

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

UNITED STATES OF AMERICA :  
 :  
 v. : CIVIL ACTION  
 : NO. 96-8042  
 :  
 DEMETRIUS WHITE : (Criminal No. 94-396-1)  
 :  
 a/k/a "Meat" :

MEMORANDUM ORDER

Petitioner was convicted in a jury trial of interference with commerce by means of robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, for an armed robbery of the Pilgrim Insurance Company at Folcroft, Pennsylvania. Consistent with the pertinent federal sentencing guidelines, the court imposed a sentence of incarceration of 108 months to be followed by three years of supervised release.<sup>1</sup> Presently before the court is defendant-petitioner's second 28 U.S.C. § 2255 petition to vacate, set aside or correct his sentence. Petitioner seeks to have his sentence reduced for various reasons which will be considered in turn.

Petitioner contends that his sentence was improperly enhanced based on conduct for which he was acquitted. He relies on a series of Ninth Circuit cases which were overruled by the United States Supreme Court. The Supreme Court held that a sentencing court may consider conduct of which the defendant has been acquitted. United States v. Watts, 117 S.Ct. 633, 635

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1. Petitioner contends that he was inappropriately sentenced pursuant to the 1994 guidelines for conduct that took place in 1992. The sentencing calculation under the 1992 guidelines is equivalent to the calculation under the 1994 guidelines.

(1997). Moreover, while explicitly recognizing that it could do so, the court in fact specifically declined at sentencing proceedings to enhance petitioner's sentence based upon conduct for which he was acquitted.

Petitioner contends that he was improperly sentenced for others' use of a weapon. Sentencing based upon the foreseeable acts of co-conspirators is appropriate. U.S. v. Casiano, 113 F.3d 420, 427-28 (3d Cir. 1997) (upholding conspirator's sentence based on co-conspirator's use of gun where such use was reasonably foreseeable). The court found by a preponderance of the evidence presented that a confederate of petitioner possessed and brandished a firearm during the robbery and that petitioner did foresee that such would occur. On that basis his base offense level was increased by five levels pursuant to U.S.S.G. §2B3.1(b)(2)(C).

Petitioner contends that a loss of \$5,708 suffered in the robbery was never proven. The government provided a detailed accounting of the loss to the Probation Office which included the finding of a \$5,708 loss in the presentence report. Petitioner was expressly given an opportunity to object to this finding at sentencing and declined to do so. The court appropriately relied on the finding consistent with Fed. R. Crim. P. 32(b)(6)(D).

Petitioner also contends the evidence was insufficient to support the enhancement based on restraint. The court found by a preponderance of the evidence that persons were physically restrained to facilitate the commission of the robbery. The

court further found that defendant was personally engaged in such conduct and supplied material to confederates for use by them in binding the victims. Petitioner's base offense level was thus properly increased by two levels pursuant to U.S.S.G.

§ 2B3.1(b)(4)(B).<sup>2</sup>

Finally, petitioner objects to being placed in Criminal History Category II due to a prior federal conviction.

Petitioner contends that because the sentence imposed by this court is concurrent with the prior sentence for his other offense imposed by the Hon. James McGirr Kelly, petitioner should not have been assessed criminal history points for the prior offense.

Petitioner's argument is without merit. Pursuant to U.S.S.G. §4A1.2(a)(1), criminal history points are assessed for a previously imposed sentence.

**ACCORDINGLY**, this                    day of August, 1997, upon consideration of petitioner's petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 and the response thereto, **IT IS HEREBY ORDERED** that said petition is **DENIED** and the above civil action is **DISMISSED**.

**BY THE COURT:**

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2. Petitioner incorrectly cites the failure of a particular witness to appear at sentencing as support for this argument. That witness, however, was called to testify regarding physical harm he suffered. Based upon his failure to appear, the court found that there was insufficient evidence to warrant a two level increase pursuant to U.S.S.G. §2B4.1(b)(3)(A) for bodily injury to a victim.

JAY C. WALDMAN, J.