

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

UNITED STATES OF AMERICA : **CRIMINAL DOCKET**
v. :
HARRY KATZIN ; **NO. 11-226-01**

GENE E.K. PRATTER, U.S.D.J.

MARCH 19, 2018

MEMORANDUM

INTRODUCTION

Harry Katzin pled guilty on July 20, 2015 to an indictment charging him with one count of pharmacy burglary and one count of possession with the intent to distribute. He entered this plea on an “open” basis, that is to say, he had no plea agreement with the Government. Three months later sentence was imposed: 87 months’ imprisonment, followed by three years’ supervised release, payment of \$44,080.77 in restitution and a \$200 special assessment. Mr. Harry Katzin did not thereafter appeal. However, he has filed a 28 U.S.C. §2255 motion seeking to vacate, set aside and correct the Court-imposed sentence.

For the reasons outlined in this Memorandum the Court denies Mr. Katzin’s motion.

BACKGROUND

The procedural and factual background of this case have been discussed in detail several times before now. Therefore, except for purposes of delineating the underpinning for the Court’s

ruling here, this Memorandum will not repeat that which has been set out in prior rulings.¹ The Court notes that an appropriate factual and procedural summary appears in the Government's Response In Opposition To Defendant's Motion Under 28 U.S.C. §2255 (Docket No. 289).

DISCUSSION

Mr. Harry Katzin challenges his conviction and sentence on three grounds: 1) that the Court erroneously allowed the Government to use illegally obtained evidence supplied by the FBI which had applied a GPS tracking device to a Katzin vehicle; 2) that the Court erroneously failed to credit Mr. Katzin with the 30 months' time he remained under electronically monitored "house arrest" pending the trial in this case; and 3) that the Court erroneously denied Mr. Katzin a third Sentencing Guideline point for acceptance of responsibility.

A. Mr. Katzin's Challenge to the GPS Surveillance Evidence

Mr. Katzin's challenge based upon the use of the GPS tracking device is curious, at best. At a minimum, this argument flies in the face of the on-point ruling of the Third Circuit Court of Appeals of October 1, 2014. United States v. Katzin, 769 F.3d 163 (3d Cir. 2014). Specifically, the appeals court ruled that the GPS-secured evidence used by the Government in the prosecution of Mr. Katzin and his brothers was admissible.² Mr. Katzin has presented no reason why the admission of evidence that the appellate court validated should serve as grounds for

¹ See Memoranda of this Court in this case dated May 9, 2012 (Docket No. 76), December 22, 2015 (Docket No. 224), and April 18, 2016 (Docket. No. 256), as well as the Third Circuit of Appeals' decision dated October 1, 2014. United States v. Katzin, 769 F.3d 163 (3d Cir. 2014).

² The Government also argues that because Mr. Katzin had a full opportunity to litigate this Fourth Amendment issue in the context of the Government's interlocutory appeal of the "GPS issue" he cannot do so now in a collateral proceeding. See United States v. DeRewal, 10 F.3d 100, 105 n. 4 (3rd Cir. 1993); United States v. Brown, No. 04-4121, 2005 WL 1532538, at *5 n. 14 (E.D. Pa. June 28, 2005). Cf. Stone v. Powell, 428 U.S. 465, 494 (1976). Be that as it may, the October 1, 2014 decision of Third Circuit Court of Appeals governs the issue on the merits and serves to defeat Mr. Katzin's argument on this point.

vacating, setting aside or otherwise changing his sentence - - and the Court cannot discern one from its detailed knowledge of this case.

B. Mr. Katzin's Claim that He Is Entitled to Credit for 30 Months While Being Under Electronic Monitoring Awaiting Trial

Mr. Katzin believes the Bureau of Prisons ought to have applied some 30 months of credit to his 87-month prison sentence because for 30 months he was electronically monitored while on house arrest, as a condition of his release on bail pending the interlocutory appeal of the GPS issue and while time passed given the efforts to reschedule the trial. Mr. Katzin's hope that the Court will supplant the Bureau's assessment is unavailing.

Congress has granted the Bureau of Prisons, not the courts, the jurisdiction to determine whether - - and to what extent - - to give credit for other circumstances against the service of a sentence of imprisonment. By statute, if he wishes to argue for such credit, Mr. Katzin must raise this claim concerning "credit" under 28 U.S.C. §2241. He is not permitted to make this challenge in the manner he has attempted, namely by invoking 28 U.S.C. §2255. In other words, a claim that a sentence has not been correctly computed is properly brought under Section 2241, Jiminian v. Nash, 245 F.3d 144, 146-147 (2nd Cir. 2001), whereas an attack on the fact, or imposition, of a sentence - - such as an argument that the sentence violates the Constitution - - is cognizable under Section 2255. Pack v. Yusuff, 218 F.3d 448, 451 (5th Cir. 2000). Clearly, Mr. Katzin's claims for credit fall squarely within the purview of Section 2241; not 2255.³

³ There is an additional basis for denying Mr. Katzin's claim here. At the time he raised this challenge - - albeit under the wrong statutory rubric - - he was confined in a different federal district, namely, the Middle District of Pennsylvania. Thus, he was obliged to initiate this "credit" challenge in the district in which he was then confined, see United States v. Hayman, 342 U.S. 205, 213 (1952), meaning that this Court would not be the appropriate place to raise the issue.

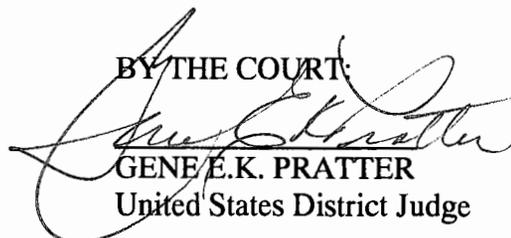
C. Mr. Katzin's Challenge To The Calculation Of His Guidelines

Mr. Katzin believes he ought to have been awarded a further reduction of a point under Guideline §3E1.1(b) because he decided to plead guilty once the court of appeals ruled against him with respect to the GPS-generated evidence. Mr. Katzin raised the same argument as an objection to the Presentence Report and during the sentencing hearing. See Hearing, Oct. 29, 2015, N.T. 9, 36-39. Given the discretionary nature of the §3E1.1(b) acceptance of responsibility point, which counsel for Mr. Katzin quite properly acknowledged during the sentencing hearing, see id., N.T. 10, 36-39 and the absence of any basis on which a defendant can claim a right or entitlement to a §3E1.1(b) acceptance of responsibility point, the Court declined to award the additional reduction during the sentencing hearing and does so again now. This matter was discussed fully at the hearing, see also N.T. 44-47, and no extraordinary reason to revisit this non-constitutional issue has arisen.

CONCLUSION

Accordingly, the Court denies Mr. Katzin's Motion on each of the three grounds he has raised. None of those grounds presents any basis for expecting a dispute among courts that might consider his arguments as raising or presenting a substantial showing of the denial of a constitutional right, Slack v. McHarry, 529 U.S. 473, 484 (2000), and so the Court declines to issue a certificate of appealability. Santana v. United States, 98 F.3d 752, 757 (3rd Cir. 1996).

BY THE COURT:



GENE E.K. PRATTER
United States District Judge

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ORDER

AND NOW, this 19th day of March, 2018, it is hereby **ORDERED** that the Defendant Harry Katzin's Motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence (Docket No. 273) by a person in federal custody is **DENIED**. No certificate of appealability shall issue.

BY THE COURT:


GENE E.K. PRATTER
United States District Judge