

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

UNITED STATES OF AMERICA)	
)	Criminal Action
v.)	No. 12-cr-00007
)	
MIGUEL VASQUEZ,)	Civil Action
)	No. 14-cv-06115
Defendant)	

APPEARANCES:

ARLENE D. FISK, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

MIGUEL VASQUEZ
Defendant pro se

* * *

O P I N I O N

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed by defendant pro se on October 20, 2014¹("§ 2255 Motion")².

¹ In my Orders dated May 6, 2015 (Document 27) and June 23, 2015 (Document 29), I noted that, while Mr. Vasquez's 2255 Motion was filed October 24, 2014, the motion itself indicates that it was signed by defendant on October 20, 2014. Thus, giving defendant the benefit of the prison mailbox rule (see Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998) and Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts), I considered October 20, 2014 the filing date of Mr. Vasquez's motion.

² Document 25.

For the reasons expressed in this Opinion, the § 2255 Motion is dismissed.

FACTS AND PROCEDURAL HISTORY

By Information³ filed January 6, 2012, defendant was charged with 54 counts of Aiding or assisting in the preparation of false federal tax returns in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. § 2, and two counts of Filing false federal income tax returns in violation of 26 U.S.C. § 7206(1). Defendant pled guilty to all 54 counts on May 23, 2011⁴ and was sentenced on June 11, 2012 to 120 months imprisonment, one year supervised release, \$1,600,000 restitution, and a \$5,400 special assessment.⁵

On August 16, 2012, defendant filed Defendant's Motion for Extension of Time to File Notice of Appeal and For Partial Unsealing of Documents.⁶ I granted defendant's motion by my Order dated August 21, 2012 and filed August 22, 2012.⁷ Defendant filed his Notice of Appeal on September 19, 2012.⁸

³ Document 1.

⁴ See Guilty Plea Agreement, signed May 23, 2011 and Transcript of Hearing Re Initial Appearance, Arraignment, and Guilty Plea before the Honorable James Knoll Gardner[,] United States District Judge, held February 1, 2012 ("Plea Hearing Transcript") at pages 50-52.

⁵ Judgment in a Criminal Case (Document 11).

⁶ Document 12.

⁷ Document 15.

⁸ Document 17.

On appeal, defendant argued that his trial counsel was ineffective for failing to object to the court's denial of the defendant's right of allocution. The United States Court of Appeals for the Third Circuit did not review defendant's ineffective assistance of counsel claim and affirmed the sentence without prejudice for defendant to file a Section 2255 motion. United States of America v. Vasquez, 532 Fed.Appx. 277 (3rd Cir. 2013).

On October 24, 2014 defendant filed his within § 2255 Motion, in which he asserts four grounds for habeas corpus relief. On June 3, 2015 defendant filed Petitioner's Brief in Support of His Motion Made Pursuant to 28 U.S.C. § 2255.⁹ On July 2, 2015, the government filed Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255.¹⁰

Hence this Opinion.

CONTENTIONS OF THE PARTIES

In his § 2255 Motion, defendant lists four grounds which he contends entitle him to habeas corpus relief.

First, defendant claims that his trial counsel was ineffective for failing to inquire about his mental health, for providing untimely advice regarding defendant's continued

⁹ Document 28.

¹⁰ Document 30.

receipt of welfare payments, and for not properly preparing for the sentencing hearing.

Second, defendant argues that his appellate counsel was ineffective because his counsel raised only one issue on appeal and did not raise the issues defendant has now brought as Ground One in his § 2255 Motion.

Third, defendant argues that he was deprived of his Fifth Amendment right to remain silent during sentencing.

Fourth, defendant claims that he was deprived of his right of allocution.

The government, in its Response to Defendant's Motion, argues that, because defendant waived his right to attack the judgment and sentence as part of his guilty plea, defendant's § 2255 motion must be denied.

STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

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 a 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).

A motion to vacate a sentence or judgment under Section 2255 "is addressed to the sound discretion of the district court." United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A defendant may prevail on a Section 2255 habeas corpus claim only by demonstrating that an error of law was either 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, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

In determining whether a defendant's collateral attack is barred by a waiver contained within a plea agreement, the threshold issue is whether the waiver is enforceable. United States v. Mabry, 536 F.3d 231 (3d Cir. 2008).

A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the right to appeal. United States v. Mezzanatto, 513 U.S. 196, 201, 115 S.Ct. 797, 801, 130 L.Ed.2d 697, 704 (1995). Such waivers may be enforced, "provided that they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice."

Mabry, 536 F.3d at 237 (citing United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001)).

In determining whether a waiver is knowing and voluntary, the court must look to the record, specifically the written plea agreement and the change of plea colloquy, for evidence that the defendant understood the waiver and agreed to it of his own volition. United States v. Gwinnett, 483 F.3d 200, 204-205 (3d Cir. 2007).

In establishing whether or not a miscarriage of justice has occurred, a court must consider

the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), 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.

United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001)

(adopted by the Third Circuit in Khattak, 273 F.3d at 563).

DISCUSSION

Defendant, as part of his plea agreement with the government, waived his rights to collaterally attack the judgment in this case. Specifically, the plea agreement stated that

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.

Guilty Plea Agreement at ¶ 10.

The Guilty Plea Agreement further specified that the waiver was "not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived."

The sentencing judge is responsible for determining that the defendant understands "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." Khattak, 273 F.3d at 563. Thus, I look to the transcript of the change of plea hearing held before me on February 1, 2012, which addressed the guilty plea agreement, for evidence that defendant knowingly and voluntarily entered into his guilty plea agreement.

During the guilty plea hearing, defendant affirmed that he had understood and agreed to the guilty plea agreement when he signed it.¹¹ Counsel for the government then summarized the contents of the guilty plea agreement, including the waiver of appeal rights as contained in paragraph ten.¹² At the end of the summary, defendant again affirmed that he understood and agreed to the terms of the plea agreement.¹³ Defendant further

¹¹ Plea Hearing Transcript, at pages 50-52.

¹² Id., at pages 52-63.

¹³ Id., at page 63.

affirmed that he understood that the government's summary was not word-for-word what he had agreed to in the plea agreement itself and that he was "bound by all of the terms and conditions of the written Guilty Plea Agreement," whether summarized or not.¹⁴

I then discussed the sentencing process with defendant.¹⁵ Throughout this discussion, defendant affirmed that he understood the sentencing process and was "pleading guilty voluntarily and of his own free will."¹⁶

I then detailed both the appeal rights a defendant would ordinarily have and those which defendant had given up in his plea agreement. Defendant affirmed throughout the colloquy that he understood both the appeal rights ordinarily available to a defendant and which of those rights he had given up in his plea agreement.¹⁷

At the conclusion of the change of plea hearing, defendant confirmed that he was pleading guilty voluntarily and of his own free will.¹⁸ I found that defendant was "fully alert, competent, and capable of entering into an informed plea and

¹⁴ Plea Hearing Transcript, at page 64.

¹⁵ Id., at pages 65-83.

¹⁶ Id., at page 66.

¹⁷ Id., at pages 83-105.

¹⁸ Id., at page 127.

that each guilty plea is a knowing and voluntary plea" and accepted his change of plea.¹⁹

Based on defendant's affirmations throughout the hearing, I conclude that he knowingly and voluntarily entered into the waiver of appeal rights. Therefore, his waiver is valid.

Defendant's first two claims involve ineffective assistance of counsel. In Ground One of his § 2255 Motion, defendant claims that his trial counsel was ineffective because he failed to inquire about his mental health, provided untimely advice regarding defendant's continued receipt of welfare payments, and did not properly prepare for the sentence hearing. None of these allegations is a discrete claim directly related to the negotiation of defendant's appellate waiver.²⁰ Similarly, defendant's claim in Ground Two that his appellate counsel was

¹⁹ Plea Hearing Transcript, at page 130.

²⁰ The Fourth Circuit has allowed defendants who have waived their appeal rights to challenge their sentences based upon ineffective assistance of counsel at the sentencing stage. See United States v. Attar, 38 F.3d 727 (4th Cir. 1994). The majority of Circuits which have ruled on the matter, however, disagree. See e.g. United States v. Djelevic, 161 F.3d 104 (2d Cir. 1998), United States v. White, 307 F.3d 336 (5th Cir. 2002), Mason v. United States, 211 F.3d 1065, 1069 (7th Cir. 2000), States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001).

Within this district, attorney assistance (or lack thereof) which "relates to conduct at sentencing and thus could not have affected the plea process" falls within the scope of such a waiver. United States v. Rodriguez, 2011 WL 2845768 (E.D.Pa. July 19, 2011)(Rufe, J.)

ineffective because he only raised one issue on appeal is also unrelated to the negotiation of the waiver.

Defendant's third and fourth claims involve alleged violations of his right to remain silent and his right of allocution. Because there was no reservation in the waiver for such claims and because there is no relevant case law which holds that defendant's Fifth Amendment rights and right of allocution cannot be waived, I find that the waiver covers Grounds Three and Four of defendant's § 2255 motion.

Additionally, defendant has not established that there are unusual circumstances which would invalidate his waiver, nor has he offered a clear argument to overcome the presumption of truthfulness which attaches to his sworn statements. Thus, I find nothing to conclude that upholding this waiver would lead to a miscarriage of justice, especially in light of the extent to which the defendant acquiesced in the result.²¹

²¹ The argument for a miscarriage of justice is especially difficult for defendant to make regarding Ground Two of his § 2255 Motion. Defendant argues that his appellate counsel was ineffective for not bringing a broader claim of ineffective assistance by trial counsel despite the Third Circuit's refusal to review a claim of ineffective assistance of counsel in his case on direct appeal. The Court stated:

We ordinarily do not review claims of ineffective assistance of counsel on direct appeal. Rather, the preferred avenue to raise ineffective assistance claims is a collateral proceeding pursuant to because the district court is the forum best suited to developing the facts necessary to determining the adequacy of representation before the trial court and has an advantageous perspective to evaluate the overall effectiveness of trial counsel.

(Footnote 21 continued):

CERTIFICATE OF APPEALABILITY

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, I conclude that, because defendant has not met statutory requirements to have his case heard, no reasonable jurist could find this procedural ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542, 555 (2000). Accordingly, a certificate of appealability is denied.

CONCLUSION

For all the foregoing reasons, I dismiss defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Moreover, a certificate of appealability is denied.

(Continuation of footnote 21):

Vazquez, 532 Fed.Appx. at 279 (internal citations omitted). Given that the Third Circuit refused to review this type of ineffective assistance claim on appeal, it is difficult to imagine what difference in impact on defendant would have resulted from a broader claim of ineffective assistance in this case.

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UNITED STATES OF AMERICA)	
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MIGUEL VASQUEZ,)	Civil Action
)	No. 14-cv-06115
Defendant)	

O R D E R

NOW, this 15th day of September, 2015, upon
consideration of the following documents:

Motion Under 28 U.S.C. § 2255 to Vacate, Set
Aside, or Correct Sentence by a Person in Federal
Custody, which motion was filed by defendant
Miguel Vasquez pro se on October 20, 2014
("§ 2255 Motion")(Document 25)¹ ;

Petitioner's Brief in Support of His Motion Made
Pursuant to 28 U.S.C. § 2255, which brief was
filed by defendant pro se on June 3, 2015 ("Brief
in Support")(Document 28)² ; and

¹ In my Orders dated May 6, 2015 (Document 27) and June 23, 2015 (Document 29), I noted that, while Mr. Vasquez's 2255 Motion was filed October 24, 2014, the motion itself indicates that it was signed by defendant on October 20, 2014. Thus, giving defendant the benefit of the prison mailbox rule (see Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998) and Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts), I considered October 20, 2014 the filing date of Mr. Vasquez's motion.

² On October 23, 2014, defendant filed a Motion to Extend Time to Amend Brief in Support of Grounds I through IV of Defendant's Motion Pursuant to Title 28 U.S.C. § 2255 ("Motion to Extend")(Document 26), which requested an extension to file an initial brief in support of his § 2255 Motion. By my Order dated May 6, 2015, I granted defendant's Motion to Extend and set a deadline of June 19, 2015 for the filing of defendant's brief (Document 27). The Brief in Support indicates that it was signed by Mr. Vasquez on June 3, 2015. Again giving defendant the benefit of the prison mailbox rule (see Burns, 134 F.3d 109 and Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts), I consider June 3, 2015 the filing date of Mr. Vasquez's brief.

Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, which response was filed July 2, 2015 (Document 30);

upon consideration of the pleadings, exhibits, and record papers; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is dismissed.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case closed for statistical purposes.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge