

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

UNITED STATES : CRIM. NO. 95-406-1  
 :  
 v. :  
 :  
 THOMAS TIEDEMANN : (CIV. NO. 97-3997)

**NORMA L. SHAPIRO, J.**

**September 12, 1997**

**MEMORANDUM AND ORDER**

Petitioner, in his original motion to vacate or set aside sentence under 28 U.S.C. § 2255, alleges ineffective assistance of counsel for the following reasons:

- 1) Prior counsel failed to challenge the accuracy of petitioner's criminal history category;
- 2) Prior counsel failed to bring forth evidence of petitioner's assistance to law enforcement agencies other than federal; and
- 3) Prior counsel failed to request departure from the United States Sentencing Guidelines under Sentencing Guideline § 5H.

In addition, defendant personally filed a Supplemental Memorandum in support of his motion under 28 U.S.C. § 2255 in order to raise additional issues his lawyer failed to raise.<sup>1</sup> Attached to the submission is an affidavit stating the history of

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<sup>1</sup> Defendant also submitted a Motion to Supplement the record and Allow Hybrid Representation. However, the Defendant has no "right to counsel when mounting collateral attacks upon their convictions." Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). The Motion to Allow Hybrid Representation is denied.

his state and federal prosecutions to which numerous documents are attached pertaining to his state charges as well as a number of federal pretrial orders.

On December 4, 1995, the defendant entered a plea of guilty to attempt to possess with intent to distribute phenyl-2-propanone (Count 2). Defendant was sentenced on April 16, 1996, at offense level 23 (26 less 3 for acceptance of responsibility) and criminal history category V (criminal history of VI based on 14 points was deemed to overstate the seriousness of defendant's criminal history category). The court granted a motion under Sentencing Guideline § 5K1.1 and reduced defendant's sentence to 75 months followed by 5 years supervised release, a fine of \$5,000, and a special assessment of \$50.00. Defendant appealed his sentence and it was affirmed by the Court of Appeals on February 5, 1997.

#### **Defendant's Original Motion**

The 1995 guidelines in effect on the date of sentencing were used, rather than the guidelines in effect when the offense was committed in 1990, because the court and counsel believed them to be more favorable to defendant.<sup>2</sup> Because this motion can only be understood as an effort to obtain a sentencing reduction, no longer available under Fed. R. Civ. P. 35, under the alleged guise of ineffective assistance of counsel, the motion will be

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<sup>2</sup>This conclusion was based on the fact that the amendment to the rules allowing an additional 1 point reduction for early acceptance of responsibility became effective November 1, 1992. (U.S. Sentencing Guidelines Manual, Appendix C, amendment 459).

denied without an evidentiary hearing.

#### DISCUSSION

Defendant's ineffectiveness of counsel claim is controlled by Strickland v. Washington, 446 U.S. 668 (1984). To establish ineffective assistance of counsel, defendant Tiedemann must show both: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant; so that the result was in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687.

Judicial scrutiny of counsel's performance must be highly deferential. Id. at 687. A defendant must overcome the presumption that, under the circumstances, counsel's actions might be considered sound strategy. Id. at 689. Here, defendant's prior counsel properly addressed all relevant sentencing issues. Defendant has failed to show prejudice from any alleged errors. Defendant fails to meet the Strickland burden.

A. Defendant claims his Criminal History Points were not properly calculated.

Defendant claims the 1990 Sentencing Guidelines should govern his claim. If they were more favorable, defendant is correct and counsel's failure to insist on their application might have been ineffective assistance. The court will therefore apply the 1990 guidelines to see if using the 1995 guidelines was prejudicial.

Based upon the 1995 guidelines, defendant was sentenced at offense level 23 and criminal history category V; the sentencing

range without a § 5K1.1 departure was 84-105 months. If the 1990 guidelines were used, under Sentencing Guideline § 3E1.1, the reduction for acceptance of responsibility would have been only 2 points. Starting with an offense level of 26, the resulting offense level after reduction would have been 24. With a criminal history of V, the presumptive sentence would have been 92-115 months. The 1995 guidelines were more favorable as to the offense level.

Defendant contends the criminal history points were calculated incorrectly and should not have been 14, but only 6. The criminal history points were correctly calculated under the 1995 guidelines and would have been no different under the 1990 Sentencing Guidelines.

1. Defendant contends his state conviction for DUI on October 24, 1989, should not have been counted because he was without counsel at the time.

The presentence report assigned points to a state DUI conviction on October 24, 1989, because defendant was represented by counsel, namely Stuart Phillips, Esq., Assistant Bucks County Public Defender. ADA Phillips was duly appointed and acted as defendant's counsel. There is no requirement that counsel be privately retained.

The presentence report stating that defendant was represented by counsel was available to defendant prior to the sentencing hearing. Defendant reviewed the presentence report with counsel. At the sentencing hearing defendant and counsel each confirmed that the presentence report contained no

inaccurate statements of fact. (Sentencing Transcript, pp. 2 and 4). There was no reason for the government to prove defendant was not uncounselled. Nor did a valid reason exist for defendant's counsel to object to points assigned for this conviction.

Defendant's DUI conviction is a prior felony conviction, not a misdemeanor, under the 1990 Sentencing Guidelines. The Sentencing Guideline § 4B1.2, Application Note 3 defines a prior felony conviction as "a prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether the offense is specifically designated as a felony and regardless of the sentence imposed." U.S. Sentencing Guidelines Manual § 4B1.2, Application Note 3 (1990). Driving under the influence of alcohol is a misdemeanor of the second degree, 75 Pa. Cons. Stat. Ann. § 3731(e) (West 1996), punishable for a maximum term of two years, 18 Pa. Cons. Stat. Ann. § 1104 (West 1983). Assigning points to this conviction was proper.

2. Defendant claims his DUI conviction on February 12, 1990, should not have been assigned 1 point because U.S. Sentencing Guideline § 4A1.2(c) excludes a misdemeanor or petty offense unless the sentence was at least 30 days in prison or probation for more than one year.

Sentencing Guideline § 4A1.2, Application Note 5 states the following: "Convictions for driving while intoxicated or under the influence are counted" within the defendant's Criminal History

Category. U.S. Sentencing Guidelines Manual §4A1.2, Application Note 5 (1990). As a result, the DUI conviction does not fall within the "misdemeanors and petty offenses" category.

The point for this conviction was properly assigned.

3. Defendant contends he should have received only 2 points for the offenses in Par. 31 and 32, rather than the 4 points he was assigned.

Because his sentence on January 26, 1995, was consolidated (60 days in jail for two related cases of domestic violence), he contends the 1990 Sentencing Guidelines required their consideration as a single conviction with a maximum of 2 points.

The 1990 Sentencing Guidelines provided that prior sentences imposed in related cases were to be treated as one sentence under Sentencing Guideline § 4A1.2. But Sentencing Guideline § 4A1.2, Application Note 3 states should only be considered related if they: "(1) occurred on the same occasion; (2) were part of a single common scheme or plan; or (3) were consolidated for trial or sentencing." U.S. Sentencing Guidelines Manual § 4A1.2, Application Note 3(1990). Although defendant's multiple convictions were consolidated for sentencing, a "related case" categorization was inappropriate, because the offenses were not committed on a single occasion but on separate dates, separated by an intervening arrest, and thus were not part of a single scheme or plan.

Defense counsel did raise this matter (Sentencing Transcript, p. 15), but the court believed the offenses were separate offenses under the Guidelines. If this determination

was in error, it was not the ineffectiveness of counsel but the mistake of the court and should have been corrected by appeal.

However, the court did reduce defendant's criminal history category from VI (13+ points) to V (10, 11, or 12 points) because it was of the opinion that the criminal history category of VI overstated defendant's past criminal conduct. Treating the two acts of domestic violence as related and limiting the assignment of points to 2 rather than 4 would have reduced defendant's criminal history points from 14 to 12 but would have still placed him in a criminal history category of V. There was no prejudice from this alleged miscalculation.

4. Defendant contends the three points in paragraphs 33 and 34 were erroneously assessed.

Defendant contends the three points in paragraphs 33 and 34 were erroneously assessed because the allegedly uncounselled conviction of October 24, 1989 was the basis for these points. He contends that conviction must be excluded from the criminal history. However, defendant had counsel so this contention has no merit. (See section A1, above.)

The criminal history points were calculated correctly; counsel was not ineffective for not persuading the court to the contrary.

B. Defendant contends that counsel failed to bring forth evidence of defendant's assistance to state and local law enforcement agencies as well as the federal government.

Although the government made, and the court granted, a

motion under Sentencing Guideline § 5K1.1, defendant claims counsel should have called additional cooperation to the court's attention, because it might have resulted in a greater downward departure from 84-105 months than the 75 month sentence imposed.

This contention is baseless. The court was advised of defendant's past cooperation with state authorities (Sentencing Transcript, p.12); however, his credit for cooperation was marred by his threat to kill a federal agent. The court's downward departure of 9-30 months (in effect, a reduction of the offense level by three levels) was appropriate. The court would not have been influenced to reduce the sentence further on account of earlier additional cooperation with state and local authorities. Under the circumstances, it was surprising that the government even filed a motion under Sentencing Guideline § 5K1.1.

C. Defendant claims counsel failed to request a downward departure based on Sentencing Guideline § 5H.

Defendant contends that his 30 year addiction to drugs and alcohol affected his mental and physical condition and his lack of parental upbringing also constituted an extraordinary circumstance warranting departure. These facts were brought to the court's attention in the presentence report, i.e. Par. 43. Defense counsel did in fact argue for a downward departure under Sentencing Guideline § 5H based on defendant's "extraordinary childhood experience, his substance and narcotics abuse and diminished capacity." (Sentencing Transcript, p. 18). The court did not expressly grant a downward departure for those reasons because the government's §5K1.1 motion made that basis moot, that

is, unnecessary: the court could and did sentence below the guidelines anyway. The court explicitly stated that defense counsel's arguments about defendant's childhood experience, substance and narcotics abuse, and diminished capacity were considered. The court did not believe defendant had "diminished capacity" under the sentencing guidelines or that his childhood experience was so extraordinary it warranted downward departure. However, his substance and narcotic abuse did warrant special consideration. (Sentencing Transcript, pp. 18-19). There was extensive discussion of defendant's need for treatment at the sentencing hearing. Defense counsel prevailed upon the court to recommend defendant for the federal 500 hours treatment program.

Defendant's sentence was adversely affected by his pre-trial release behavior, resulting in his pre-trial detention. The sentence imposed was not adversely affected by the ineffectiveness of counsel. A review of defense counsel's written objections to the presentence report and his advocacy at the sentencing hearing convinces the court that defense counsel's motion to vacate or set aside his sentence under 28 U.S.C. § 2255 for ineffective assistance of counsel at sentencing is devoid of merit.

### Supplemental Memorandum

The additional issues asserted in the supplemental memorandum are as follows:

"1. Whether ineffective assistance of counsel violated my Due Process rights that the state acquittal on the same charges barred federal prosecution under res judicata and double jeopardy?"

An acquittal or conviction on state charges does not bar federal prosecution under either res judicata or double jeopardy. The federal government is separate and distinct from the Commonwealth of Pennsylvania and may prosecute for alleged violations of its laws, regardless of state proceedings. The current motion before the court cannot attack the inappropriateness or illegality of state proceedings since there has been no exhaustion of state remedies; but there may not even be a state conviction to attack.

There has been no violation of the double jeopardy provision of the U.S. Constitution. A federal prosecution arising out of the same facts which had been the basis of a state prosecution is not barred by the double jeopardy clause. United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). See also Bartkus v. Illinois, 359 U.S. 121 (1959) (due process clause does not prohibit a state from prosecuting a defendant for the same act for which he was acquitted in federal court). The "dual sovereignty" doctrine rests on the premise that, where both sovereigns legitimately claim a strong interest in penalizing the

same behavior, they have concurrent jurisdiction to vindicate those interests and neither need yield to the other. As the Supreme Court explained in Lanza:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory ... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. Lanza, 260 U.S. at 382.

The federal prosecution was not barred by res judicata, nor was it double jeopardy prohibited by the Constitution.

"2. Whether ineffective assistance of counsel failed to address the issue of entrapment when the charges were orchestrated by the Government and acted in all ways to cause me to commit an illegal act?"

If the conduct of the state official(s) -- Lynnann Lewis -- amounted to entrapment under state law, that should have been and must be attacked in state court. However, it is the court's understanding that defendant was acquitted of all charges in state court.

The federal standard for a valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, 485 U.S. 58, 63 (1988); United States v. Fedroff, 874 F.2d 178, 181 (3d Cir. 1989); United States v. Bay, 852 F.2d 702, 704 (3d Cir. 1988).

The defendant has the burden of producing evidence of both inducement and non-predisposition to commit the crime. Fedroff, 874 F.2d at 182; United States v. Marino, 868 F.2d 549, 551 n. 3 (3d Cir.), cert. denied, 492 U.S. 918, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989). "After the defendant has made this showing, ... the government then has the burden of proving beyond a reasonable doubt that it did not entrap the defendant." Marino, 868 F.2d at 552 n. 6 (quoting United States v. El-Gawli, 837 F.2d 142, 145 (3d Cir. 1988)).

In his supplemental memorandum, defendant argues that "counsel failed to move to dismiss the indictment on the entrapment issue." (Def. Supplemental Memorandum at 8) No prejudice results from a lawyer's not exploring a potential defense unless it "likely would have succeeded at trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). It is not clear why Mr. Tiedemann thinks he was entrapped and hence no basis for determining that the court would have submitted the issue to the jury if the defense were raised. There was no evidence of a lack of predisposition. The only evidence regarding entrapment cited by defendant is the dismissal of the state charges for failure to state a cause of action upon which relief could be granted. This state court decision has no bearing on the strength of a valid entrapment defense in the federal trial. They are simply two different issues. There is no reasonable probability to believe that had counsel raised the issue, Mr. Tiedemann would have succeeded in an entrapment defense at trial. Defendant's contention regarding entrapment is without merit.

"3. Whether prosecutorial misconduct was evident when the state silver-plattered the charges before the grand jury and to obtain an indictment that was based on hearsay and known perjured testimony?"

To the extent the court understands the defendant's contention, there has been no government misconduct established in presenting the case to the grand jury. United States v. Ismaili, 828 F.2d 153, 164 (3d Cir. 1987), cert. denied, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988); United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979). Even if there were governmental misconduct, the defendant cannot challenge the grand jury proceedings in a habeas action, after a plea of guilty.<sup>3</sup> Tollett v. Henderson, 411 U.S. 258 (1973), U.S. v. Fulford, 825 F.2d 3 (3d Cir. 1987), Telepo V. Scheidemantel, 737 F. Supp. 299 (E.D. Pa. 1990). The Supreme Court has said:

"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. "Tollett, 411 U.S. at 267.

Any alleged misconduct before the grand jury provides no basis for setting aside defendant's conviction.

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<sup>3</sup> If defendant has been convicted at trial, defendant may not contest the propriety of the grand jury proceedings thereafter. United States v. Mechanik, 475 U.S. 66 (1986); United States v. Johns, 858 F.2d 154 (3d Cir. 1988).

### CONCLUSION

Counsel was not ineffective for failure to move to dismiss the indictment on the entrapment or any other issue as such a motion would not have been successful. The conduct of the state law enforcement agency was not so outrageous that due process principles would bar federal indictment or subsequent prosecution. There was a sufficient factual basis for the charges to permit the court to accept the defendant's plea of guilty.

After consideration of defense counsel's motion and defendant's Supplemental Memorandum in Support of his Motion, defendant's motion to vacate or set aside sentence under 28 U.S.C. § 2255 is denied without an evidentiary hearing.

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UNITED STATES : CRIM. NO. 95-406-1  
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 THOMAS TIEDEMANN : (CIV. NO. 97-3997)

**ORDER**

AND NOW this 8th day of September, 1996, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 18 U.S.C. § 2255 and the government's response thereto, defendant's Motion to Supplement the Record, Motion to allow Hybrid Representation, and Supplemental Memorandum on behalf of Defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 18 U.S.C. § 2255, it is **ORDERED** that:

1. Defendant's motion to supplement the record is **GRANTED**.
2. Defendant's motion to allow hybrid representation is **DENIED**.
3. Defendant's Motion to Vacate, Set Aside, or Correct Sentence is **DENIED** without hearing.

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Norma L. Shapiro, J