

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

RICHARD C. MCNAUGHTON : CIVIL ACTION
: :
v. :
UNITED STATES OF AMERICA : No. 97-2797
: (No. 93-CR-147-10)

MEMORANDUM AND ORDER

On April 18, 1997, Richard McNaughton filed a motion to vacate, set aside or modify his sentence under 28 U.S.C. §2255¹. McNaughton's motion alleged three constitutional errors: that he was denied effective assistance of counsel at sentencing, in violation of the Sixth Amendment, that he was sentenced based on a misapprehension of fact, in violation of the Due Process Clause, and that he was sentenced based on a misapprehension of law, also in violation of the Due Process Clause. I held an evidentiary hearing on April 1, 1998. In a memorandum and order dated April 6, 1998, I denied Richard McNaughton's motion as to all three grounds. On April 10, 1998, McNaughton moved for

¹ On October 25, 1994, McNaughton was sentenced to a term of 40 months imprisonment after being convicted of multiple counts of conspiracy, wire fraud, tax evasion and RICO forfeiture. McNaughton remained free on bail pending appeals, and began serving his sentence on December 5, 1995. The §2255 motion was filed approximately sixteen months later, and was the subject of several requests, by McNaughton, for continuances so that more evidence could be gathered and shared with the government. McNaughton has now served approximately 29 months of his 40-month sentence and is scheduled to be transferred to a half-way house in July. I note that, three and a half years after the sentencing date, McNaughton is in the general prison population and has not needed to be placed on oxygen.

reconsideration with respect to my ruling on his misapprehension of fact argument, and appended a revised medical report from Scott Manaker, M.D.. McNaughton asserts his motion under either Fed.R.Civ.P. 59(e)(motion to amend or alter judgment) or Local Rule 7.1(g) (motion for reconsideration or reargument).

The government responded to McNaughton's argument on May 4, 1998. The government argues that McNaughton's motion for reconsideration should be denied because amendment or alteration of a judgment under Rule 59(e) is only appropriate in the case of after-discovered evidence, and the evidence now offered by McNaughton in support of his §2255 motion is not after-discovered. The government further argues that even if I were to consider the newly offered evidence, the evidence on which McNaughton was originally sentenced remains accurate. For the following reasons, I will deny the motion for reconsideration.

The basis of McNaughton's misapprehension of fact argument - and indeed, of all three alleged errors raised in his §2255 motion - is that at the time of sentencing, I was unaware of the severity of McNaughton's medical condition, specifically that he had a five - year life expectancy resulting from advanced chronic obstructive pulmonary disease. McNaughton argued in his §2255 motion, and argues now, that the incomplete picture I had of McNaughton's health before me at the time of sentencing was prejudicial and affected the outcome. At the hearing on McNaughton's motion, his counsel acknowledged that the medical evidence he was offering did not indicate that a prognosis of a

five - year life expectancy had been made as of the time of sentencing in October 1994, but rather in 1995, a year later. In my April 6, 1998 memorandum and order, I stated, as one of the reasons for rejecting his due process argument, that "McNaughton's misapprehension of fact argument fails because, as noted in my findings regarding his Sixth Amendment claim, McNaughton has not demonstrated that the fact of his diminished life expectancy existed at the time of sentencing." McNaughton has now moved for reconsideration, and has appended to his motion a medical report containing the opinion that the fact did exist at the time of sentencing.

The government is correct that under either Rule 59(e) or Local Rule 7.1(g), McNaughton is not entitled to a reconsideration of the April 6, 1998 order. His newly-offered medical evidence is not after-discovered; there was no impediment to it being provided to the court before the April 1, 1998 hearing. A motion for reconsideration is also appropriate to correct manifest errors of law or fact. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). McNaughton's characterization of the evidence notwithstanding, there has been no manifest error of law or fact in this case, since McNaughton was sentenced based on accurate, even if, as McNaughton contends, incomplete, information. Moreover, the April 6, 1998 order denying §2255 relief did not turn on the existence or non-existence of this newly-offered evidence. I will therefore deny the motion for reconsideration. Even assuming, arguendo, that I

were to reach the merits of McNaughton's motion and consider the newly-offered medical evidence, which contains the opinion that McNaughton had a five-year life expectancy at the time of sentencing, I would still conclude that McNaughton was not denied due process when he was sentenced without benefit of this information.

As I went on to say in the April 6th memorandum and order, due process requires that a defendant be sentenced based on truthful and reliable information. U.S. v. Tabares, 86 F.3d 326 (3d Cir. 1996). The Tabares court noted that "a defendant should not be sentenced on the basis of information about him that is materially incorrect." Id. at 329, quoting Moore v. U.S., 571 F.2d 179, 183 (3d Cir. 1978).²

In this case, McNaughton was not sentenced based on false, unreliable or materially incorrect information. McNaughton does not and cannot argue that he was sentenced based on false or unreliable information regarding, for example, the information required to be included in a presentence investigation report under Fed.R.Crim.P. 32(b)(4) - criminal history, role in the

² Moore involved information contained in the pre-sentence investigation report, that the defendant had beaten and shot several people, killed one person, and that he was a member of the "Black Mafia", which the defendant alleged was false. The defendant did not see the pre-sentence report until six years after he had been convicted, at which point he filed a habeas corpus petition. The district court denied the petition without a hearing. The Third Circuit ruled that the defendant was entitled to a hearing on his habeas petition to determine whether the information was false or unreliable, and whether the trial court had relied on the information in imposing sentence.

offense, other relevant conduct, nature of the offense, acceptance of responsibility, victim impact, etc. Instead he argues that, as to his medical condition, a discouraged factor for consideration under the Sentencing Guidelines, he was sentenced based on truthful information which was nonetheless a less than complete picture of his poor health.³

As I stated in my April 6th memorandum and order, McNaughton was sentenced, not based on incorrect information, but on an arguably incomplete analysis of that information. Even conceding, which I do not, that the medical evidence at sentencing was incorrect (for failing to include the five - year life expectancy conclusion), it was not materially incorrect, i.e., it did not go to an issue necessary to the correct determination of McNaughton's sentence under the Guidelines.⁴

³ McNaughton argues in his motion for reconsideration that Dr. Manaker's supplemental report, in addition to providing the five-year prognosis, also contradicts the opinion of McNaughton's treating physician, Dr. Murdoch, that McNaughton would be "fine if he would quit smoking." Dr. Murdoch's statement was not before me at sentencing, but was instead referred to in Mr. Welsh's affidavit submitted as part of the §2255 motion; therefore, it could not have formed any part of the basis for imposing sentence. Moreover, a conflict of opinion between two experts would not, of necessity, render one of the opinions false or unreliable.

⁴ In Tabares, in which the Third Circuit remanded the case for resentencing because the defendant was sentenced based on inaccurate information regarding prior convictions, the court noted that it "need not decide today whether every situation in which a district court relies on a mistaken belief about a prior conviction would require resentencing." Id. at 329. Tabares, Moore, and Townsend v. Burke, 334 U.S. 736 (U.S. 1948), all involved false information regarding the defendant's prior criminal conduct.

If every sentence based on inaccurate information regarding

As I stated in the April 6th memorandum and order, "for the same reason that it is not ineffective representation to fail to put every possibly relevant piece of information before the court at sentencing, it does not violate due process to sentence a defendant based on accurate and relevant information which, theoretically, might have been more persuasively presented."

McNaughton's introduction of medical evidence showing that he had a five - year life expectancy at the time of sentencing requires me to remove the word "theoretically" from that statement; it does not, however, compel or even suggest the result that his sentence, imposed with knowledge of his poor health but without the "fact" of his five - year life expectancy, implicates the Due Process Clause.

THEREFORE, this day of May, 1998, upon consideration of McNaughton's motion for reconsideration (docket # 859), and the government's response, **IT IS ORDERED THAT** the motion for reconsideration is **DENIED**.

prior convictions is not constitutionally infirm, then a fortiori, a sentence based on inaccurate information regarding a defendant's medical condition, a discouraged factor for consideration, would not implicate the Due Process Clause. A defendant might be sentenced based on inaccurate information regarding any number of things - how many children they had, how long they had worked at their job - which, while relevant to the exercise of the court's discretion within the guideline range, would not be material to a constitutionally valid sentence.

I also note that the Tabares court ordered that the defendant be resentenced but expressed no opinion as to what the new sentence should be.

Anita B. Brody, J.

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