

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 JOSEPH MOTT : NO. 93-325-5

MEMORANDUM AND ORDER

HUTTON, J.

October 15, 1997

Presently before the Court is the Motion of Petitioner, Joseph Mott, to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, and the Government's response thereto. For the reasons set forth below, this Court dismisses Petitioner's Motion.

I. DISCUSSION

The petitioner brings this petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The petitioner states three grounds for his motion: 1) his conviction was obtained by a coerced guilty plea; 2) the sentence was imposed based on non-applicable sentencing guidelines; and 3) the pre-sentence investigation report erroneously did not reflect his past substance abuse.

The petitioner seeks relief under the federal habeas corpus provision which provides in relevant part that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1996). In considering a petition for habeas relief under Section 2255, "the appropriate inquiry is whether the claimed error of law was a fundamental defect which inherently resulted in a complete miscarriage of justice, and whether it presents exceptional circumstances where a need for the remedy afforded by the writ of habeas corpus is apparent." Casper v. Ryan, 822 F.2d 1283 (3d Cir. 1987), cert. denied, 484 U.S. 1012 (1988); accord United States v. Diggs, 1993 WL 140740 (E.D. Pa. May 4, 1993).

A petition under § 2255 "is not a substitute for appeal, nor may it be used to re-litigate matters decided adversely on appeal." Wright v. United States, No. CIV.A.95-5733, 1996 WL 224672, at *1 (E.D. Pa. April 29, 1996). Further, a district court may summarily dismiss a motion brought under § 2255 without a hearing where the "motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992); Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)).

A. The Guilty Plea

The petitioner filed a signed plea agreement with this Court on January 13, 1994, in which he agreed to plead guilty to certain counts of the indictment. At the petitioner's change of plea hearing held that day, the following exchanges took place:

THE COURT: Is there anything about this agreement, sir, that at this point you're still unclear and would like to have the Court focus on, or discuss with me or your attorney or all of us? Are you clear on every provision in this agreement?

THE DEFENDANT: Yes, I believe I am, your Honor.

THE COURT: Okay, at the time you signed this document, sir, did anyone suggest to you that if you went along with the plea agreement that the Court would more than likely be lenient on you at the time of sentencing?

THE DEFENDANT: No, they didn't.

THE COURT: Did anyone suggest to you that you better plead guilty, because if you go for right to a trial by jury the Government is really going to come down on you?

THE DEFENDANT: No.

THE COURT: They didn't threaten you or coerce you to sign this agreement?

THE DEFENDANT: No, they didn't.

Change of Plea Hearing, 1/13/94 at 10-11. Now, the petitioner seeks to withdraw his guilty plea.

In his petition, the petitioner states that: "agents, as well as the prosecutor . . . advised me that if I didn't plead guilty to all relevant charges, all my co-defendants would be denied any type of deal." Pet. at 5. For this reason, the petitioner contends that his guilty plea was tainted and involuntary. The Government has not denied that it made this threat; instead the Government argues that the guilty plea was entered knowingly, intentionally, and voluntarily. Govt.'s Resp. at 2.

"The acceptance of a plea conditioned on lenient treatment for another is troublesome business." United States v. Laura, 667 F.2d 365, 379 (3d Cir. 1981) (Stern, J., dissenting). In fact, the Supreme Court of the United States has commented that such a bargain, "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." Bordenkircher v. Hayes, 434 U.S. 357, 364 n. 8 (1978). Moreover, where the threatened prosecution pertains to those with whom the defendant has familial ties or other close bonds, the threat of coercion is much greater. United States v. Carr, 80 F.3d 413, 417 (10th Cir. 1996). Therefore, "'special care must be taken to ascertain the voluntariness of' guilty pleas entered into in such circumstances." United States v. Nuckols, 606 F.2d 566, 569 (5th Cir. 1979) (quoting United States v. Tursi, 576 F.2d 396, 398 (1st Cir. 1978)).

Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit, however, has forbidden the acceptance of such a plea. Most courts have found that prosecutors may practice this type of bargaining if they "use a high standard of good faith." Nuckols, 606 F.2d at 569. This high standard of good faith is met if the threatened prosecution of the third persons is justified. Id. at 570. Moreover, if this standard is met, those courts have "insisted that an accused's choice be respected, and if he 'elects to sacrifice himself for such motives, that is his choice.'" Carr, 80 F.3d at 417 (quoting Mosier v. Murphy, 790 F.2d 62, 66 (10th Cir. 1986)).

Courts have held that "a defendant's affirmation to the sentencing court that he entered the guilty plea voluntarily is 'not an absolute bar to his subsequent claims that he pleaded guilty only to protect [a] third party.'" United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992) (quoting Martin v. Kemp, 760 F.2d 1244, 1248 (11th Cir. 1985)). Still, where the defendant makes an affirmation to the sentencing court that he entered the guilty plea voluntarily, that defendant "carries a heavy burden 'to establish that the government did not observe a high standard of good faith based upon probable cause to believe that the third party had committed a crime.'" Whalen, 976 F.2d at 1348 (quoting Martin, 760 F.2d at 1248; Nuckols, 606 F.2d at 569).

In the instant case, the petitioner does not contend that the prosecution lacked probable cause to indict his co-defendants. Nor does the petitioner argue that the prosecution failed to act in good faith through any other improper conduct. In fact, it is clear that the Government had probable cause to indict the petitioner's co-defendants. The petitioner instead argues that the government conditioned a deal to his co-defendants on his willingness to plead guilty.

The petitioner has not put forth any evidence indicating that the Government failed to meet a high standard of good faith. The threatened prosecution of the petitioner's co-defendants was fully justified. Finally, this Court recognizes that the petitioner previously denied being coerced or threatened to plead guilty. Change of Plea Hearing, Tr. at 11 (January 13, 1994). Therefore, any "package deal in the instant case survives this standard of 'special care,'" and there is nothing to suggest that this deal was improperly coercive. Carr, 80 F.3d at 417. "If [an accused] elects to sacrifice himself for [third persons], that is his choice." Mosier, 790 F.2d at 66 (citing Kent v. United States, 272 F.2d 795, 798 (1st Cir. 1959)). Here, even if the petitioner's allegations are true, this Court must respect that choice. This fails to make the petitioner's guilty plea involuntary at the time it was made. Thus, the petitioner's argument fails and the guilty plea must be upheld.

B. The Sentencing Guidelines

The petitioner asserts that his sentence was imposed based on non-applicable sentencing guidelines. Pet. at 5. Although the petitioner was arrested on July 15, 1993, the petitioner argues that he was sentenced on July 2, 1996, under guidelines that first became effective on November 1, 1993. The petitioner contends that this has a "direct affect on my good time and supervised release time." Pet. at 5.

The United States Sentencing Commission Guideline Manual clearly states which Guideline Manual should be used by a court when sentencing under the guidelines:

- (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
- (b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

United States Sentencing Commission, Guidelines Manual, §1B1.11 (Nov. 1995).

In the case before the Court, the petitioner pled guilty to conspiracy to distribute and possess with intent to distribute in excess of one thousand kilograms of marihuana, unlawful possession with intent to distribute marihuana, unlawful use of a

communication facility, and continuing criminal enterprise. These charges arose out of offenses committed between April, 1992 and April, 1993. Change of Plea Hearing, Tr. at 17-19 (January 13, 1994). The date of the sentencing was July 2, 1996. Thus, the sentencing guidelines effective November 1, 1995, should have been used, unless the sentencing guidelines effective November 1, 1992 would have imposed a lesser sentence. §1B1.11.

Under both versions of the sentencing guidelines, the continuing criminal enterprise count results in a base offense level of 38 under §2D1.5 and the defendant receives a three level reduction for acceptance of responsibility under Section 3E1.1. This results in an overall base offense level of 35. With a criminal history category III, the sentencing guideline range for imprisonment under both versions was 210 to 262 months imprisonment. The sentencing guidelines effective November 1, 1995, and those effective November 1, 1992, produce the same result. Thus, the petitioner was not prejudiced in any way in reference to the sentence he received.

The petitioner argues, however, that by using the November 1, 1993, version of the sentencing guidelines, his good time and supervised release time were adversely affected. Both of these arguments are misguided. The computation of credit towards service of a prisoner's sentence for satisfactory behavior is calculated by the Bureau of Prisons, and the sentencing guidelines

have no affect on this computation. 18 U.S.C. § 3624(b) (West Supp. 1997). Further, any changes in the sentencing guidelines between 1992 and 1996 do not affect the petitioner's supervised release time. See §5D1.2. Therefore, the Court finds the petitioner's arguments on this issue meritless.

C. Information in the Pre-Sentence Investigation Report

The petitioner contends that he has recently been denied admission into an inpatient drug program at his place of incarceration due to an error on his pre-sentence investigation report ("PSI"). Pet. at 5. The petitioner argues that the PSI erroneously failed to reflect his substance abuse prior to his incarceration. Pet. at 5. More specifically, the petitioner states that his PSI was never updated after its preparation to reflect that he abused controlled substances within one year of his incarceration. Pet. at 5. The Government maintains that the petitioner himself substantiated the PSI, and that petitioner's contentions are therefore frivolous.

The petitioner has twice maintained that he was drug free since his arrest in 1993, more than three years before his incarceration. First, in the petitioner's own sentencing memorandum, the petitioner stated that he had been "drug free" since his arrest. Def.'s Sentencing Mem. at 2. Second, the petitioner's revised PSI, which sets forth the substances abused by

the petitioner, states that, "Mott maintained that he has refrained from drug use since April 1993." PSI ¶ 96.

Thus, any error in the defendant's PSI was caused by his own statements, which were relied upon in support of the defendant's own sentencing memorandum. In fact, when this Court granted the defendant's Motion for Downward Departure and reduced the defendant's term of imprisonment from a minimum of 210 months to a term of 60 months, this Court relied on the defendant's statements in the PSI which the defendant now claims were false. See Tr. of Sentencing Hearing at 25. This Court refuses to allow the defendant to change his statements after the Court relied on them to grant this defendant such leniency. After considering the defendant's arguments to correct his PSI, this Court cannot grant the defendant's motion on this issue. Thus, the petitioner's argument must fail.

II. CONCLUSION

This case is one where the motion, files, and record conclusively show that the movant is not entitled to relief. Accordingly, petitioner's motion is dismissed without a hearing.

An appropriate Order follows.

