

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 97-34
 :
 NORMAN CURTIS SHOEMAKER :

MEMORANDUM ORDER

Presently before the court is defendant's Motion to Correct the Record and Vacate and Modify the Sentence Imposed.

Defendant was charged in an indictment with thirty-one counts of assisting in the preparation and presentation of false tax returns. Defendant prepared several hundred fraudulent tax returns between 1985 and 1993 with a resulting loss to the IRS of more than \$1,600,000. Pursuant to a plea agreement with the government, defendant pled guilty to three of these counts.

The probation officer who prepared the Presentence Investigation Report ("PSR") noted that defendant was sentenced and incarcerated for a 1973 conviction for possession of a vehicle with a defaced serial number, and accordingly added three points to the calculation of defendant's criminal history score. In an objection to the PSR, defendant stated that he was not incarcerated for this offense. If true, he should not have been assessed the three criminal history points. See U.S.S.G. § 4A1.2(e)(1). He did not argue that he was not convicted of that

crime or that the conviction was overturned on appeal.

At the sentencing hearing, the court accepted testimony and documentary evidence regarding the 1973 crime. The government presented an extract of defendant's criminal record supplied by the Philadelphia Police Department. The criminal record indicated that defendant was convicted in 1973 of the crime charged and sentenced to a term of one to two years in prison. Defendant testified that he had never been incarcerated for the 1973 crime and stated, for the first time, that the charge was "thrown out."

Because defendant has not objected to or otherwise earlier disavowed the statement in the PSR regarding the fact of the conviction and presented no record or transcript reflecting a dismissal or non-custodial sentence, the court was skeptical. The court credited the Police Department record and found that the PSR correctly set forth the disposition of this charge.

With six points, defendant's criminal history category was III and the guideline range was 46 to 57 months imprisonment. Without the three points in question, defendant's criminal history category would be II and the guideline range would be 41 to 51 months imprisonment.

At the sentencing hearing, the court also considered and granted the government's motion for a downward departure under § 5K1.1. Defendant had assisted the government in

identifying an accomplice in the tax fraud scheme. The court departed downward six levels to offense level 15 with a guideline range of 24 to 30 months imprisonment. With a criminal history category of II, the range would be 21 to 27 months.

The court imposed a sentence of 24 months of imprisonment followed by one year of supervised release and a \$150 special assessment.

A week later, defendant filed the instant motion in which he now contends that he was found not guilty of the vehicle charge. Defendant has attached a photocopy of a court record from which it appears that after being found guilty on June 20, 1973 in the Municipal Court of this offense, he appealed to the Common Pleas Court where he was adjudged not guilty on October 4, 1973. Defendant requests that the record be corrected and his sentence reconsidered.

The government responds that the court does not have authority to grant the relief defendant seeks in the circumstances presented. Defendant cites to no statute, rule of procedure or case law to support his request. The court is unaware of any such authority.¹ See 18 U.S.C. § 3582(c) (with exceptions inapplicable herein a "court may not modify a term of

¹ Neither Fed. R. Crim. P. 35(c) (within 7 days court may correct sentence resulting from arithmetical, technical or other clear error) nor Fed. R. Crim. P. 36 (clerical mistakes and errors in record arising from oversight or omission may be corrected at any time) apply in this case.

imprisonment once it has been imposed"). Even if there were such authority, the court would not exercise it in this case.

The photocopied document is not newly discovered evidence.² It is dated October 4, 1973. Defendant presents nothing to show that with diligence he could not have obtained the document in the five months between completion of the PSR and the sentencing hearing.³

A criminal defendant cannot reasonably expect to sit back after a PSR is completed and a sentencing proceeding is scheduled and then only after a sentence is imposed collect and present pertinent evidence.⁴

Assuming the court had authority to revisit defendant's

² "Newly discovered evidence" does not encompass evidence that could have been discovered through the exercise of diligence by a defendant. See Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985) (discussing Fed. R. Crim. P. 33); United States v. Alberici, 618 F. Supp. 669, 670 (E.D. Pa. 1985).

³ The court, of course, expects the probation office to seek any pertinent records regarding a challenge to a PSR finding. A defendant, however, is not precluded from doing likewise. Defendant was able to obtain the 1973 court record within a week and thus presumably could have done so with a modicum of diligence over the preceding months.

⁴ Defendant does not aver he timely related to counsel that he was acquitted on appeal of the vehicle charge and expressly relied on counsel to obtain pertinent documentation. If the failure timely to procure the court record was due to counsel's dereliction, defendant may have an ineffective assistance of counsel claim which may be cognizable under 28 U.S.C. § 2255. For the reason that follows, however, a reduction in defendant's sentence is simply not a realistic prospect in any event.

sentence at this juncture, that it did so and that it discounted the 1973 conviction, the guideline range would be 21 to 27 months. Thus, the maximum permissible reduction of his sentence would be three months. The court was obliged to entertain and resolve objections to the PSR which it did from the record presented before addressing the § 5K1.1 motion. The court then granted that motion and generously, given the nature and extent of defendant's assistance, departed downward six offense levels.⁵

Given the details of the offense of conviction, the nature of the prior listed offenses, the extent of the departure and the relatively modest and narrow guideline ranges at the resulting offense level for criminal history category I, II or III, defendant's criminal history as a practical matter had a negligible effect on his ultimate sentence. Disregarding entirely defendant's criminal history, 24 months of imprisonment is the appropriate sentence in this case.

ACCORDINGLY, this day of January, 1998, upon consideration of defendants Motion to Correct the Record and Vacate and Modify the Sentence Imposed and the government's response, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

⁵ Assuming a criminal history category of II, at his predeparture offense level of 21 defendant faced 41 to 51 months imprisonment.

JAY C. WALDMAN, J.