

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>REGINA TOLLIVER</b>	:	<b>NO. 08-026</b>

**MEMORANDUM**

**Schiller, J.**

**July 15, 2014**

In this counseled Motion to Vacate, Set Aside or Correct a Sentence, filed pursuant to 28 U.S.C § 2255, Regina Tolliver seeks a new trial on the basis that her trial attorney was so ineffective as to deprive her of the competent counsel guaranteed by the Sixth Amendment of the United States Constitution. The Magistrate Judge has issued a Report and Recommendation advising that relief be denied. Tolliver, however, has filed Objections to which the government has not responded.

As explained below, I am convinced that Tolliver's counsel was constitutionally ineffective. I will therefore vacate her conviction and order that she be retried.

**I. Factual and Procedural Background**

On March 25, 2009, following a jury trial in the Eastern District of Pennsylvania, Tolliver was convicted of bank fraud, aiding and abetting bank fraud, aggravated identity theft, aiding and abetting identity theft, and unauthorized use of a computer. Transcript of Criminal July Trial, March 25, 2009, docketed in this case as Document No. 39. She was sentenced on August 2, 2010, to 30 months imprisonment. Transcript of Sentencing, August 2, 2010, docketed in this case as Document No. 77 at 27.

Tolliver had been a customer services representative at the King of Prussia Mall branch of Citizens Bank. Between March and November of 2007, several false checks were cashed against the accounts of seven Citizens Bank customers. The fraud involved the use of faked forms of identification. At that time, a Citizens Bank employee could access the personal information of account holders by entering his employee number and a confidential password. Every time an account holder's information was accessed, data including the employee number of the bank employee who accessed it was archived into an employee tracking system for six months.

A Citizens Bank fraud investigator determined that Tolliver's employee number was the only one that had been used to access all seven of the compromised accounts. Evidence was also admitted at trial showing that Tolliver worked at Citizens Bank on every day in which her password was used to access one of the accounts. The first three accounts were accessed from the King of Prussia mall branch where Tolliver worked. There was no evidence offered as to where the other accounts were accessed.

On the day after the first three accounts were accessed, someone checked the balance of the accounts telephonically. All three account holders testified at trial that they had not placed those calls. The balances of the other compromised accounts, too, were checked somewhat later. Eventually, fraudulent checks drawn on each of the accounts was cashed, supported by the use of faked identification; one woman cashed all the checks for accounts held by female victims, and one man cashed all of the checks held by male victims. The total amount of loss to Citizens Bank, which reimbursed the account holders, was more than \$180,000.

The United States Postal Inspections Agent who investigated this case, Frank Busch, and who also testified as an expert at Tolliver's trial, conceded that there was nothing at all except Tolliver's employee number tying her to the fraud. Transcript of March 23, 2009, at 198. No unexplained deposits were made into Tolliver's bank accounts, and she made no unexpected purchases.

Tolliver filed a timely direct appeal to the Court of Appeals for the Third Circuit. United States v. Tolliver, 451 Fed. Appx. 97 (3d Cir. 2011). In it, she argued that the evidence at trial was insufficient to support her conviction; trial counsel was ineffective for failing to object to the testimony of the prosecution expert; the court erred in admitting the testimony of the prosecution expert; and the court erred in denying her motions for acquittal and for a new trial. Id. at 101. However, her conviction was upheld. Id. Her petition for certiorari to the United States Supreme Court was denied on October 1, 2012. Tolliver v. United States, 133 S. Ct. 105 (Oct. 1, 2012).

Subsequently, Tolliver filed the present motion under § 2255 with the assistance of appointed counsel. Significant here is her argument that trial counsel was ineffective in failing to investigate her case before trial. Tolliver pointed to evidence uncovered by her § 2255 counsel that Angela Anderson, an assistant manager at Citizens Bank, who had also worked on all the days on which accounts were wrongfully accessed, had personal financial difficulties at the time the frauds were committed. Linda Carter, another co-worker, also had financial problems at that time. Tolliver also obtained evidence that, if trial counsel had interviewed any of the other arrested members of the fraudulent conspiracy, he would have discovered that each of them denied knowing Tolliver.

On May 28, 2014, the Honorable Jacob P. Hart, a United States Magistrate Judge, issued a Report and Recommendation advising that Tolliver's § 2255 petition be denied. As to trial counsel's failure to conduct an adequate pre-trial investigation of the case, the Magistrate Judge admitted that the information which Tolliver obtained post-trial would have strengthened her defense. However, he found that the prejudice caused to Tolliver by her counsel's failure to discover the evidence did not warrant a finding of constitutionally ineffective counsel.

In Tolliver's objections to the Magistrate Judge's Report and Recommendation, she has argued that he erred in concluding that she was not prejudiced by trial counsel's failure to obtain "alternate-perpetrator motive evidence" and evidence that no co-conspirator knew her. She also maintains that it was erroneous to conclude that she was not prejudiced by her counsel's advice that she not testify.

## II. Discussion

In order to succeed on an ineffective assistance of counsel claim, a movant for relief pursuant to § 2255 must show that counsel's performance was deficient and that counsel's actions prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1983). In order to prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

I have concluded that the Magistrate Judge's Report and Recommendation was thorough and accurate in many respects. However, it applied a stringency in determining whether counsel's errors prejudiced Tolliver in excess of that which the law requires.

In Branch v. Sweeney, -- F.3d -- , 2014 WL 3293716, No. 1301657 (3d Cir. 2014), a recent case upon which Tolliver relies, the Court of Appeals for the Third Circuit discussed the Strickland standard for prejudice, and emphasized the need to assess the effect of the errors in light of the strength of the individual case:

Branch was not required to establish that his ‘counsel’s deficient performance more likely than not altered the outcome of the case’; he only must have shown “a probability sufficient to undermine confidence in the outcome.” Grant [v. Lockett], 709 F.3d [224] at 235 [3d Cir. 2013] (internal quotation mark omitted). We look to the “totality of the evidence at trial,” meaning that “a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” Id.

We often have said that this standard is not “stringent.” See, e.g., Thomas v. Varner, 428 F.3d 491, 502 (3d Cir. 2005). In fact, it is “less demanding than the preponderance standard.” Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). See also Woodford v. Visciotti, 537 U.S. 19, 22, 123 S. Ct. 357, 359 (2002) (observing that Strickland “specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered”). But see Harrington [v. Richter], -- U.S. at --, 131 S.Ct. [770] at 792 [2011] (“The difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case.” (internal quotation marks omitted)).

2014 WL at \*11.

The verdict against Tolliver, which relied solely on the use of her employee identification number, was only weakly supported by the record. On these facts, it was not appropriate to decline to find prejudice simply because the information which trial counsel failed to discover was something less than a smoking gun.

Even Tolliver’s trial counsel stated in an affidavit:

I did not know that Ms. Anderson had any financial problems. That would have been a big red flag. I would have looked into that. Regina never had financial problems like that, that was one of the weaknesses of the prosecution’s case against her.

Declaration of Mark Keenheel, attached to § 2255 Motion as Exhibit 2 at ¶ 2.

When the totality of the evidence at the trial is considered, a reasonable probability clearly exists that, if the jury knew that several of Tolliver's co-workers, particularly Anderson, had pressing financial needs which Tolliver lacked, it could have changed the outcome at trial.

Further, although counsel argued to the jury that the prosecution lacked evidence that the other participants in the fraud knew Tolliver, he was not able to argue affirmatively that they *denied* knowing her, because he did not interview any of them. Tolliver's current counsel did conduct these interviews, and it is now clear that not even those identified as "insiders" knew her. If trial counsel had found this out, it would have meaningfully strengthened his defense. Postal Inspector Busch testified that it was possible that Tolliver functioned as the crucial bank insider in this case without any of the other arrested defendants knowing her. However, the neutrality of his testimony could easily have been found to have been compromised by his dual role as an expert witness and the investigator in this case.

As the Court of Appeals for the Third Circuit explained in Branch, in determining prejudice for Strickland purposes, it is necessary to look at the totality of the evidence admitted at trial. The case against Tolliver was only weakly supported by the evidence, and, was therefore more affected by counsel's weak pre-trial investigation than it would have been if it had been one with "overwhelming record support. Branch, supra, at \*11.

I will therefore grant in part, as specified herein, Tolliver's Objections to the Magistrate Judge's Report and Recommendation, vacate her conviction, and order that she be retried.<sup>1</sup>

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<sup>1</sup> Because I have concluded that Tolliver is entitled to a new trial, it is not necessary that I rule on whether counsel erred in preventing her from testifying at trial. I will only note that counsel asserted in his affidavit that he recommended that Tolliver not testify, but did not forbid her from testifying. Declaration of Mark Keenheel, supra. Tolliver's unilateral assertion that Keenheel never explained to her that it was her choice whether to testify, unsupported by a consistent affidavit from counsel or inferences from the trial record, may not have been sufficient to permit her to prevail on this claim. See U.S. v. Falciglia, Cr. No. 05-32 Erie, 2010 WL 2408153 (W.D. Pa. June 17, 2010) at \*5, and cases cited therein.

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**UNITED STATES**

**v.**

**REGINA TOLLIVER**

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**CRIMINAL ACTION**

**No. 08-26**

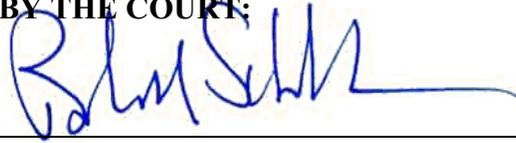
**ORDER**

**AND NOW**, this 15<sup>th</sup> day of **July, 2014**, upon consideration of the Objection to the Report and Recommendation by Regina Tolliver, the Supplemental Objection to the Report and Recommendation by Regina Tolliver, and for the reasons provided in this Court's Memorandum dated July 15, 2014, it is hereby **ORDERED** that:

1. The Amended Motion to Vacate Conviction Under 28 U.S.C. § 2255 (Document No. 100) is **GRANTED**.
2. Defendant's conviction and judgment dated August 2, 2010 are **VACATED** and **SET ASIDE**.
3. The Government shall, within thirty days of the entry of this Order, advise Defendant and the Court whether it intends to retry Defendant; if the Government intends to retry Defendant, the trial shall commence within seventy days of the entry of this Order.

4. The Court will initiate a conference call with counsel for Defendant and the Government on **Thursday, July 17, 2014** at **8:30 a.m.** to discuss the status of Defendant pending further proceedings.

**BY THE COURT;**

A handwritten signature in blue ink, appearing to read "Berle M. Schiller", written over a horizontal line.

**Berle M. Schiller, J.**