

the U.S. Court of Appeals for the Third Circuit dismissed the appeal on jurisdictional grounds because the notice of appeal was not timely filed. Thereafter, Mousa filed this pro se motion attacking his sentence under 28 U.S.C. § 2255.

DISCUSSION

Mousa contends that his trial counsel, Kerry Kalmbach, was ineffective for failing to file a notice of appeal from the judgment of conviction and sentence. Mousa claims that he "wished to appeal [his] sentence and told [his] attorney this repeatedly. I did not waive my right to appeal and did not tell him, nor did I imply in any way, that I did not want to appeal." Mousa Verification, pursuant to 28 U.S.C. § 1746, attached to § 2255 petition. Mousa seeks reinstatement of his appellate rights, and challenges his sentence because he was denied effective assistance of counsel.

Waiver of Right to Appeal

A petitioner under 28 U.S.C. § 2255 is entitled to relief if he was prevented from appealing a conviction as a result of counsel's failure to file a timely notice of appeal. Rodriguez v. United States, 395 U.S. 327, 89 S. Ct. 1715 (1969) (if petitioner under 28 U.S.C. § 2255 was prevented from appealing conviction by counsel's failure to file a timely notice of appeal, petitioner was not required to specify issues for appeal if his right to appeal were reinstated); Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346 (1988) (relief granted where defense counsel failed to file notice of appeal and lower court permitted

counsel's withdrawal on the basis of a conclusory statement that an appeal would be meritless).

Mousa alleges that his court-appointed counsel failed to file a notice of appeal despite Mousa's request that he do so. If Mousa is correct, he is entitled to reinstatement of his right to appeal, regardless of whether counsel's failure actually prejudiced him. Penson at 88-89, 109 S.Ct. at 353-54 (footnote omitted). If Mousa did not request that counsel file an appeal, he must show both that counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, the result would have been different. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Nino, 878 F.2d 101, 103-4 (3d Cir. 1989).

Trial counsel disputed Mousa's claim, so there was a genuine issue of fact. Generally, if a prisoner's § 2255 petition raises an issue of material fact, the district court must hold a hearing to determine the truth of the allegations. United States v. Essig, 10 F.3d 968, 976 (3d Cir. 1993) (citing Walker v. Johnson, 312 U.S. 275, 285 (1941) and United States v. Biberfeld, 957 F.2d 98, 102 (3d Cir. 1992)). The court appointed counsel for Mousa and held an evidentiary hearing.

At the evidentiary hearing, Mousa testified that he instructed his trial counsel, Mr. Kalmbach, to take an appeal. Mousa denied calling Mr. Kalmbach and leaving a message with his secretary that Mousa had changed his mind and did not wish to appeal.

Mr. Kalmbach testified in accordance with the affidavit he had previously submitted: his secretary informed him Mousa had called and advised he no longer wished to appeal. Mr. Kalmbach believed that and did not return the telephone call or confirm the message in writing.

Mr. Kalmbach's secretary, Ms. Pierce, testified that: Abraham Mousa called; she knew his voice; she understood his accented speech; and he told her to tell Mr. Kalmbach he had changed his mind and did not wish to appeal. (Tr. 3/24/97 at 56-57.) Ms. Pierce is a highly competent, experienced legal secretary. She worked for the Honorable Charles Smith, now a U.S. Magistrate Judge, when he was a Common Pleas Court judge and after he became a U.S. Magistrate Judge. She left her position as a federal court secretary to work for Mr. Kalmbach and has worked for Mr. Kalmbach for four years. She took a message that was not ambiguous; she was certain of it. She went over the message with Mousa and she understood that he said, "I do not want to appeal. I've changed my mind."

That is consistent with everything Mr. Kalmbach said, as Mousa had previously told Mr. Kalmbach he wanted to appeal. It's also consistent with Mr. Kalmbach's testimony that, a day or two before Mousa called the office, Mr. Kalmbach discussed the futility of an appeal with Mousa and a cousin or friend. Mousa changed his mind as he had done a number of times before his eventual guilty plea. Mousa is a convicted felon with a strong motive to shade the truth. There is no doubt that it is Ms.

Pierce, not Mousa, who remembers what happened accurately and is telling the truth.

The court finds that Mousa timely requested to take a direct appeal, but then informed counsel he no longer wished to appeal and instructed counsel not to take an appeal. Therefore, Mousa is procedurally barred under United States v. Frady, 456 U.S. 152, 162-66 (1982), from raising this claim in a 28 U.S.C. § 2255 motion. He can not show that counsel's representation fell below an objective standard of reasonableness for following his instructions regarding appeal. United States v. Nino, 878 F.2d 101 (3d Cir. 1989); see also Murray v. Carrier, 477 U.S. 478, 492 (1986). Nor can he show any actual prejudice, that is, that counsel's failure to appeal rendered the result unreliable or fundamentally unfair. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The court finds Mousa knowingly and voluntarily waived his right to direct appeal, and counsel was not ineffective for failing to file a timely notice of appeal.

Ineffective Assistance of Counsel

Mousa's new counsel contended Mr. Kalmbach was ineffective for failing to argue for a reduction in the offense level for Mousa's minor role, or to petition for a downward departure because Mousa's sentence was disproportionate to those of co-defendants in view of his relative culpability. The court deemed those matters improperly raised at the hearing because of lack of notice to the government. Since Mousa did not have the chance to raise the issue of ineffective assistance of counsel, the court

permitted his counsel to submit a supplemental petition pursuant to 28 U.S.C. § 2255 to raise ineffectiveness issues and the government was required to respond.

In order to establish an ineffective assistance of counsel claim, petitioner must show both: (1) his attorney made serious errors which undermined the proper functioning of the adversarial process; and (2) but for those errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984). As stated on the record at the evidentiary hearing, defendant must meet a high standard to establish ineffective assistance of counsel, particularly in a case such as this where the court gave so much thought to the respective sentences of co-defendants and to their role in the offense.

Mousa argues that his sentence should have been reduced in light of his role in the counterfeiting scheme. Section 3B1.2 mandates that the court decrease the offense level by either two or four levels if the defendant was a minimal or minor participant in the criminal activity, respectively. The Court of Appeals has made it clear that adjustments "are directed to the relative culpability of participants in group conduct." United States v. Romualdi, 101 F.3d 971, 975 (3d Cir. 1996) (quoting United States v. Bierley, 922 F.2d 1061, 1065 (3d Cir. 1990)). In the process of sentencing, the court attempted "within the limits of the law . . . to . . . see that [the] sentences [imposed in this case] have a relationship to . . . the . . .

guilt of the person." (Tr. 7/25/96 at 13-14). At sentencing, the court seriously considered the criminal history of each defendant, the role of each defendant in the scheme, the dollar amount of counterfeit conduct attributed to each defendant, and cooperation with the government, if any. The government met with Mousa prior to entry of his guilty plea and Mousa stated in no uncertain terms that he did not wish to cooperate with the government. Other defendants had cooperated with the government, and had benefitted from government motions for downward departure at their sentencings. Where the government filed motions under Sentencing Guideline § 5K1.1 for some defendants and not others, and where guidelines and criminal history varied, it is not possible to compare sentences in any meaningful manner.

When sentencing Mousa, the court found that his actions were sufficient to qualify him as an average participant in the criminal scheme, and not that of a minor or minimal participant. Mousa had pled guilty to three counts. The first count involved the conspiracy to counterfeit audio tapes of copyrighted material. The other two counts alleged that Mousa infringed copyrights of ten records, and placed fake labels on the copied material. At the change of plea hearing, Mousa discussed admitted he was responsible for counterfeiting over one million tapes (See Tr. 3/26/96, p. 29), which the court found amounted to a loss of \$4,037,000. Defendant admitted to understanding the charges against him. (Tr. 3/26/96, p. 13). After the court discussed the number of counterfeit tapes involved and their

value, Mr Mousa admitted that he had copied the tapes as alleged by the government, and said, "I'm guilty." Prior to sentencing, the court and the parties received a presentence report stating the facts Mousa admitted in pleading guilty, including the number and value of counterfeit tapes involved.

Mousa now contends that his role was that of a "minimal participant;" if so, there should have been a 4 level downward departure. In order to escape the conclusions in the presentence report, habeas counsel contends trial counsel was ineffective for failing to object to the portions of the presentence report regarding Mousa's role in the criminal activity.

At the evidentiary hearing on March 24, 1997, Mousa testified he did not recall discussing the presentence report with his lawyer. But at the sentencing hearing, he was expressly asked if he had received the presentence report and discussed it with his lawyer and he answered, "Yes." (Tr. 7/25/96 at 4). When the court asked him if he had any objection to the factual statements made there, he quite clearly said, "No, Your Honor." (Id.) His later denial that he did not have the opportunity to review the presentence report with his lawyer and make objections is simply not credible.

Even if trial counsel had argued that Mousa's role was minor or minimal, the court would have imposed the same sentence. Therefore, there was no prejudice. Mousa has not established ineffectiveness of counsel at sentencing.

Mousa's petition under 28 U.S.C. § 2255 will be denied. An

appropriate order follows.

