

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

UNITED STATES OF AMERICA	:	CIVIL NO. 97-2675
	:	
v.	:	CRIMINAL NO. 89-299
	:	
SCOTT DAVID LATTANY	:	

MEMORANDUM

R.F. KELLY, J.

SEPTEMBER 16, 1997

Before this Court is Petitioner Scott David Lattany's ("Lattany") pro se Motion to Vacate, Correct, or Set Aside Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, Lattany's Motion is denied.

I. Background

In the late spring of 1989, a three-block section of center city Philadelphia was the scene of four bank robberies. Because all four of the banks were federally insured, the Federal Bureau of Investigation ("FBI") was called into the case. Subsequently, the FBI distributed a picture of a man wanted for questioning in connection with the robberies.

On June 16, 1989, a man entered the First Bank of Philadelphia, produced a gun, and announced that a robbery was taking place. One teller recognized the man from the picture distributed by the FBI, and warned another teller. The second teller approached the man, ascertained that the gun was not real, and told the man to leave. A scuffle ensued and two tellers eventually forced the would-be robber to the floor and held him until police arrived. The suspect was identified as Lattany. Employees of the other robbed banks later identified Lattany as

the man who had robbed them.

Lattany was indicted on four counts of robbery and one count of attempted robbery. Before his case came to trial, Lattany was represented by five different attorneys. He finally decided to represent himself at trial, with court-appointed standby counsel. After a one week trial, which concluded on February 1, 1991, Lattany was convicted on two of four robbery counts and on the attempted robbery count.

This Court denied Lattany's motion for a judgment of acquittal or new trial. See United States v. Lattany, 769 F. Supp. 181 (E.D. Pa. 1991). Lattany's conviction was affirmed on appeal. See United States v. Lattany, 982 F.2d 866 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993).

II. Discussion

Lattany alleges six separate grounds for his Motion. All are based upon the ineffectiveness of appellate counsel. Lattany contends that appellate counsel was ineffective in failing to claim the following: (1) that the trial court erred in permitting the jury to view the bank surveillance videotape during deliberations, (2) that trial counsel was ineffective for not objecting to the jury reviewing those videotapes, (3) that the jury engaged in misconduct, (4) that the defense lost or destroyed evidence, (5) that the trial court erred in not permitting Lattany to approach witnesses, and (6) that the trial court erred in permitting the jury to review the videotape of a

trial witness's testimony.¹

"Once a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. § 2255." United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981) (citing Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969)). The issues Lattany raised on direct appeal included the following: (1) the jury viewing bank surveillance videotape,² (2) the alleged jury misconduct, (3) the trial court's refusal of his request to approach witnesses, and (4) the videotaped witness testimony. See Lattany, 982 F.2d at 869 n.1. The court of appeals rejected all of Lattany's contentions as lacking merit. Id. at 868-69. Therefore, because these issues have been litigated and decided, this Court will not consider them on this Motion.

The only issue remaining in Lattany's amended Motion that was not squarely raised in, and rejected by, the Third

¹In his original Motion (prior to amendments), Lattany also claims that the five bank robberies were not properly joined and should have been tried separately. Even had Lattany retained this claim in his amended Motion, it would fail. Requests for severance of charges under Federal Rule of Criminal Procedure 14 must be made prior to trial or they are waived. FED. R. CRIM. PRO. 12(b)(5) and (f). No motion was made here.

²Because the court of appeals found that the trial court did not err in allowing the jury to view the bank surveillance videotape, the trial counsel could not have been ineffective in failing to object to the jury viewing the tapes. Therefore, Lattany's first and second grounds for this Motion have been effectively litigated.

Circuit is Lattany's contention that the government lost or destroyed evidence.

At a pretrial hearing on January 29 1991, Lattany asked the FBI case agent why he had not procured a photograph from the bank surveillance camera recording the June 16, 1989 attempted robbery at which Lattany was apprehended and shown it to victim witnesses from the prior four robberies. The agent explained that because someone was taken into custody, official arrest photographs would be taken which would produce a more accurate depiction than a photograph from a video cassette tape (1/29/91; 10:17:06 - 10:18:10). Lattany then asked "Do you still have the film from that alleged attempted robbery?" The agent answered (apparently in error): "Yes" (1/29/91; 10:18:52 - 10:18:58). Lattany asked if any still photographs had been produced from it and the agent testified that none had been (1/29/91; 10:18:59 - 10:19:04).

On January 31, 1991, during the cross-examination of a witness, Lattany asked that the June 16th surveillance videotape be shown. Government counsel advised the Court that the government in fact did not have the videotape (1/31/91; 10:51:30 - 10:52:24). At that point, Lattany's standby counsel, Gregory Smith, conferred with the government at government counsel table, returned to defense counsel table, and explained the situation to Lattany. The discussion between counsel and the subsequent explanation are not audible on the videotaped courtroom proceedings, however, Lattany appeared to be satisfied with the

explanation as he then resumed cross-examination of the witness (1/31/97; 10:52:25 - 10:53:10).

At the charge conference, Mr. Smith indicated that his client might request what he described as a charge akin to a missing witness instruction, based upon the fact that the government supposedly possessed the surveillance videotape and elected not to show it at trial, thereby permitting an adverse inference as to its contents. Government counsel explained to the Court that the agent advised that he had viewed the tape, determined it to contain nothing of value, and did not possess it (1/31/91; 14:26:00 - 14:28:00).

The Court's recollection was that the videotape was not of great concern to the FBI because Lattany had been apprehended during the incident (1/31/97; 14:27:15 - 14:28:00).³ That resolved the matter at trial, and the issue was not further pressed. Thus, the only indication that the government ever possessed the videotape was the agent's statement at the pretrial hearing. The only fair inference from the record is that the agent testified in error on January 29th as to whether or not the FBI took possession of the videotape, although he had reviewed it. There is nothing to support Lattany's claim that the government lost or destroyed relevant evidence.

³The FBI agent had testified at the pretrial hearing as follows: "Since a person was taken into custody following an alleged incident on June 16 and there would be arrest photos resulting from that arrest . . . those photos would be a more accurate representation of the person on June 16 than we would get from a video cassette tape" (1/29/91; 10:17:30 - 10:18:10).

In order to claim ineffective assistance of counsel, a convicted defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989) (citing Strickland v. Washington, 466 U.S. 668, 687-96 (1984)). The defendant must show that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). To obtain collateral relief, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). A collateral challenge may not substitute for a direct appeal. Id. at 165.

There is nothing to indicate that Lattany's appellate counsel's representation was unreasonable. Indeed, the Third Circuit addressed five of the six areas in which Lattany contends appellate counsel's assistance was ineffective, finding all of them lacking in merit. Further, there is no support for the contention that the government lost or destroyed evidence. Lattany is unable to show that but for counsel's alleged errors, the result of the proceeding would have been different. Thus, this Motion does not meet the requirements for showing ineffective assistance of counsel.

III. Conclusion

In summary, all but one of the arguments raised by

Lattany in support of this Motion have been previously litigated and will not be considered by this Court. Further, there is no support for the remaining argument that the government lost or destroyed evidence. In light of these facts, as well as the lack of any evidence that Lattany was denied effective assistance of counsel, this Motion is denied.

An appropriate Order follows.

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ORDER

AND NOW, this 16th day of September, 1997, upon consideration of Petitioner Scott David Lattany's Motion to Vacate, Correct, or Set Aside Judgment pursuant to 28 U.S.C. § 2255, and all responses thereto, it is hereby ORDERED that said Motion is DENIED.

BY THE COURT:

Robert F. Kelly, J.