

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION NO. 10-388-01
	:	CIVIL ACTION NO. 16-6507
CHARLES E. JACKSON	:	

MEMORANDUM

Rufe, J.

February 11, 2020

Defendant Charles E. Jackson seeks relief pursuant to 28 U.S.C. § 2255 from a judgment of conviction and sentence for distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine. For the following reasons, the petition will be denied without a hearing.

I. BACKGROUND

Defendant was indicted on charges of conspiracy to distribute five kilograms or more of cocaine, distribution of five kilograms or more of cocaine, and possession with intent to distribute 500 grams or more of cocaine, and aiding and abetting. Before trial, the government issued an Information pursuant to 21 U.S.C. § 851 and 21 U.S.C. § 841(a) charging Defendant with two prior convictions for controlled-substance violations under Pennsylvania statute 35 Pa. C.S. § 780-113(3), that would serve as the basis for increased punishment in this case. First, on April 12, 1999, in the Philadelphia Court of Common Pleas, Defendant was sentenced to two to four years of imprisonment. Second, on May 18, 1981, in the Philadelphia Municipal Court, Defendant was sentenced to probation.¹ The government took the position that these convictions meant that Defendant faced a mandatory minimum sentence of life in prison. However, prior to

¹ Doc. No. 20.

sentencing, the government withdrew its reliance on the 1981 conviction, meaning that Defendant faced a mandatory minimum sentence of 20 years in prison. Defendant was sentenced to 330 months of imprisonment.² The sentence was later reduced to 270 months pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 to the Sentencing Guidelines.³

The evidence at trial showed that James Kearney of the Philadelphia Police Department received information from a confidential informant of a drug deal occurring at a house in Philadelphia. The confidential informant identified two vehicles as being involved in the transaction, including a tan Kia with a specified license-plate number. The law-enforcement agents arrived in the area within approximately one hour of receiving the informant's tip and saw the Kia parked in front of the house. The police set up surveillance, and after some time, two people left the house and approached the Kia. The police officers identified themselves and yelled "freeze," whereupon one individual stopped and put up his hands and the other, later identified as Defendant, fled.⁴ The police recovered from the Kia a bag containing approximately \$258,000 and a bill counter.⁵ In the backyard of the home, in the direction that Defendant's co-defendant Gerald Williams had run, the police found a bag containing three kilograms of cocaine.⁶

Several witnesses testified, including the supplier who provided Defendant with 16 kilograms of cocaine and who was speaking with Defendant on the phone as the police attempted

² Doc. No. 334.

³ Doc. No. 358.

⁴ Defendant was arrested some time later, as was Williams.

⁵ Doc. No. 286 at 87-88.

⁶ *Id.* at 229.

to arrest Defendant;⁷ Williams, at whose mother's house the drug transaction occurred;⁸ and two other people who were at the house where the drug transaction occurred. Law-enforcement officers testified as to the attempted arrest of Defendant, the arrest of the co-defendant, and the recovery of evidence. The Kia was registered to Defendant's then-girlfriend, who testified that Defendant told her what happened the night he escaped arrest and told her to lie to the police that the Kia had been stolen.⁹

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to vacate, set aside, or correct the sentence by asserting 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."¹⁰ Relief under AEDPA is extraordinary and "generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure."¹¹

"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. Put differently, a movant has procedurally defaulted all claims that he neglected to raise on direct

⁷ Doc. No. 287 at 17,21.

⁸ Doc. 287 at 133.

⁹ Doc. No. 286 at 168-70.

¹⁰ 28 U.S.C. § 2255(a).

¹¹ *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

appeal.”¹² This bar can be overcome if the movant “can prove either that he is actually innocent of the crime for which he was convicted, or that there is a valid cause for the default, as well as prejudice resulting from the default.”¹³ However, claims of ineffective assistance of counsel are properly raised in a § 2255 motion.¹⁴

III. DISCUSSION

A. Ground One: Ineffective Assistance of Counsel

The Sixth Amendment guarantees to each criminal defendant the effective assistance of counsel. Whether counsel was ineffective is evaluated under the familiar guidelines of *Strickland v. Washington*.¹⁵ To prevail on an ineffective assistance of counsel claim:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.¹⁶

Defendant argues that his retained counsel, Harry Feinberg, was unprepared for trial and that he failed to advise him with regard to a plea agreement. For context, the Court reviews the appointment of counsel in this case. Defendant initially retained counsel, but then represented that he could not afford counsel and requested that counsel be appointed pursuant to the Criminal Justice Act (“CJA”) to represent him.¹⁷ The Court granted this motion and appointed counsel

¹² *Hodge v. United States*, 554 F.3d 372, 378–79 (3d Cir. 2009) (citing *Bousley v. United States*, 523 U.S. 614, 621 (1998)).

¹³ *Id.* at 379 (citing *Bousley*, 523 U.S. at 622).

¹⁴ *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[A]n 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.”).

¹⁵ 466 U.S. 668 (1984).

¹⁶ *Id.* at 687.

¹⁷ *See* 18 U.S.C. § 3006A.

from the CJA Panel to represent Defendant. Defendant then twice requested the appointment of different CJA counsel, which the Court granted each time. The final CJA attorney appointed was Hope Lefeber. Shortly after that appointment, Defendant filed a motion to proceed without counsel, which the Court granted after a hearing.¹⁸ Ms. Lefeber was appointed as backup counsel. Defendant represented himself for more than a year before trial, during which time he filed scores of motions and repeated interlocutory appeals. As a result, the trial date was postponed several times. Next, Defendant requested that the Court appoint a specific attorney to represent him; the Court denied that motion at a hearing on October 9, 2012.¹⁹ Defendant at that time reaffirmed his decision to proceed *pro se*, despite the option to be represented by fully-prepared and capable backup counsel.²⁰ The Court then set a final trial date of December 4, 2012.

On November 29, 2012, the Court was notified that Defendant intended to retain new counsel; the Court denied Defendant's motion for a continuance for that purpose given the history of the case.²¹ On December 4, as the case was called for trial, attorney Harry Feinberg entered his appearance as retained counsel and requested a two-week continuance. In a hearing in open court, the Court denied the continuance, because of the numerous past postponements and a potentially unavailable government witness.²² However, the Court offered to postpone jury selection until the next day so that Mr. Feinberg could spend the rest of the day in the

¹⁸ Doc. No. 82.

¹⁹ Doc. No. 235 at 3.

²⁰ *Id.* at 7

²¹ Doc. No. (Nov. 29, 2012).

²² On direct appeal, where Defendant was represented by appointed counsel from the New Jersey Office of Federal Public Defender, the Third Circuit held that the denial of the continuance was not an abuse of discretion and that "Jackson identife[d] no areas in which his counsel was unprepared or unable to competently represent him" and thus showed no prejudice. *United States v. Jackson*, 619 F. App'x 189, 193 (3d Cir. 2015).

courtroom with Ms. Lefeber and meet with Defendant. Ms. Lefeber had a complete file for the case, and had been prepared to try the case if Defendant had requested that she do so. Mr. Feinberg accepted this offer. Defendant did not indicate that he would prefer to represent himself at trial, as he had done for the past year.

Court resumed about noon the next day. Counsel for the government advised the Court that Mr. Feinberg had approached her with regard to a possible plea offer, and that she was able to obtain supervisory permission for an earlier offer to be reinstated.²³ Mr. Feinberg confirmed that the government had “put back on the table a prior offer,” but that after a thorough discussion between Mr. Feinberg and his client, Defendant rejected the offer.²⁴ The Court conducted a colloquy with Defendant as to his decision to reject the plea offer.²⁵ The case then proceeded to trial.

Defendant argues that Mr. Feinberg failed to advise him of the benefits of the plea offer. When a defendant rejects a plea offer, “he must show that ‘but for counsel’s deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea’ and the resulting sentence would have been lower.”²⁶ Defendant makes no such showing here. The record establishes that on the eve of trial, Mr. Feinberg was able to have a plea offer reinstated, that he explained the offer to Defendant, and that Defendant rejected the offer and decided to go to trial.²⁷ Defendant affirmed on the record that he understood that the

²³ Doc. 285 at 4.

²⁴ *Id.* at 5.

²⁵ *Id.* at 11-15.

²⁶ *Shotts v. Wetzel*, 724 F.3d 364, 376 (3d Cir. 2013) (quoting *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)).

²⁷ Defendant refers to “several plea offers,” Doc. No. 362 at ECF pages 14–15, but as set forth above, there was one plea offer when Mr. Feinberg came into the case. As this plea offer was the same one that Defendant previously rejected, he would have to show that previous counsel were also ineffective in failing to advise him, but Defendant does not so argue. In addition, Defendant had represented himself for more than a year, through the filing of numerous motions, and was well aware of the evidence and issues in his case.

offer was for a 20-year mandatory minimum sentence, and that he understood the risks of going to trial.²⁸

Defendant also argues that Mr. Feinberg was ineffective at trial. However, Defendant points to nothing in the record to support this argument. Before jury selection began, Mr. Feinberg affirmed that he was “thoroughly ready to handle this case and aggressively defend my client.”²⁹ The transcript of the trial shows that in this straightforward case, Mr. Feinberg offered a strong opening statement and closing argument; cross-examined all of the witnesses, bringing out salient points such as the motivations of cooperating witnesses³⁰ and the lack of fingerprints on the black bag, the money counter, and other objects;³¹ and otherwise represented Defendant zealously.

The government for its part produced substantial evidence of guilt, as set forth above. “It is well settled that courts applying Strickland’s prejudice test must consider the strength of the evidence against the defendant.”³² “The greater the support a verdict has in the record, the less likely it is to have been affected by errors.”³³ Here, the record shows both effective representation and a strong case against Defendant. Because the record is clear, no hearing on this claim is necessary.³⁴

²⁸ Doc. No. 285 at 13–15. Defendant also cannot show that he would have received a lower sentence had he accepted the plea offer. *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992).

²⁹ Doc. No. 285 at 6.

³⁰ *See, e.g.*, Doc. No. 287 at 182–88.

³¹ *See, e.g.*, Doc. 287 at 63.

³² *United States v. Calhoun*, 600 F. App’x 842, 844 (3d Cir. 2015) (internal citations omitted).

³³ *Id.* (citing *Strickland*, 466 U.S. at 696).

³⁴ *United States v. Armstrong*, --- Fed. App’x ---, 2020 WL 261223, at *1 (3d Cir. Jan. 17, 2020)

B. Ground Two: Unconstitutionality of 21 U.S.C. § 851 and Vindictive Prosecution

As discussed above, the government issued an Information pursuant to 21 U.S.C. § 851 and 21 U.S.C. § 841(a), identifying two prior convictions in Pennsylvania state court for felony drug distribution that would qualify for a sentencing enhancement. At sentencing, Defendant challenged the applicability of the 1981 conviction, and the government withdrew its reliance on that conviction.³⁵ This resulted in a change from a mandatory minimum sentence of life imprisonment to a mandatory minimum sentence of 20 years of imprisonment, with an advisory guideline range of 324–405 months.³⁶ Defendant argues that because the 1999 conviction increased the maximum penalty, the fact of it had to be submitted to the jury.³⁷

Defendant relies upon the decision of the Supreme Court in *Alleyne v. United States*, which held that any fact that increases the penalty for a crime is an “element that must be submitted to the jury and found beyond a reasonable doubt.”³⁸ However, the Third Circuit has held that *Alleyne* did not alter the existing law that prior judgments of conviction are not elements of the offense to be submitted to the jury.³⁹ Defendant has not provided this Court with a basis for ruling otherwise.

³⁵ Doc. No. 325.

³⁶ Doc. No. 327.

³⁷ It is not clear from the record whether Defendant raised this issue on direct appeal; the Third Circuit’s opinion noted that “Jackson also raises two sentencing arguments to ensure they are preserved for further review, but he properly recognizes that they are foreclosed by our current precedent.” *Jackson*, 619 F. App’x at 190 n.1. If this claim was not raised on direct appeal it is procedurally defaulted, but if it was raised, then the Third Circuit has determined it is foreclosed by precedent.

³⁸ 570 U.S. 99, 102 (2013).

³⁹ *United States v. Rivera*, 532 F. App’x 304, 308 (3d Cir. 2013) (holding that the defendant’s argument “is squarely rebutted by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which upheld the constitutionality of the recidivism provision on the basis that prior judgments of conviction are not elements of the offense that must be submitted to a jury and proved beyond a reasonable doubt. Notwithstanding any existing criticism of *Almendarez-Torres*, this Court is bound by this precedent unless it is overturned, and we have recently discussed the continued vitality of *Almendarez-Torres*. See *Garrus v. Sec’y of Pa. Dep’t of Corr.*, 694 F.3d 394, 401-03 (3d Cir. 2012) (en banc)”). The Supreme Court recently reaffirmed that it has recognized that “[p]rosecutors need not prove to a jury the fact of a defendant’s prior conviction.” *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019).

Defendant also argues that it was vindictive for the government not to withdraw the § 851 Information as to the remaining conviction. This claim was not raised on direct appeal and is procedurally defaulted.⁴⁰ Even if it were not defaulted, it is without merit. The Supreme Court has stated that a prosecutor “should remain free before trial to exercise . . . broad discretion” to alter or even increase the charges pending against a defendant to the limits that the law allows.⁴¹ The filing of the § 851 Information is analogous to the filing of charges. Therefore, Defendant “would have to demonstrate that the Government’s decision to file a § 851 Information was motivated by actual vindictiveness in order to establish a due process violation.”⁴² There is no basis in the record for such a finding here.

C. Ground Three: Prior State Court Conviction as Sentencing Enhancement

Defendant asserts that his 1999 conviction for delivery of a controlled substance is not a qualifying predicate for an enhanced sentence because the Pennsylvania statute sweeps more broadly than the comparable federal statute.⁴³ Defendant cites no law to support this argument, and it is not supported by the language of the state statute, 35 Pa. C.S. § 780-113(a)(30), which provides that a charge of delivery applies only to controlled substances, and not more broadly.⁴⁴ For purposes of the sentencing enhancement, the offense had to become final more than one year

⁴⁰ There is no presumption of vindictiveness associated with a prosecutor’s pretrial decision concerning what charges to bring, as opposed to conduct after trial or an appeal. *See United States v. Goodwin*, 457 U.S. 368, 381 (1982) (stating that “a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision”)

⁴¹ *Id.* at 382.

⁴² *United States v. Trader*, No. 04-680, 2015 WL 4941820, at *11 (E.D. Pa. Aug. 19, 2015).

⁴³ Again, it is not clear whether this sentencing argument was raised on direct appeal, and recognized by the Third Circuit as foreclosed by precedent, or whether it is procedurally defaulted.

⁴⁴ *See United States v. Spears*, No. 12-113, 2018 WL 2065922, at * 2 (W.D. Pa. May 3, 2018).

before the offenses charged in this case were committed, and be punishable by imprisonment for more than one year.⁴⁵ The 1999 conviction qualified.⁴⁶

D. Ground Four: Fifth Amendment Due Process Violation

Defendant asserts that hearsay testimony was improperly used at trial to cover up the fact that an officer at the scene had been convicted of a crime. This claim was not raised on direct appeal, and therefore it is procedurally defaulted.⁴⁷ It is also without merit.

Defendant raised this issue during litigation of a suppression motion while proceeding *pro se*. Briefly summarized, in 2010, Richard Durham, a former detective with the Philadelphia Police Department, was convicted of obstruction of justice in proceedings stemming from an unrelated incident in which the detective warned his best friend that the friend's sister was the subject of a search and arrest warrant relating to the sister's relationship with an accused drug dealer.⁴⁸ Durham was one of the officers at the scene of the events leading to Defendant's conviction, but did not testify at trial. The law enforcement officers who did testify at trial did so based on their first-hand knowledge, and thus did not rely upon hearsay. There was no due process violation.

E. Supplemental Issues

Defendant raises several issues in a "supplemental § 2255 motion."⁴⁹ Defendant first alleges that his backup, or standby, counsel was ineffective with regard to a stipulation that he entered into with the government that the recovered substance was cocaine. However, there is

⁴⁵ 21 U.S.C. § 841(b)(1)(A).

⁴⁶ See PSR ¶ 50.

⁴⁷ *Hodge v. United States*, 554 F.3d 372, 378–79 (3d Cir. 2009) (internal citation omitted).

⁴⁸ See Criminal Action No. 09-405 (E.D. Pa filed June 16, 2009).

⁴⁹ Doc. No. 369.

“no constitutional right to standby counsel.”⁵⁰ It is not entirely clear as to what stipulation Defendant is referring, as the stipulation admitted at trial, that the packages weighing nearly three kilograms contained cocaine, was agreed to by Defendant and his counsel, Mr. Feinberg.⁵¹ In any event, Defendant cannot argue that he was denied the Sixth Amendment right to counsel when he had knowingly exercised “the right to defend himself.”⁵²

Next, Defendant contests the language of a jury instruction, arguing that to convict on criminal conspiracy, the government must prove that the accused had advance knowledge of his co-conspirator’s conduct, citing the Supreme Court’s decision in *Rosemond v. United States*.⁵³ *Rosemond* was decided after Defendant’s trial and direct appeal were concluded and thus the claim is not procedurally defaulted. However, the decision in *Rosemond* is relevant only to charges of aiding and abetting use of a firearm under 18 U.S.C. § 924(c), which is not an offense of which Defendant was convicted.⁵⁴

Defendant also argues that the plea negotiations were tainted by § 851 Information listing two prior felonies that would have resulted in a mandatory life sentence, which reflected an overly harsh potential sentence that the government later conceded was not appropriate by withdrawing reliance on one of the convictions. This claim also is procedurally defaulted, and as “a defendant has no right to be offered a plea,”⁵⁵ the claim is without merit.

⁵⁰ *United States v. Tilley*, 326 F. App’x 96, 96 (3d Cir. 2009).

⁵¹ Doc. No. 286 at 121–22.

⁵² *Faretta v. California*, 422 U.S. 806, 836 (1975).

⁵³ 572 U.S. 65 (2014).

⁵⁴ *Sanchez-Angeles v. United States*, No. 17-2412, 2019 WL 3714584, at *3 (M.D. Pa. Aug. 7, 2019) (collecting cases).

⁵⁵ *Missouri v. Frye*, 566 U.S. 134, 138 (2012).

Finally, Defendant seeks relief under 18 U.S.C. § 3582(c)(2) and Amendment 782 to the Sentencing Guidelines. Defendant was granted this relief by prior order of the Court reducing his sentence to 272 months.⁵⁶ This claim is therefore moot.

IV. CONCLUSION

Upon careful consideration of the parties' submissions and the record in this case, the Court concludes that there has been no showing of prejudice to Defendant or a miscarriage of justice. The motion will be denied without a hearing.⁵⁷ Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue.⁵⁸ An order will be entered.

⁵⁶ Doc. No. 358.

⁵⁷ "In evaluating a federal habeas petition, a District Court must hold an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Kenley*, 440 F. App'x 78, 80 (3d Cir. 2011) (citation omitted). If the record as a whole "conclusively show[s] that the prisoner is entitled to no relief," a court is not required to hold an evidentiary hearing. *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988) (quoting *Gov't of the V.I. v. Bradshaw*, 726 F.2d 115, 117 (3d Cir. 1984)) (internal quotation marks omitted). Here, the Court has assumed the truth of the facts set forth in Defendant's motion, except where contradicted by the Court's own direct observations during the hearing, and finds that the record as a whole conclusively establishes that Defendant is not entitled to the relief he seeks.

⁵⁸ 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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CHARLES E. JACKSON	:	

ORDER

AND NOW, this 11th day of February 2020, upon consideration of Defendant's Motion to Vacate, Set Aside, or Correct Sentence, and the responses and supplements thereto, it is hereby **ORDERED** that:

1. The Motion [Doc. No. 362] is **DENIED with prejudice and without a hearing.**
2. The Supplemental Motion [Doc. No. 369] is **DENIED with prejudice and without a hearing.**
3. There is no basis for the issuance of a certificate of appealability.
4. The Clerk is directed to **CLOSE** the civil case.

IT IS SO ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.