

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

KENNETH THOMAS :
Petitioner, :
v. :
UNITED STATES OF AMERICA, : CRIMINAL NO. 95-182
Respondent. : CIVIL NO. 97-5636

MEMORANDUM ORDER

J. M. KELLY, J.

APRIL , 1998

Petitioner Kenneth Thomas's ("Thomas") Motion for a Certificate of Appealability is presently before the Court. On June 14, 1995, Thomas pled guilty to an information charging him with possession with intent to distribute "666 grams, of a mixture or substance containing a detectable amount of cocaine base ('crack')." Thomas was sentenced to 188 months.

Thomas filed a motion to vacate, set aside, or correct the sentence pursuant 28 U.S.C. § 2255. Thomas's motion raised two grounds for relief: (1) that he was improperly sentenced under the Sentencing Guidelines for crack cocaine; and (2) that his counsel was ineffective for not objecting at sentencing to the application of the Guidelines for crack cocaine. Thomas's motion was denied.

Thomas now seeks to appeal the denial of his habeas petition. In order to appeal a final order in a proceeding under § 2255, a petitioner must obtain a certificate of appealability from a district or circuit court judge. 28 U.S.C. § 2253(c). "A certificate of appealability may issue . . . only if the

applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Thomas did not raise the issue, at sentencing or on direct appeal, that the substance he possessed was anything other than "crack." This "procedural default" bars relief under § 2255, unless Thomas can show cause for his failure to raise the issue and "actual prejudice." United States v. Frady, 456 U.S. 152, 162-66 (1982).

Thomas claims that under the Third Circuit's interpretation of Section 2D1.1 of the United States Sentencing Guidelines in United States v. James, 78 F.3d 851 (3d Cir. 1996), the government did not meet its burden of showing that the substance that he possessed was "crack." The Guidelines state:

"Cocaine base," for the purposes of this guideline means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. § 2D1.1. The James court interpreted this section to mean that there are several types of "cocaine base," but only "crack" is subject to the sentence enhancement of § 2D1.1. Id. at 851. The indictment charged James with possession and distribution of "cocaine base," and during James's guilty plea colloquy, the court and the defendant referred to "cocaine base" rather than "crack." The court of appeals held that James did not knowingly and intelligently plead guilty to possession of "crack" under § 2D1.1.

Thomas's case is factually distinguishable from the James case. Unlike James, the information in this case charged Thomas with possession of "crack," and the Court used the term "crack cocaine" during the plea colloquy. In addition, an experienced narcotics agent testified at a suppression hearing that the substance Thomas possessed was crack, and that this conclusion was supported by a field test. The government met its burden of showing that the substance Thomas possessed was crack. Thomas's guilty plea was knowing and intelligent. He cannot show "actual prejudice."

Thomas's ineffective assistance of counsel claim was evaluated under the test set out in Strickland v. Washington, 466 U.S. 668 (1984). Thomas must establish that, under the circumstances, his counsel's failure to object to the application of the Sentencing Guidelines for crack cocaine was objectively unreasonable. Considering the evidence in this case, especially the testimony at the suppression hearing, Thomas's counsel was not ineffective for failing to object to the application of the Sentencing Guidelines for crack cocaine.

Thomas has not made a substantial showing of the denial of a constitutional right that would provide a basis for the issuance of a certificate of appealability. Therefore, it is ORDERED that Petitioner's Motion for a Certificate of Appealability is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.