twice, first during a June 4, 1984 hearing, and second, during a June 19, 1984 hearing. (June 4, 1984 Change of Plea Hearing Tr. 26:3-12; June 19, 1984 Hearing Tr. 9:10-15.) The latter hearing was convened because at the earlier hearing on June 4, Mr. Martorano was not informed of the correct maximum sentence that could have been imposed for the crimes to which he pleaded guilty. At the June 19 hearing, the Court informed Mr. Martorano that the maximum possible sentence he could receive for pleading guilty to 19 counts of the indictment, including the count relating to participation in a continuing criminal enterprise, was life imprisonment without parole plus certain fines and forfeitures. (June 19, 1984 Hearing Tr. 3:16-25.) Mr. Martorano confirmed that he understood the maximum sentence and then pleaded guilty. (June 19, 1984 Hearing Tr. 4:9-15.) The district court accepted his guilty plea. (June 19, 1984 Hearing Tr. 9:10-15.)

brought pursuant to former Rule 35(a) as constituting a § 2255 motion. See Little, 392 F.3d at 678; Canino, 212 F.3d at 384. However, in this case, Mr. Martorano has already filed two motions under § 2255, so in order to file a successive § 2255 motion he must first request authorization from the Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3).⁹ Because he has not done so, this Court does not possess jurisdiction to consider any of Mr. Martorano's claims.

Upon consideration of Mr. Martorano's Rule 35(a) Motion to Correct an Illegal Sentence (Docket No. 222), and the United States' response, for the reasons provided above, **IT IS ORDERED** that the Motion (Docket No. 222) is **DENIED**.

BY THE COURT:

S/Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge

⁹ In order to obtain authorization from the Court of Appeals to file a successive § 2255 motion, a petitioner must show that his claim is based on either:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.
28 U.S.C. § 2255.

Mr. Martorano does not present newly discovered evidence or argue that a new rule of constitutional law has been made retroactive to cases on collateral review. To the extent that Mr. Martorano would challenge his convictions under the Supreme Court's 1996 holding in Rutledge, such an argument fails because Rutledge has not been made retroactive to cases on collateral review. See Little, 392 F.3d at 679; Canino, 212 F.3d at 384; see also Underwood v. United States, 166 F.3d 84, 87 n. 2 (2d Cir. 1999) (noting Rutledge does not announce a "new rule of constitutional law" because "the double jeopardy and separation of powers principles on which Rutledge ultimately rests are not new"). Furthermore, even if Rutledge was conceptually available to Mr. Martorano, a § 2255 motion based on Rutledge would be untimely because a § 2255 motion must be filed within one year of the time that the Supreme Court first recognizes the constitutional right asserted. See § 2255 para. 6(3).