

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

JOSEPH FUGARINO : CIVIL ACTION
 :
 v. : NO. 97-2896
 :
 UNITED STATES OF AMERICA : (Criminal No. 92-133-11

M E M O R A N D U M

WALDMAN, J.

November 19, 1997

Presently before the court is petitioner's 28 U.S.C. § 2255 petition to vacate, set aside or correct sentence.

Petitioner was charged in nine counts of a 116 count indictment against multiple defendants with the possession and distribution of multi-kilogram quantities of methamphetamine and conspiring to do so over a two-year period. On October 30, 1992, petitioner pled guilty to one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846. The government agreed to dismiss the other charges against petitioner.

Petitioner was sentenced on April 2, 1993 to a period of 135 months imprisonment, the minimum sentence within the applicable guidelines range, to be followed by five years of supervised release.¹ Petitioner was also subject to a mandatory statutory minimum sentence of 120 months in prison. See 21 U.S.C. § 841(b)(1)(A)(vii).

Petitioner asserts five instances of alleged ineffective assistance of counsel. Insofar as these involve

1. Petitioner's offense level was 31 and his criminal history level was III.

guideline reductions or departures for which petitioner contends he was eligible, they would implicate at most fifteen months of his otherwise statutorily mandated sentence.²

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; U.S. v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

First, petitioner contends that his counsel was ineffective for not explaining why he never argued that petitioner was a minor participant. Counsel in fact argued that

2. The guidelines provisions addressing departures do not authorize a court to depart from a statutory minimum sentence. See Melendez v. U.S., 116 S. Ct. 2057, 2062-63 (1996); U.S. v. Miller, 71 F.3d 813, 817 (11th Cir.), cert. denied, 117 S. Ct. 123 (1996); U.S. v. Valente, 961 F.2d 133, 135 (9th Cir. 1992). Moreover, claims of sentencing error under the guidelines generally are not even cognizable in a § 2255 action. See Grant v. U.S., 72 F.3d 503, 505-06 (6th Cir.), cert. denied, 116 S. Ct. 1701 (1996); Knight v. U.S., 37 F.3d 769, 773 (1st Cir. 1994).

petitioner was entitled to a 4 level reduction pursuant to U.S.S.G. § 3B1.2 for being a "minimal participant." Counsel's argument clearly highlighted the possibility that petitioner was at least no more than a "minor participant" and entitled to a 2 level reduction pursuant to § 3B1.2. Counsel effectively argued that petitioner's involvement was limited so as to warrant a decreased offense level. Counsel was not ineffective.

Moreover, petitioner did not qualify for a "minor participant" decrease in his offense level. Petitioner conspired to distribute ounce and pound quantities of methamphetamine. Petitioner would pick up pound quantities of methamphetamine from a codefendant, deliver them to an unindicted coconspirator, pick them up again and deliver the methamphetamine to various customers. Petitioner also stored methamphetamine and cocaine for a codefendant. Petitioner distributed over three kilograms of methamphetamine during his involvement in the conspiracy. Petitioner's conduct was clearly more culpable than that of some of his other coconspirators and his role was not minor given the conduct for which he was held accountable. See U.S. v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995) (question is not per se whether a defendant was "minor" in relation to a criminal organization of which he is a member, but whether his role was minor in relation to the offense of conviction and conduct for which he is held accountable).

Second, petitioner contends that his counsel was ineffective for not challenging the Government's decision not to

file a § 5K1.1 motion. Counsel stated that he hoped the government would file such a motion but recognized that it was not required to do so. Petitioner had expressly agreed that the decision to file a motion for a downward departure would be one for the government to make solely in its discretion. There is no showing or suggestion that the government decided not to file such a motion for any legally impermissible reason. Counsel was not ineffective.

Third, petitioner contends that his counsel misinformed him "as to the specifics concerning the Guidelines." Petitioner, however, provides no explanation of how he was misinformed and does not otherwise support this vague contention.

Fourth, petitioner claims counsel was ineffective when he "failed to present sufficient facts so that the Court could depart on the basis of diminished capacity."³ Counsel did in fact argue that petitioner should receive a § 5K2.13 departure because of his diminished mental capacity and submitted evidence including three psychiatric reports. The court also had available a court-ordered psychiatric report and an ample basis

3. Section 5K2.13 provides:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

for determining petitioner was not entitled to a § 5K2.13 departure. Counsel was not ineffective.

Fifth, petitioner suggests that counsel did not effectively pursue the possibility of departure for duress and coercion.⁴ Petitioner's counsel did in fact argue that petitioner was "controlled" by his codefendant brother and should thus receive a departure pursuant to § 5K2.12. Petitioner does not claim that he was induced to distribute drugs over a lengthy period by threats of physical injury or other harm. There is no showing that counsel could have honestly presented anything more to support such a departure. Counsel was not ineffective.

Sixth, petitioner claims that his counsel was ineffective for failing adequately to argue for a downward departure based on petitioner's family and personal history. Petitioner's counsel did in fact argue that such a departure was warranted based on the uncontroverted information about petitioner's personal and family background in the PSR. Counsel was not ineffective. Moreover, petitioner's personal and family circumstances were not remotely sufficient to warrant such a

4. Section § 5K2.12 provides in pertinent part:

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. . . Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency.

departure. A downward departure on this ground is only appropriate where circumstances are extraordinary. See United States v. Diegert, 916 F.2d 916, 919 (4th Cir. 1990).

Petitioner's final contention is that the wrong guidelines were used to calculate his sentence as there are two distinct types of methamphetamine, type "L" and type "D." Petitioner is apparently arguing that he was sentenced inappropriately pursuant to guideline penalties applicable to D rather than L-methamphetamine.

For purposes of the mandatory minimum sentence of imprisonment to which petitioner was subject, the type of methamphetamine involved is irrelevant. See U.S. v. DeJulius, 121 F.3d 891, 894-95 (3d Cir. 1997). The government bears the burden of proving the type of methamphetamine involved if a defendant objects to the offense level calculated in the PSR by use of the guidelines for D-methamphetamine. See U.S. v. Massey, 57 F.3d 637, 638 (8th Cir. 1995); U.S. v. Acklen, 47 F.3d 739, 742 n.4 (5th Cir. 1995); U.S. v. Deninno, 29 F.3d 572, 580 (10th Cir. 1994).

Because petitioner did not so object at sentencing or on appeal, the issue is procedurally barred unless he demonstrates cause for and actual prejudice from the failure earlier to assert it. See U.S. v. Frady, 456, U.S. 152, 167-68. (1982); U.S. v. Essiq, 10 F.3d 968, 979 (3d Cir. 1993); Deninno, 29 F.3d at 579-80; Henry v. U.S., 913 F. Supp. 334, 335-36 (M.D. Pa.), aff'd, 96 F.3d 1435 (3d Cir. 1996). Cause may be shown by

demonstrating that some "objective factor" which is "external to the defense" such as "a showing that the factual or legal basis for a claim was not reasonably available to counsel" or "that some interference by officials made compliance impracticable." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner must show more than "a possibility of prejudice" but rather must demonstrate that any error worked to his "actual and substantial disadvantage." Frady, 456 U.S. at 170 (emphasis in original). Petitioner has not satisfied this standard. The legal basis for raising this issue was available to the defense at the time of petitioner's sentencing in 1993. See, e.g., U.S. v. Koonce, 884 F.2d 349, 353 (8th Cir. 1989). He has not alleged or shown that he would have been eligible factually for a lesser sentence if this issue had been raised.⁵

Although petitioner has no apparent problem specifying ineffective assistance as a ground when he intends to and has not done so here, conceivably he means to argue that counsel was ineffective for not raising this issue at sentencing. The court will thus examine this possibility as well.⁶ Petitioner does not aver that the drug in which he was trafficking was in fact L and not D-methamphetamine or otherwise show that counsel's failure to

5. Indeed, the only pertinent laboratory report the government was able to locate after five years shows that a quantity of drugs seized from the conspirators was DL-Methamphetamine.

6. Petitioner is not required to show "cause and prejudice" for a failure to raise an ineffective assistance of counsel claim on direct appeal. United States v. DeRewal, 10 F.3d 100, 104-05 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

put the government to its proof was unreasonable at the time or actually prejudicial. See Lambert v. U.S., 908 F. Supp. 356, 360 (W.D. Va. 1995); U.S. v. Acklen, 907 F. Supp. 219, 223 (W.D. La. 1995), aff'd, 97 F.3d 750 (5th Cir. 1996); U.S. v. Blakenship, 906 F. Supp. 461, 465-66 (C.D. Ill. 1995).⁷

Petitioner has not shown that the result of his sentencing proceedings was unreliable, unfair or unjust. He has not remotely shown any sentencing error which amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." See U.S. v. Addonizio, 442 U.S. 178, 185 (1979). He has not shown that he suffered from any ineffectiveness of counsel. He has failed even facially to show that he is entitled on any asserted ground to the relief he seeks. Accordingly, the petition will be denied. An appropriate order will be entered.

7. This critical omission is not surprising since there is no underground or street market for L-methamphetamine which has virtually no physiological effect and when made clandestinely results from a failed attempt to produce profitable D-methamphetamine. See DeJulius, 121 F.2d at 894; Acklen, 907 F. Supp. at 223. This was a principal reason the Sentencing commission has amended the guidelines to delete the distinction between L- and D-methamphetamine. See U.S.S.G. App.C, Amend. 518 (Nov. 1, 1995).

