

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

UNITED STATES OF AMERICA : CRIMINAL ACTION NO. 10-556  
 :  
 v. :  
 :  
 JULIO COLON : CIVIL ACTION NO. 15-57

**MEMORANDUM**

**Padova, J.**

**July 7, 2015**

Before the Court is Julio Colon's *pro se* Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 and the Government's Motion to Dismiss Colon's § 2255 Motion. For the following reasons, we deny both Motions in their entirety.

**I. BACKGROUND**

On October 25, 2011, Colon was convicted by a jury of conspiracy to distribute marijuana, in violation of 21 U.S.C. § 846 (Count One); possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D) (Count Two); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three); and being a convicted felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count Four).

We sentenced Colon on April 5, 2012 to 250 months of imprisonment: 190 months' imprisonment on Count Four; 60 months' imprisonment on each of Counts One and Two, to be served concurrently with Colon's sentence on Count Four; and a consecutive term of imprisonment of 60 months on Count Three. We also sentenced Colon to five years of supervised release, a special assessment of \$400.00, and a \$2,500.00 fine.

Colon appealed to the United States Court of Appeals for the Third Circuit, which affirmed his conviction and sentence on July 24, 2013. United States v. Colon, 532 F. App'x 241 (3d Cir.

2013). Colon raised five arguments on appeal: (1) the district court erred in denying his motion to suppress evidence seized from the search of a house; (2) “the evidence at trial was insufficient to sustain his conviction because there was no direct evidence that he possessed drugs or firearms on his person;” (3) he was deprived of his right to a public trial because his family was excluded from part of the jury selection process; (4) “the [d]istrict [c]ourt erred in counting his four prior drug convictions as separate offenses under the guidelines because the four offenses were consolidated for the entry of pleas and for sentencing;” and (5) “his two-level leadership enhancement was unwarranted because the evidence did not show that he participated in any drug-for-money transactions.” *Id.* at 243-46. The United States Supreme Court denied Colon’s petition for a writ of certiorari on March 24, 2014. Colon v. United States, 134 S. Ct. 1568 (2014).

Colon filed the instant Motion on January 5, 2015. The Motion raises two grounds for relief: (1) trial and appellate counsel were ineffective for failing to argue that the Court erred by sentencing Colon as an armed career criminal pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), and by applying the career offender sentencing guideline pursuant to § 4B1.1 of the United States Sentencing Guidelines; and (2) trial counsel was ineffective for failing to object to the Court’s imposition of separate \$100.00 special assessments for each of the three convictions for which it imposed concurrent prison sentences.

## **II. LEGAL STANDARD**

Colon has moved for relief pursuant to 28 U.S.C. § 2255, which provides as follows:

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). ““Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.”” United States v. Perkins, Crim. A. No. 03-303, Civ. A. No. 07-3371, 2008 WL 399336, at \*1 (E.D. Pa. Feb. 14, 2008) (quoting United States v. Rishell, Crim. A. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at \*1 (E.D. Pa. Dec. 21, 2001)). To prevail on a § 2255 motion, the movant’s claimed errors of law must be 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**

The Government has moved to dismiss Colon’s Motion on the ground that his claims are procedurally barred. The Government contends that Colon did not raise, at sentencing or on direct appeal, his arguments that the Court erred in: (1) sentencing him as an armed career criminal and by applying the career offender sentencing enhancement, and (2) imposing a \$400.00 total special assessment, and that these arguments are therefore procedurally barred. “Because collateral review under § 2255 is not a substitute for direct review, a movant ordinarily may only raise claims in a 2255 motion that he raised on direct review.” Hodge v. United States, 554 F.3d 372, 378-79 (3d Cir. 2009) (citing Bousley v. United States, 523 U.S. 614, 621 (1998)). This means that a movant has “procedurally defaulted all claims that he neglected to raise on direct appeal.” Id. at 379 (citing Bousley, 523 U.S. at 621). However, there is an exception to this rule for claims of ineffective assistance of counsel. See Massaro v. United States, 538 U.S. 500, 504 (2003) (holding that “an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct

appeal”). Colon has asserted only ineffective assistance of counsel claims in the instant Motion. Because those claims are not procedurally defaulted, see id., we deny the Government’s Motion to Dismiss the instant § 2255 Motion.

The Government also argues, in the alternative, that we should deny Colon’s § 2255 Motion because his claims are substantively meritless. To prevail on a claim for ineffective assistance of counsel, a criminal defendant must demonstrate that: (1) his attorney’s performance was deficient, i.e., that the performance was unreasonable under prevailing professional standards; and (2) he was prejudiced by his attorney’s performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). An attorney’s performance is deficient if it falls “below an objective standard of reasonableness.” Id. at 688. Prejudice is proven if “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. Thus, a criminal defendant is not required to prove with “certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; [the Strickland standard] requires only a reasonable probability” which is a “relatively low standard.” Boyd v. Waymart, 579 F.3d 330, 354 (3d Cir. 2009) (quotation omitted). Nonetheless, counsel cannot be found to be ineffective for failing to pursue a meritless claim. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) (“There can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.” (citations omitted)); see also Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010) (citing Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998)).

A. The Career Offender Sentencing Enhancement

Colon argues that his prior counsel was ineffective for failing to argue that his prior drug convictions could not be used as predicate offenses to trigger his sentencing either as a career offender pursuant to § 4B1.1 of the United States Sentencing Guidelines or as an armed career criminal pursuant to the ACCA<sup>1</sup> because those convictions did not involve heroin, cocaine, or cocaine base and instead involved some other unspecified controlled substance.<sup>2</sup> Specifically, Colon argues that, because the section of the Pennsylvania Controlled Substances Act under which he was previously convicted provides for different penalties depending upon the controlled substance that was involved in the offense, and one provision of that section provides for imprisonment of one year or less, his prior offenses cannot constitute qualifying convictions for the purposes of either § 4B1.1 or the ACCA.

Section 4B1.1 provides that an individual is a “career offender” if:

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

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<sup>1</sup> At Colon’s sentencing, we adopted the Presentence Investigation Report (“PSI”) as constituting our findings of fact. The PSI found that Colon was both a career offender pursuant to § 4B1.1 of the United States Sentencing Guidelines and an armed career criminal pursuant to the ACCA. We arrived at a recommended Guidelines sentencing range of 360 months to life imprisonment “result[ing] from the application of the Career Offender Provisions.” (Sentencing Tr. at 35.)

<sup>2</sup> Colon discusses his claim solely with respect to his counsel’s failure to object to his designation as a career offender pursuant to § 4B1.1. However, he also mentions his belief that his counsel was ineffective in failing to object to his being sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e). (See Pet’r’s Mot. at 4.) Consequently, we address this claim in connection with both the ACCA and the Sentencing Guidelines.

U.S.S.G. § 4B1.1(a). If a defendant who has been convicted of violating 18 U.S.C. § 924(c) is sentenced as a career offender under § 4B1.1 of the Sentencing Guidelines, as Colon was in this case, his advisory Guidelines sentencing range may be increased to 360 months to life imprisonment. See U.S.S.G. § 4B1.1(c).

The Sentencing Guidelines define the term “controlled substance offense” as:

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). The Sentencing Guidelines also define the phrase “two prior felony convictions” to mean the following:

(1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established . . . .

U.S.S.G. § 4B1.2(c).

The ACCA “imposes a 15-year mandatory prison term on an individual convicted of being a felon in possession of a firearm if that individual has ‘three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another.’” Chambers v. United States, 555 U.S. 122, 124 (2009) (emphasis in original) (quoting 18 U.S.C. § 924(e)(1)). The ACCA defines “serious drug offense” as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance[,] . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii).

Colon was twenty-nine years old when he committed the instant offenses. Two of those offenses -- conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D) -- constitute controlled substance offenses as defined by the Sentencing Guidelines. See U.S.S.G. § 4B1.2(b). At the time that Colon committed these offenses, he had four previous convictions -- on September 30, 1998; December 21, 1998; and February 24, 1999 -- for “the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance,” in violation of Pennsylvania’s Controlled Substance Act.<sup>3</sup> (PSI ¶¶ 32, 34, 36, 38); 35 Pa. Cons. Stat. Ann. § 780-113(a)(30).

The punishment for violating § 780-113(a)(30) depends on the type of controlled substance involved in the offense. See 35 Pa. Cons. Stat. Ann. § 780-113(f). The only instance in which a violation of § 780-113(a)(30) is not a felony punishable by more than one year’s imprisonment is when the offense involves “[a] controlled substance or counterfeit substance classified in Schedule V,” which is a misdemeanor for which an individual may not be imprisoned for more than a year. See id. § 780-113(f)(4). The Pennsylvania Controlled Substance Act lists heroin as a Schedule I controlled substance and lists cocaine and cocaine base as Schedule II controlled substances. See Id. §§ 780-104(1)(ii), (2)(i)(4). A person who violates § 780-113(a)(30) with respect to heroin is subject to imprisonment for no more than fifteen years, and a person who violates § 780-113(a)(30) with respect to cocaine or cocaine base is subject to imprisonment for no more than ten years. See id. § 780-113(f)(1)-(1.1). Colon has failed present any evidence that his

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<sup>3</sup> On September 30, 1998, Colon pled guilty to charges arising from a January 21, 1997 arrest. (PSI ¶ 34.) On December 21, 1998, he pled guilty to charges arising from a January 16, 1997 arrest and to charges arising from a May 17, 1998 arrest. (Id. ¶¶ 32, 38.) On February 24, 1999, Colon was convicted of charges arising from a July 28, 1997 arrest. (Id. ¶ 36.)

convictions involved Schedule V substances. To the contrary, the certified convictions for Colon's four prior drug offenses specify that the drugs involved were heroin, cocaine, and cocaine base.<sup>4</sup> (See Gov't's Mot. to Dismiss, Ex. A.)

The Sentencing Guidelines define the term "[p]rior felony conviction" as "a prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, . . . regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 cmt. 1 (emphasis added). The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance[,] . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(a)(ii). We conclude, accordingly, that Colon's previous convictions constitute felony offenses pursuant to § 4B1.2 and "serious drug offenses" pursuant to the ACCA. See United States v. Williams, 290 F. App'x 475, 477 (3d Cir. 2008) (concluding that district court did not err in sentencing defendant as career criminal based, in part, on prior § 780-113(a)(30) conviction for which defendant was sentenced to one to ten years' imprisonment because ten years' imprisonment clearly established that his prior conviction was a predicate conviction for purposes of the ACCA).

Accordingly, because Colon had four previous felony drug convictions punishable by up to

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<sup>4</sup> "[T]he Supreme Court [has] held that 'a later court determining the character of an admitted [prior conviction] is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factfinding by the trial judge to which the defendant assented,' or other 'comparable judicial record[s]' of the prior conviction." United States v. Siegel, 477 F.3d 87, 93 (3d Cir. 2007) (second and third alterations in original) (quoting Shepard v. United States, 544 U.S. 13, 16-17 (2005)). Certified copies of convictions "are the type of judicial records that are permissible for sentencing courts to use to establish past convictions for sentencing purposes." United States v. Howard, 599 F.3d 269, 272-73 (3d Cir. 2010).

either ten or fifteen years' imprisonment and was over the age of eighteen when he committed the instant felony offenses, Colon's counsel could not have made a meritorious argument that Colon should not be sentenced as a career offender under the Sentencing Guidelines or as an armed career criminal under the ACCA because he did not have prior qualifying convictions.<sup>5</sup> See Sanders, 165 F.3d at 253. Since an attorney cannot be found to be ineffective for failing to pursue a meritless claim, id., we deny Colon's Motion as to his argument that his attorneys were ineffective for failing to challenge the application of § 4B1.1 of the United States Sentencing Guidelines and the ACCA in this case.

B. Special Assessment

Colon also argues that, because we ordered that he serve his sentences of imprisonment on three counts of conviction concurrently, his counsel was ineffective for failing to object to the imposition of a \$100.00 special assessment for each of three felony convictions for which we imposed concurrent prison sentences. He contends that the sentencing court cannot impose consecutive special assessments where the sentences are to be served concurrently, and therefore argues that we should have imposed a \$200.00 special assessment rather than a \$400.00 special assessment. Colon relies on Ray v. United States, 481 U.S. 736 (1987) (per curiam), in which the Supreme Court determined that, if the sentencing court imposes separate special assessments for different counts of conviction, the sentences on those counts are not concurrent for the purposes of

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<sup>5</sup> We also note that the conduct that led to these four convictions occurred on four different dates: January 16, 1997; January 21, 1997; July 28, 1997; and May 12, 1998. (PSI ¶¶ 33, 35, 37, 39); see also 18 U.S.C. § 924(e)(1) (requiring that the offenses underlying the previous convictions be “committed on occasions different from one another”); United States v. Crump, 229 F. App'x 186, 188 (3d Cir. 2007) (concluding that offenses were “committed on occasions different from one another” because, even though the defendant pled guilty to two offenses on the same day, he committed the offenses “several days apart”).

the “concurrent sentence doctrine” even if the defendant has been ordered to serve his terms of imprisonment on those counts concurrently.<sup>6</sup> Id. at 737. However, Ray “does not establish that a court cannot impose special assessments consecutively if it has imposed custodial sentences concurrently.” Lambert v. United States, Civ. A. No. 01 C 1066, 2001 WL 686814, at \*2 (N.D. Ill. June 15, 2001). Rather, the special assessment statute, 18 U.S.C. § 3013, requires the sentencing court to “assess on any person convicted of [a felony] offense against the United States . . . the amount of \$100 if the defendant is an individual.” 18 U.S.C. § 3013(a)(2)(A). If the defendant has been convicted of more than one count, the statute requires “that a separate assessment be levied for each offense upon which a defendant is convicted.” United States v. Donaldson, 797 F.2d 125, 128 (3d Cir. 1986). This is true even when the sentence of imprisonment for one count has been imposed to run concurrently to the sentence of imprisonment for another conviction. United States v. Barel, 939 F.2d 26, 36 (3d Cir. 1991).

Colon was convicted of four felonies in the instant case. The special assessment statute therefore required the imposition of a separate \$100.00 special assessment for each count, despite the fact that Colon was sentenced to serve his terms of imprisonment for three of the counts concurrently. See 18 U.S.C. § 3013(a)(2)(A); Barel, 939 F.2d at 36. We therefore conclude that Colon’s counsel could not have made a meritorious argument that Colon should not have been ordered to pay a \$100.00 special assessment for each of the counts for which he was sentenced to serve concurrent prison terms. See Barel, 939 F.2d at 36; Lambert, 2001 WL 686814, at \*2. Since an attorney cannot be found to be ineffective for failing to pursue a meritless claim, Sanders,

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<sup>6</sup> Under the “concurrent sentence doctrine,” “an appellate court may avoid the resolution of legal issues affecting less than all of the counts of an indictment where at least one count has been upheld and the sentences are concurrent.” United States v. Barel, 939 F.2d 26, 36 (3d Cir. 1991) (citation omitted).

165 F.3d at 253, we deny the Motion as to Colon's argument that his attorney was ineffective for failing to challenge the imposition of a \$100.00 special assessment for each of the three felony convictions for which he was sentenced to serve concurrent prison sentences.

#### **IV. CONCLUSION**

For the foregoing reasons, we deny Colon's § 2255 Motion in its entirety, and we deny the Government's Motion to Dismiss Colon's Petition. An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova  
John R. Padova, J.