

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

THOMMIE HAMPTON

v.

UNITED STATES OF AMERICA

CIVIL ACTION

NO. 96-7829

CRIMINAL ACTION

NO. 93-009-02

MEMORANDUM

Broderick, J.

December 30, 1997

Petitioner Thommie Hampton has filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Hampton contends the he was denied effective assistance of counsel at sentencing and on appeal because his counsel failed to argue that: (1) the government violated his plea agreement; (2) Hampton was a minor participant and therefore entitled to a reduction in his base offense level; and (3) the Court erred in sentencing him under the enhanced guidelines for "crack" cocaine rather than "cocaine base." Hampton also contends that the Court erred in ordering him to pay restitution to a probation officer and that he was convicted of a crime which is not a lesser included offense of the crime for which he was indicted.

Rule 8(a) of the Rules Governing Section 2255 proceedings provides that the Court shall determine whether an evidentiary hearing is required for the disposition of a § 2255 petition. The Court has examined the record in this case and has determined that an evidentiary hearing is not required in view of the fact that all of petitioner's claims can be properly disposed of on

the basis of the record. Government of the Virgin Islands v. Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984), as modified by United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988).

For the reasons set forth below, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 will be granted in part and denied in part.

## **I. BACKGROUND**

On January 6, 1993, a grand jury returned an eleven count indictment against petitioner and co-defendants Kenneth Hampton, Eric Hampton, Edward Hampton, Edward Abbott and Darryl Kates. The indictment alleged that the defendants were members of a drug organization called "Hamp's Nation" which sold kilogram quantities of cocaine and cocaine base (crack) in West Philadelphia between 1989 and 1992. Petitioner was charged in three of the eleven counts with conspiracy to distribute more than fifty grams of cocaine base (crack) and more than five kilograms of cocaine in violation of 21 U.S.C. § 846 (Count I), distribution of and aiding and abetting the distribution of more than five grams of cocaine base (crack) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count VIII), and criminal forfeiture of his residence pursuant to 21 U.S.C. § 853 (Count IX).

On July 8, 1993, petitioner pled guilty to the two drug counts (Counts I & VIII). As part of the written plea agreement signed that day, the government agreed to dismiss the forfeiture

count (Count IX) at sentencing if petitioner cooperated fully and truthfully. The government also agreed that it would file a motion for downward departure pursuant to U.S.S.G. § 5K1.1 if Hampton provided substantial assistance, and that it would not divulge any self-incriminating information gathered during his cooperation for use in determining his sentencing guideline range.

The Court held a sentencing hearing on December 5, 1994 in open court with the petitioner and his counsel present. Petitioner's counsel raised two objections to the presentence report: (1) a two level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a firearm during the offense; and (2) a three level enhancement pursuant to U.S.S.G. § 3B1.1(b) for the defendant's role as a manager or supervisor in the Hamp's Nation drug organization.

The Court adopted the factual findings and guideline application in the presentence report, including the firearm and manager enhancements. The Court found that testimony offered at the sentencing hearing showed by a preponderance of the evidence that the petitioner provided drug runners with firearms and that petitioner kept firearms in his residence for protection during drug sales. (N.T. Dec. 5, 1994, at 29-32). The Court also found that the testimony showed by a preponderance of the evidence that the petitioner played a managerial or supervisory role in the Hamp's Nation drug organization. Petitioner met with and compensated drug runners on a weekly basis and was president of

the automobile garage which served as a front for the drug organization. (N.T. Dec. 5, 1994, at 22 & 29).

Because of the quantity of drugs, petitioner was subject to a mandatory minimum term of ten years imprisonment pursuant to 21 U.S.C. § 846 & 841(b)(1)(A)(ii). His adjusted offense level was 40, yielding an imprisonment range of 292 to 365 months under the Sentencing Guidelines. The Court, however, granted the government's motion for a downward departure pursuant to U.S.S.G. § 5K1.1, and imposed a sentence of 100 months imprisonment with a five year term of supervised release. The Court also ordered restitution of \$25,000 in connection with petitioner's mail fraud charge in docket 94-CR-435-01, to be paid to five named payees (insurance and car rental companies) in installments determined by the probation officer prior to completion of supervised release. A fine and full restitution were waived based on the petitioner's inability to pay.

Petitioner appealed his sentence to the United States Court of Appeals for Third Circuit. In an unpublished opinion by the Honorable Walter K. Stapleton dated November 30, 1995, the Third Circuit held that Hampton's offense level could not be enhanced for managerial role under U.S.S.G. § 3B1.1 "without a finding, based on record evidence, that he exercised direction or control with respect to one or more members of the [Hamp's Nation drug] organization." Id. at 3. The Third Circuit ruled that paying off drug runners, without additional factual findings, was insufficient to establish managerial role, and remanded for

resentencing.

On February 28, 1996, the Court held a resentencing hearing in which it made explicit findings that petitioner held a supervisory role in the drug organization. In an order accompanying the sentence, the Court found that the petitioner testified under oath at his guilty plea hearing that he was primarily responsible for managing the drug runners. Furthermore, the government presented testimony at the resentencing hearing which clarified that the petitioner, as second in command of the drug organization, played a supervisory role in recruiting co-defendant Eric Hampton into the organization and in directing criminal activity by co-defendant Edward Hampton. The Court resentedenced petitioner to the same sentence that it originally imposed (100 months), which the Court found to be a fair sentence representing a departure of at least 192 months from the imprisonment range of 292-365 months recommended by the Sentencing Guidelines. The Court also found that the sentence was justified even if the petitioner had not been a manager or supervisor, in which case the guidelines would have provided a sentence in the range of 210-262 months. The Third Circuit affirmed this judgment.

Following petitioner's resentencing and his filing of the instant § 2255 motion, the Court reduced his sentence further. At a hearing held February 20, 1997, the Court granted the government's motion pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure to reduce petitioner's sentence to reflect

his subsequent, substantial assistance in a criminal investigation and prosecution of a Philadelphia police officer. The Court found that petitioner's assistance merited an eighteen month reduction in his 100 month term of imprisonment, and amended the February 28, 1996 judgment to provide an 82 month term of imprisonment.

## II. DISCUSSION

### A. Ineffective Assistance of Counsel

Petitioner's ineffective assistance of counsel claims are governed by the two-part standard enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).

In that case, Justice O'Connor wrote:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. "More precisely, the claimant must show that (1) his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms, and, unless prejudice is presumed, that (2) there is a 'reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" United States v. Day, 969

F.2d 39, 42 (3d Cir. 1992) (quoting Strickland, 466 U.S. at 687-91 & 694).

1. Government's Violation of Plea Agreement

Petitioner contends that the government used self-incriminating information against him to determine his sentencing guideline range in violation of his plea agreement. Petitioner also claims that the government breached his plea agreement by refusing to return his residence and personal property that was seized when he was arrested.

In this Circuit, "the government must adhere strictly to the terms of the bargain it strikes with defendants." United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989) (citing United States v. Miller, 565 F.2d 1273, 1274 (3d Cir. 1977)). As the Supreme Court has held, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971).

District courts must conduct three inquiries in assessing whether a plea agreement has been violated: (1) the terms of the agreement and the conduct of the government; (2) whether the government's conduct violated the plea agreement; and (3) the appropriate remedy if a violation has occurred. Moschalaidis, 868 F.2d at 1360.

As heretofore stated, petitioner first claims that the

government used self-incriminating information against him at sentencing in violation of the plea agreement. In Paragraph 8b of the written guilty plea agreement, the parties agreed that:

Subject to § 1B1.8 of the Sentencing Guidelines, the government agrees that self-incriminating information provided pursuant to this agreement will not be used against the defendant in determining the applicable guideline range. The Court may, however, in keeping with § 1B1.8(b) and the Commentary, use the information to determine where to sentence the defendant within the applicable guideline range, whether to grant a downward departure, and the extent of the departure.

Guilty Plea Agreement, July 8, 1993, at 7-8. The government supported the probation department's presentence finding that the petitioner should receive a three-level enhancement pursuant to U.S.S.G. § 3B1.1(b) for his role as a manager or supervisor of the Hamp's Nation drug organization. Petitioner claims that the government breached its obligation in the plea agreement by agreeing with the probation officer's presentence findings and by recommending a sentence which included this three-level enhancement. As a remedy, petitioner asks the Court to reduce his offense level by three points and resentence him accordingly.

Petitioner has failed to show that the government's conduct violated either the letter or the spirit of the plea agreement. There is no evidence that the government either used or provided to the probation department self-incriminating information in determining the applicable sentencing guideline range. Moreover, the Court has already ruled -- first at sentencing and again at resentencing -- that petitioner's three-level enhancement for managerial role was justified. Hampton, himself, testified under

oath at his plea hearing that he was primarily responsible for managing the drug runners. Finally, as this Court has also previously ruled, the three-level enhancement in no way affected petitioner's sentence, since the Court departed substantially from the minimum sentence recommended by the guidelines when it granted the government's § 5K1.1 motion for a downward departure.

Petitioner's claim that his offense level should be reduced by three levels from 29 has absolutely no merit. Petitioner's adjusted offense level was 40, not 29, which petitioner has apparently crafted by cross-referencing his 100 month sentence with the sentencing table. Any adjustments to a defendant's offense level are made before the Court's downward departure, not after. Thus, even if the three-level enhancement for managerial role were not justified and even if the government had breached its plea agreement by using self-incriminating information, the petitioner has suffered no prejudice. The Court sentenced petitioner to 100 months imprisonment after granting the government's § 5K1.1 motion based on petitioner's level of cooperation and assistance. Accordingly, any failure by petitioner's counsel to argue that the government violated the plea agreement does not constitute ineffective assistance of counsel, since petitioner suffered no prejudice.

Petitioner's claim that the government seized his property in violation of the plea agreement, however, does have some merit. As part of the plea agreement, the government agreed to dismiss the criminal forfeiture count. In addition, counsel for

the government agreed with defense counsel's statement at the plea hearing that "at the time of sentencing the government agrees to dismiss Count 9, a criminal forfeiture count on Mr. Hampton's residence and agrees he can keep the residence." (N.T. July 8, 1993, at 8). Although the government did move to dismiss this count at sentencing, the government has admitted in its responses to petitioner's § 2255 motion that it did not remove the lien it placed on his residence. Thus, at the time petitioner filed his § 2255 motion, the government was indeed in breach of this part of the plea agreement. However, the government has submitted documents to the Court showing that it has moved to release the lien on petitioner's residence and will furnish the petitioner with a replacement copy of the deed, which was destroyed by the Drug Enforcement Administration. Accordingly, petitioner has received or will shortly receive the relief he requests in connection with his residence. The Court will grant the petitioner's claim that the government seized his residence in violation of the plea agreement, and will order the government to release the lien and furnish the petitioner with a replacement copy of the deed.

Petitioner also claims that the government violated the plea agreement by failing to return his personal property, a Mercedes Benz automobile and jewelry. Here, petitioner's claim fails. This property was seized during petitioner's arrest in January, 1993. Petitioner admits that he received notice of the seizures and of his right to file a claim in February, 1993. Petitioner's

Memorandum of Law, Nov. 25, 1996, at 8. In April, 1993, the Mercedes Benz and jewelry were administratively forfeited by the Drug Enforcement Administration after the petitioner failed to file a claim and cost bond for the property. Government's Supplemental Submission, Dec. 15, 1997.

In July, 1993, three months after the administrative forfeiture order had been entered, petitioner entered into the plea agreement with the government. Thus, when the petitioner entered into the plea agreement he had no right to the Mercedes Benz and the jewelry, and this property could not have served as consideration for his entering into the plea agreement. Moreover, the plea agreement does not mention the return of petitioner's property. The plea agreement only states that "at the time of sentencing, the government will ... Move to dismiss Count Nine (seeking forfeiture pursuant to 21 U.S.C. § 853(a)(1) and (p))." Guilty Plea Agreement, July 8, 1993, at 5.

The return of petitioner's automobile and jewelry were also not mentioned at the plea hearing, unlike the return of his residence. In summarizing the plea agreement, petitioner's counsel stated and the government agreed that, "at the time of sentencing the government agrees to dismiss Count 9, a criminal forfeiture count on Mr. Hampton's residence and agrees he can keep the residence." (N.T. July 8, 1993, at 8). The record therefore shows that the government never agreed to return the petitioner's Mercedes Benz and jewelry as consideration for his entering a guilty plea.

The Court finds that the Mercedes Benz and the jewelry seized by agents of the Drug Enforcement Administration were forfeited to the United States pursuant to 19 U.S.C. § 1609, as set forth in the declarations of forfeiture dated April 2 and 9, 1993. Having been forfeited to the United States in April, 1993, this property could not have served as either consideration or an inducement for petitioner's having entered into the plea agreement on July 8, 1993. Accordingly, petitioner's claim that the government breached the plea agreement by seizing his property, other than his residence, will be denied.

2. Adjustment for Minor Participant

The petitioner claims his counsel was ineffective for failing to argue at sentencing that petitioner was a minor participant in the criminal activity. Application Note 2 of U.S.S.G. § 3B1.2(b) defines "minor participant" as "any participant who is less culpable than most other participants, but whose role could not be described as minimal." A minor participant is entitled to receive a two level reduction in his offense level pursuant to U.S.S.G. § 3B1.2(b).

Counsel's failure to argue that the petitioner was a minor participant in this case was clearly not unreasonable. While the petitioner may not have been present for as much of the criminal activity as some of his co-defendants, his participation can hardly be called minor. Testimony provided at the plea hearing and at both sentencing hearings revealed that for most of 1992,

at the very least, petitioner was involved on a day-to day basis with the criminal activity of Hamp's Nation. Moreover, the factual findings in the presentence report reveal that approximately one-half of the crack and cocaine involved in the conspiracy was distributed during this period. Presentence Report, rev. Nov. 28, 1994, at ¶ 25. The Court has also found that petitioner personally paid the drug runners to participate in the criminal activity and personally provided them with firearms. These facts do not support petitioner's claim that his counsel deviated from professional norms by failing to argue for a two level reduction pursuant to U.S.S.G. § 3B1.2(b).

Furthermore, counsel's failure to argue for a minor participant reduction in no way prejudiced the petitioner. The petitioner was sentenced to 100 months imprisonment after the Court granted the government's motion for a downward departure. This sentence was eminently fair and justified, and would have been the same even with the adjustments petitioner now seeks.

### 3. "Crack" v. "Cocaine Base"

The petitioner also claims that his counsel was ineffective for failing to object at sentencing and again on appeal to the application of an enhanced sentence for "crack" cocaine. Petitioner contends that during his plea colloquy he pleaded guilty to distributing "cocaine base," not "crack" cocaine. Petitioner further contends that even if he did plead guilty to distributing "crack," then the government was required to prove

at sentencing that the substance was "crack" but failed to do so.

Petitioner's claims are neither supported by the record nor by the governing case law. Petitioner misinterprets the holding of United States v. James, 78 F.3d 851 (3d Cir. 1996). In James, the Third Circuit ruled that the United States Sentencing Commission amended the definition of "cocaine base" in 1993 to distinguish between "crack" cocaine and other forms of "cocaine base," so that the 100:1 enhanced provisions for "cocaine base" in U.S.S.G. § 2D1.1 should only apply to the "crack" form of "cocaine base." Id. at 857-58. Accordingly, the government must make an independent showing by a preponderance of the evidence that the substance in question is "crack" if the defendant fails to make a knowing and voluntary admission during his plea colloquy that the substance is "crack." Id. at 856.

In the instant case, counsel's failure to object to petitioner's enhanced sentence for "crack" cocaine does not constitute ineffective assistance of counsel. Unlike in James, the transcript of the plea hearing in this case is replete with references to "crack" cocaine. In summarizing the plea agreement, petitioner's counsel stated:

Your Honor, the Plea Agreement substantially is as follows: Mr. Hampton will plead guilty to Count one, which is the conspiracy involving distribution of crack cocaine and cocaine, and also Count 8, which is a specific aiding and abetting and distribution of a certain quantity of crack cocaine on July 7th of 1992.

(N.T. July 8, 1993, at 7) (emphasis added). In addition, during the plea colloquy, petitioner testified under oath:

Court: Do you understand that the conspiracy Count charges that you were a member of a conspiracy to distribute 50 grams or more of crack and 5 kilos or more of cocaine? Are you aware of that?

Hampton: Yes.

Court: Now, the essential elements of that crime which the government would have to prove ... first of all, there was an illegal conspiracy ... the purpose of that conspiracy was to distribute 50 grams or more of crack and 5 kilos or more of cocaine.... Do you understand that?

Hampton: Yes.

Court: Also, they are the elements of that crime. As long as I am talking about that ... I want to say that the maximum sentence that is provided by law for a conspiracy to distribute 50 grams or more of crack and 5 kilos or more of cocaine is a prison sentence of not less than 10 years and no more than life .... Do you understand that under the law?

Hampton: Yes, I do.

Court: As to Count 8, the other count you intend to enter a guilty plea to, that charges you with distribution ... of what?

Gov't: Cocaine base, crack.

Court: The elements of that crime are that .... Do you understand that?

Hampton: Yes, your Honor.

(N.T. July 8, 1993, at 9-11) (emphasis added).

These passages leave no doubt that the petitioner knowingly and voluntarily admitted to distributing "crack." Therefore, the government, unlike in James, did not need to produce evidence on this issue at sentencing. As the Third Circuit stated in James,

"there can be no question that admissions to the court by a defendant during a guilty plea colloquy can be relied upon by the court at the sentencing stage." Id. at 856. This is precisely what the Court did in the instant case. Accordingly, petitioner's counsel acted reasonably in declining to challenge the petitioner's sentence for "crack" cocaine.

For the foregoing reasons, the petitioner has failed to establish ineffective assistance of counsel, and the Court will deny his § 2255 motion on this ground.

B. Other Claims

The petitioner presents two other claims in his § 2255 motion. First, petitioner claims that the Court erred by ordering him to pay restitution to a probation officer. The judgment and conviction entered after petitioner's resentencing directs that "All financial penalty payments are to be made to the U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program." This is the standard language included in every judgment form of this district. The clerk and Bureau of Prisons, in turn, distribute restitution payments to the victims, who were listed in Attachment A of petitioner's judgment. Although the Court did direct in its first judgment that petitioner should pay restitution in installments established by the probation officer, that instruction did not order petitioner to make payments to a probation officer, as

petitioner claims. Moreover, the judgment about which petitioner complains has been reversed by the Third Circuit and superseded by the judgment after resentencing, which does not include an instruction on installment payments.

Finally, petitioner contends that he was "convicted of a crime created by Congress which is not a lesser included offense of another." While petitioner's claim is vague, he apparently contends that the government should have charged him with simple possession of a controlled substance pursuant to 21 U.S.C. § 844(a) rather than with possession with intent to distribute cocaine base pursuant to 21 U.S.C. § 841(a). Whatever petitioner's complaint may be, there can be no doubt that he knowingly and voluntarily entered a guilty plea during his plea hearing on July 8, 1993. At that hearing, the petitioner concurred with the government's summary of its case, which included eyewitness testimony concerning petitioner's participation in a large scale cocaine and crack conspiracy and distribution ring known as "Hamp's Nation." Accordingly, petitioner's claim that he should have been charged with simple possession rather than possession with intent to distribute lacks any merit, and will be denied.

### **III. CONCLUSION**

For the foregoing reasons, petitioner has failed to demonstrate that he has been denied effective assistance of counsel. However, petitioner's claim that the government

violated the plea agreement by seizing his residence does have merit, as the government concedes, and will be granted. The government has advised the Court that it will release the lien it placed on petitioner's residence and will furnish petitioner with a replacement copy of the deed, and the Court will so order.

In all other respects, petitioner's claims that the government violated the plea agreement, that he was a "minor" participant and therefore entitled to a reduction in his offense level, and that the Court erred in sentencing him under the enhanced guidelines for "crack" cocaine rather than "cocaine base" have no merit. Moreover, even if these claims did have merit, petitioner has not been prejudiced. Petitioner's other claims also lack merit. Accordingly, the Court will deny petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on these grounds.

An appropriate Order follows.

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

THOMMIE HAMPTON

v.

UNITED STATES OF AMERICA

CIVIL ACTION

NO. 96-7829

CRIMINAL ACTION

NO. 93-009-02

ORDER

AND NOW, this 30th day of December, 1997; upon consideration of petitioner's motion pursuant to 28 U.S.C. § 2255, the government's response, the petitioner's reply, the government's supplemental submissions on the 2nd, 12th, and 15th days of December, 1997, and the petitioner's second reply; and for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED: Petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on the ground that the government violated the plea agreement by seizing his residence is GRANTED, and the government shall release the lien it placed on his residence and furnish petitioner with a replacement copy of the deed. In all other respects, the petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is DENIED.

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RAYMOND J. BRODERICK, J.