

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

UNITED STATES	:	CIVIL ACTION
	:	
vs.	:	No. 97-cv-4953
	:	
CLARENCE CRUZ	:	No. 94-cr-0364-01

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 23rd day of April, 1998, upon consideration of the pro se Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence filed by petitioner, Clarence Cruz, (Document No. 83, filed August 20, 1997); Government's Opposition to Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Document No. 84, filed October 6, 1997); Petitioner's Arguments on § 2255 Application (Document No. 87, filed November 14, 1997); Government's Opposition to Additional Arguments Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Document No. 89, filed November 21, 1997); and Traverse to the Government's Opposition filed by petitioner (Document No. 90, filed December 16, 1997), for the reasons set forth in the following Memorandum, **IT IS ORDERED THAT** petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence is **DENIED IN PART AND DISMISSED IN PART WITHOUT AN EVIDENTIARY HEARING** as follows:

1. Petitioner's claim that being convicted under both 18 U.S.C. § 2119 and 18 U.S.C. § 924(c) put him in double jeopardy is **DISMISSED**;
2. All other claims raised in petitioner's Motion under 18 U.S.C. § 2255 and related submissions in this proceeding are **DENIED**.

IT IS FURTHER ORDERED THAT:

1. Petitioner's request for appointment of counsel is **DENIED**;
2. An evidentiary hearing is not necessary and will not be held;
3. Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is not issued.

MEMORANDUM

I. Background

On December 22, 1994, petitioner was convicted by a jury of carjacking in violation of 18 U.S.C. § 2119 and the use of a firearm during a crime of violence in violation of 18 U.S.C. §924(c)(1). On February 15, 1996, this Court sentenced petitioner to, inter alia, a term of imprisonment of 123 months. Petitioner appealed to the Third Circuit, which affirmed his sentence and conviction on September 12, 1996.

On August 1, 1997, petitioner filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Document No. 80). However, as petitioner had failed to sign the Motion, the Court ordered that a photocopy of the Motion be returned to petitioner for his signature (Document No. 82, filed August 13, 1997). A signed copy of the Motion was filed on August 20, 1997. Petitioner raises the following claims in that Motion: Counsel was ineffective in that he did not require the government to prove at trial that the gun used in the carjacking had traveled in interstate commerce; and 18 U.S.C. § 924(c), one of the statutes under which petitioner was convicted, is

unconstitutional as it represents a “federal incursion into the provence [sic] of law enforcement constitutionally reserved for the States.” After the government filed its response to the Motion, petitioner filed Arguments on § 2255 Application on November 14, 1997 in which he expanded on his argument that § 924(c) is unconstitutional and set forth additional claims: the statutes under which he was convicted, 18 U.S.C. § 2119 and 18 U.S.C. § 924(c)(1), are unconstitutional as they extend beyond Congress’ power under the Commerce Clause; both statutes are unconstitutional in that they violate the Ninth and Tenth Amendments; convicting petitioner under both statutes put him in double jeopardy; and the trial court’s instruction to the jury was legally insufficient for a conviction under 18 U.S.C. § 924(c) because of the Supreme Court’s subsequent interpretation of the statute in Bailey v. United States, 516 U.S. 137 (1995).

Since petitioner set forth new claims in his Arguments on § 2255 Application, the Court allowed the government to file a response to petitioner’s new claims, which it did on November 21, 1997. In response, petitioner filed a Traverse to the Government’s Opposition on December 16, 1997. In the Traverse, petitioner argued for the first time that ineffective assistance of counsel provided “cause” for his failure to raise all of his claims on direct appeal and requested that the Court appoint counsel to represent him in this matter.

Petitioner has asserted claims and arguments in three separate documents -- the Motion, the Arguments on § 2555 Application, and the Traverse to the Government’s Opposition. Notwithstanding this defect, the government has responded to all of petitioner’s claims and the Court will decide each claim on the present state of the record.

II. Legal Analysis

The government argues that petitioner has waived all of his claims, as he did not raise them on direct appeal from his conviction and sentence and has not shown “cause” for this procedural default or prejudice resulting from the default. Issues which could have been raised at trial or on direct appeal may not be raised in a motion under § 2255 unless the petitioner can show “objective cause” for his failure to raise the issues earlier and “actual prejudice” from his failure to do so. If petitioner cannot show “cause and prejudice,” then the issues are waived. United States v. Frady, 456 U.S. 152, 167 (1982).

As discussed below, the Court concludes that petitioner has waived his claims that § 924(c) and § 2119 are unconstitutional and his claim that the jury instructions were legally insufficient for a conviction. Petitioner failed to raise these claims on direct appeal, he has not shown cause for this procedural default, and as these claims are without merit, he has not shown prejudice.

Petitioner did raise his claim of double jeopardy on direct appeal. As discussed, infra, it is therefore improperly presented to this Court and will be dismissed.

Finally, petitioner properly raised his claim of ineffective assistance of counsel for the first time in this Motion. Therefore, the Court will address the merits of that claim.

A. Procedural Default

A petitioner's failure to raise a constitutional error at trial or on direct appeal generally precludes the assertion of that error for the first time in a collateral attack under § 2255, unless the petitioner can show “cause” for his procedural default and “actual prejudice” resulting from the

default. See, e.g., United States v. Frady, 456 U.S. at 167; United States v. DeRewal, 10 F.3d 100, 105 n. 4 (3d Cir.1993), cert. denied, 511 U.S. 1033 (1994). Petitioner could have raised on direct appeal his claims that the statutes under which he was convicted are unconstitutional and his claim that the jury instructions were legally insufficient for a conviction under § 924(c). Therefore, unless petitioner can show “cause” for the procedural default and actual prejudice from it, these claims are waived.

1. Cause and Prejudice

In the Traverse to the Government’s Opposition, petitioner claims for the first time that ineffective assistance of counsel and the “unobvious nature of the arguments in light of the jurisprudence prevailing at the time” were the objective causes of his procedural default. Traverse at 1.

The “unobvious nature of the arguments” does not provide cause for petitioner’s failure to raise these issues on direct appeal unless there was actually an intervening change in substantive criminal law between the date that petitioner’s conviction became final and the filing of his Motion under § 2255. There was no such change in this case.¹ Cause is only provided by an “objective factor external to the defense.” Murray v. Carrier, 477 U.S. 478, 488 (1986). “[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default,” Id. at 486, as long as the attorney’s

¹ Bailey v. United States, 516 U.S. 137 (1995), is of no assistance to petitioner on this issue. Although Bailey changed the law with respect to the definition of “use” of a firearm under 18 U.S.C. § 924(c), it was decided on December 5, 1995, over five months before the filing of petitioner’s appellate brief on May 13, 1996. Thus, Bailey does not provide objective cause for petitioner’s failure to raise his claim regarding Bailey on direct appeal. In addition, as discussed, infra, petitioner was not prejudiced by the decision in Bailey. See Section II.A.1.b.

performance is not constitutionally ineffective. Id. at 488.

Ineffective assistance of counsel would provide objective cause for petitioner's failure to raise these claims on direct appeal. Id. To prove ineffective assistance of counsel, petitioner must first show that his attorney's actions fell below "an objective standard of reasonableness" so that he was not "functioning as the counsel guaranteed by the Sixth Amendment," Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Second, petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In the Traverse, petitioner merely stated that ineffective assistance of counsel was the cause of his procedural default. He failed to show how his attorney on direct appeal acted below an "objective standard of reasonableness." Accordingly, he has not satisfied the first prong of the Strickland test. Furthermore, as petitioner's claims are without merit, he cannot satisfy the second prong of the Strickland test, which requires a showing of prejudice.

a. Constitutionality of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2119

i. The Commerce Clause

Petitioner contends that the two statutes under which he was convicted violate the Commerce Clause and are therefore unconstitutional. However, the Third Circuit has held that 18 U.S.C. § 2119 does not violate the Commerce Clause. In United States v. Bishop, 66 F.3d 569 (3d Cir.) cert. denied 516 U.S. 1032 (1995), the Third Circuit found that Congress had a rational basis for determining that carjacking substantially affects interstate commerce and that by requiring the stolen car to have been "transported, shipped or received" in interstate commerce, the statute created the "constitutionally adequate nexus with interstate commerce." Id. at 576. Petitioner's claim that 18

U.S.C. § 2119 violates the commerce clause is therefore without merit.²

18 U.S.C. § 924(c) provides that anyone who “uses or carries” a firearm “during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States” is subject to an additional term of imprisonment. To be convicted under § 924(c), a defendant must also be prosecuted for a federal predicate offense of violence or drug trafficking. See 18 U.S.C. § 924(c). Those courts which have addressed the issue have held that if the statute creating the federal predicate offense has the necessary constitutional nexus with interstate commerce, § 924(c) does not violate the Commerce Clause. See, e.g., United States v. Crump, 120 F.3d 462 (4th Cir. 1997) (affirming convictions under § 924(c) and drug trafficking law); United States v. Staples, 85 F.3d 461, 463 (9th Cir.), cert denied 117 S.Ct. 318 (1996) (same); United States v. Brown, 72 F.3d 96, 97 (8th Cir.1995), cert. denied, 116 S.Ct. 2581 (1996) (same); United States v. Bolton, 68 F.3d 396, 399 n. 2 (10th Cir.1995) cert. denied, 116 S.Ct. 966 (1996) (affirming conviction under § 924(c) and Hobbs Act).

In this case, petitioner was prosecuted under 18 U.S.C. § 2119 for the federal predicate offense of carjacking and under 18 U.S.C. § 924(c) for using and carrying a firearm during the carjacking. Section 2119 provides the necessary constitutional nexus with interstate commerce. See Bishop, 66 F.3d at 569. Therefore, as applied to petitioner, § 924(c) did not violate the Commerce

² On March 31, 1998, the Supreme Court granted certiorari to United States v. Oliver, 60 F.3d 547 (9th Cir. 1995) on appeal after remand 116 F.3d 1487 (9th Cir. 1997) (table), to address the issue of whether 18 U.S.C. § 2119 is constitutional. See, Jones v. United States, No. 97-6203, 1998 WL 138964 (March 31, 1998) order amended by 1998 WL 153400 (April 6, 1998). If the Supreme Court rules that § 2119 is unconstitutional and applies that new constitutional rule retroactively, petitioner may file a second § 2255 motion on that issue within one year of the Supreme Court’s decision. See 28 U.S.C. § 2255.

Clause, and this claim is without merit.

ii. Tenth Amendment

Petitioner contends in the Motion that § 924(c)(1) is unconstitutional because it is a “federal incursion into the provence [sic] of law enforcement constitutionally reserved for the States.” Motion at 4. In the Arguments on § 2255 Application, petitioner expands on this argument: he asserts that both 18 U.S.C. § 924(c) and 18 U.S.C. § 2119 violate the Tenth Amendment because they duplicate state penal laws and therefore unconstitutionally usurp state powers. Arguments at 14.

The Tenth Amendment reserves for the states or the people “all powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” U.S. Const. amend X. However, the Tenth Amendment does not affect statutes which represent the valid exercise of Congress’ power under the Commerce Clause. United States v. Owen, 996 F.2d 59, 61 (5th Cir. 1993); United States v. Dumas, 934 F.2d 1387, 1390 (6th Cir. 1990) cert. denied Reed v. United States, 502 U.S. 1006 (1991); United States v. Watson, 815 F.Supp. 827 (E.D. Pa. 1993) aff’d by 26 F.3d 124 (3d Cir.) cert. denied 513 U.S. 939 (1994). As numerous courts have found both § 924(c) and § 2119 constitutional under the Commerce Clause, see supra, Section II.A.1.a.i., neither statute violates the Tenth Amendment.

iii. Ninth Amendment

In the Arguments, petitioner also contends that his conviction violates his rights under the Ninth Amendment in that his conviction “physically separates [him] from his family and community to a far greater extent than does State incarceration. Second, federal law overpunishes the offense,

any offense, compared to State law. . . . And, finally, the federal system has abolished rehabilitation as a purpose of incarceration.” Arguments at 14. Petitioner cites no case law in support of his contention that these rights are protected by the Ninth Amendment, and as the Court can find no precedent in support of the contention, the Court concludes that this claim is without merit.

b. Legally Insufficient Jury Instructions Under Bailey

Petitioner contends that the Court’s instruction to the jury at his trial on the definition of “uses or carries a firearm” in 18 U.S.C. § 924 was insufficient because of the Supreme Court’s subsequent decision in United States v. Bailey, 516 U.S. 137 (1995).³ In Bailey, the Supreme Court held that a conviction for the “use” of a firearm under § 924(c) requires sufficient evidence of “active employment” of a weapon during the commission of the crime. Id. at 505. The Bailey decision did not address the requirements for a conviction under the “carry” prong of § 924(c). See id. at 509; United States v. Eyer, 113 F.3d 470, 475 (3d Cir. 1997). As a new statutory interpretation of the “use” prong of § 924(c), Bailey applies retroactively to convictions challenged in collateral proceedings. See In re Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997).

The indictment in this case charged that petitioner “did knowingly and unlawfully use and carry a firearm during and in relation to” the carjacking. Indictment at 2. The government presented testimony at trial that petitioner had threatened the owner of the car with a gun to force him from the car. The Court instructed the jury that:

³ 18 U.S.C. § 924(c) provides, inter alia, that “Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provide for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.” 18 U.S.C. § 924(c) (1998 Supp.).

the phrase uses or carries a firearm means having a firearm available to assist or aid the commission of the [carjacking]. In determining whether the defendant used or carried a firearm, you may consider all the factors received in evidence in this case including the nature of the underlying crime, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged and the circumstances surrounding the presence of the firearm.

The government, however, is not required to show that the defendant actually displayed or fired the weapon. The government is required to prove beyond a reasonable doubt that the firearm was in the defendant's possession, or under the defendant's control at the time that a crime of violence was committed. It is sufficient if the proof establishes that the firearm furthered the commission of the crime or was an integral part of the underlying crime.

Tr. at 120-21.

The Court concludes that the evidence was more than sufficient for the jury to have concluded that petitioner "actively employed" a firearm during commission of the carjacking by using it to threaten the car owner and force him from the car. Petitioner's actions during the carjacking constituted both "carrying" a gun and "active employment" of a gun, as that term was used to define "use" of a gun under Bailey. Thus, petitioner was not prejudiced by the Court's instruction to the jury on this issue. See Thomas v. United States, 1997 WL 751985 (S.D.N.Y. December 3, 1997).

B. Claim Raised on Direct Appeal – Double Jeopardy

Petitioner argued on direct appeal that being convicted under both § 2119 and § 924 violated the double jeopardy clause of the Constitution. Brief for Appellant at 15-16. The Third Circuit denied that claim and affirmed the decision of the Court. United States v. Cruz, No. 96-1158, slip op. at 1-2 (August 20, 1996). A motion under 28 U.S.C. § 2255 cannot "be employed to relitigate

questions which were raised and considered on direct appeal.” DeRewal, 10 F.3d at 106 n.4 quoting Barton v. United States, 791 F.2d 265, 267 (2d Cir. 1986). Petitioner improperly raised this claim in the Motion presently before the Court and it is dismissed.

C. Ineffective Assistance of Counsel

Separate and apart from petitioner’s attempt in his Traverse to excuse his procedural default on the ground of ineffective assistance of counsel, petitioner argues in his Motion that his attorney was ineffective for not requiring the government to prove that the gun used in the carjacking had traveled in interstate commerce.

The Third Circuit has held that a claim of ineffective assistance of counsel should be raised in a collateral proceeding under § 2255, not on direct appeal. United States v. Oliva, 46 F.3d 320, 324 (3d Cir. 1995); see, also DeRewal, 10 F.3d at 103-104 (holding that petitioner under § 2255 need not show “cause and prejudice” to first raise a claim of ineffective assistance of counsel in a collateral proceeding). Petitioner properly raised his claim of ineffective assistance of counsel for the first time in this proceeding and the Court will address the merits of the claim.

To prove ineffective assistance of counsel, petitioner must meet the requirements of both prongs of the test set forth in Strickland v. Washington – he must prove that his attorney acted below an “objective standard of reasonableness” and that petitioner was prejudiced by his attorney’s actions. Petitioner does not satisfy either prong.

With regard to the first prong, petitioner’s attorney did not act below an “objective standard of reasonableness” in relation to this issue. To find petitioner guilty under 18 U.S.C. §924(c)(1), the

government had to prove that he used or carried a gun “during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United States.” 18 U.S.C. § 924(c)(1) (1998 Supp.). There is no statutory requirement that the gun travel in interstate commerce. See United States v. Harris, 25 F.3d 1275, 1278 (5th Cir.) cert. denied 115 S.Ct. 458 (1994) (stating elements necessary for conviction under § 924(c); United States v. Laury, 49 F.3d 141, 145 (5th Cir.) cert. denied 516 U.S. 857 (1995) (same). A prosecution under § 924(c) is predicated on a prosecution for drug trafficking or an act of violence which “may be prosecuted in a court of the United States,” in this case carjacking prosecuted under 18 U.S.C. § 2119. An element of carjacking is that the motor vehicle taken during the carjacking was “transported, shipped, or received in interstate or foreign commerce.” 18 U.S.C. § 2119 (1998 Supp.). The element of interstate commerce in § 2119 also creates federal jurisdiction for § 924(c)(1).

Petitioner stipulated to the fact that the car taken in the carjacking had traveled in interstate commerce. Tr. of December 20, 1994 at 135. That fact created the necessary connection to interstate commerce for the charges under § 924(c) as well as § 2119. As the government did not have to prove that the gun had traveled in interstate commerce, petitioner’s attorney acted reasonably in not requiring the government to do so. Additionally, as such proof was not necessary, petitioner did not suffer prejudice from his attorney’s actions and therefore did not satisfy the second prong of Strickland, which requires a showing of prejudice. Petitioner’s claim of ineffective assistance of counsel is therefore denied.

III. Appointment of Counsel

In the Traverse, petitioner requested that the court appoint counsel to represent him in this matter. There is no constitutional right to counsel during a federal habeas petition. Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991) cert. denied 503 U.S. 988 (1992). The court is given discretion to decide whether to appoint counsel in a federal habeas proceeding. Factors for the Court to consider include “the complexity of the factual and legal issues in the case, as well as the pro se petitioner’s ability to investigate facts and present claims.” Id. at 263-64.

The Court has been impressed with the quality of petitioner’s submissions in this case. Petitioner has discussed complicated issues of federalism and has presented his arguments clearly and cogently. He appears to understand the issues presented. Therefore, the Court denies petitioner’s request for appointment of counsel.

IV. Evidentiary Hearing

An evidentiary hearing on a motion under 28 U.S.C. § 2255 is not required if “the motion and files and records of the case show conclusively that the movant is not entitled to relief.” Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989) cert. denied 500 U.S. 954 (1991); see also 28 U.S.C. § 2255. In making this determination, the Court must accept the petitioner’s allegations as true unless they are clearly frivolous. Id. The Court accepted petitioner’s factual allegations in this case as true, and determined that his claims are without merit. Therefore, there is no need for an evidentiary hearing.

V. Conclusion

Petitioner has set forth claims for relief under § 2255. His claims relating to the unconstitutionality of the statutes under which he was convicted and his claim that the jury instructions were legally insufficient for a conviction under 18 U.S.C. § 924(c) were waived for failure to raise them on direct appeal or to present an objective cause for the procedural default or show actual prejudice from such default, and are therefore denied. As the claim of double jeopardy was decided on direct appeal, it cannot properly be raised in a collateral proceeding, and is therefore dismissed. Petitioner's claim of ineffective assistance of counsel was properly presented in this petition, and is denied on the merits. Petitioner did not prove that his trial attorney acted below an objective standard of reasonableness, and therefore petitioner failed to satisfy the first prong of the Strickland test for ineffective assistance of counsel. Moreover, because no prejudice resulted from the actions of petitioner's attorney, petitioner has not satisfied the second prong of Strickland.

For the foregoing reasons, petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence is denied in part and dismissed in part.

BY THE COURT:

JAN E. DUBOIS, J.