

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

DWAYNE SHUMATE : CIVIL ACTION NO. 97-2593
 :
 v. : (CRIMINAL NO. 91-321-17)
 :
 UNITED STATES OF AMERICA :

M E M O R A N D U M

WALDMAN, J.

June 3, 1998

Presently before the court is petitioner's petition to vacate, set aside or correct his sentence which the government opposes.

Petitioner was indicted with nineteen others for conspiring to distribute cocaine as part of a large scale, multi-state, multi-million dollar drug distribution enterprise directed by co-defendant Julian Claude Dumas, Jr. from Los Angeles. Because petitioner was listed as a fugitive and not apprehended until the trial of his co-defendants was over, he was tried separately in December 1993. By that time, in an effort to secure relief from an otherwise mandatory sentence of life imprisonment, Mr. Dumas had agreed to cooperate with the government and testify against petitioner. After Mr. Dumas gave rather powerful testimony against him, petitioner elected to plead guilty to the conspiracy charge during trial on December

16, 1993. He was sentenced on March 25, 1994 to 188 months of imprisonment and five years of supervised release.

Petitioner now asserts that the government breached a plea agreement by which he could have received a lesser sentence and that his counsel was ineffective in his cross-examination of Mr. Dumas.

Petitioner contends the government agreed that if he pled guilty during trial the amount of cocaine attributed to him for sentencing purposes would be 60 kilograms and that he would receive a three offense level reduction for acceptance of responsibility.¹

Prior to trial, petitioner was offered a guilty plea agreement by the government under which it would be stipulated that the amount of cocaine attributable to petitioner for sentencing purposes was 60 kilograms and he should receive a three level reduction for acceptance of responsibility.² The government also indicated to petitioner that he could qualify for a § 5K1.1 motion if he provided substantial assistance.

Petitioner made a proffer to the government prior to trial, but

¹ Petitioner does not seek to withdraw his plea, but rather seeks a sentence based on 60 kilograms and a three level reduction for acceptance of responsibility. This would result in an offense level of 33 and a sentencing range of 135 to 168 months of imprisonment.

² Before Mr. Dumas agreed to cooperate, the government had evidence of only 60 kilograms of cocaine delivered for sale to petitioner over five months in 1990.

never accepted the plea agreement before it was formally withdrawn by the government.

Petitioner contends that prior to trial, he had a new plea agreement with the government by which his sentence would be based on 60 kilograms of cocaine and he would receive a three level reduction for acceptance of responsibility. Petitioner, however, would plead guilty during trial so the government could assess the effectiveness of Mr. Dumas as a witness.

In sentencing petitioner, the court looked to base offense level 38 which encompassed 150 kilograms or more of cocaine. The court reduced this by two levels for acceptance of responsibility, but declined to grant a third level reduction given the timing and circumstances of the plea. This resulted in an offense level of 36 and a sentencing range of 188 to 235 months of imprisonment.

The government forcefully asserts that there was no plea agreement and that it is clear from the record that petitioner entered an open plea with no promises from the government.

Before accepting the plea, the court ensured that petitioner understood he now faced a greater sentence than he would have under the plea agreement offered by the government prior to trial. The court inquired as to whether there was some new plea agreement. In petitioner's presence, his counsel

represented "there isn't a new agreement." In petitioner's presence, the prosecutor stated that any plea would be "an open plea of guilty in this case, that is the Government's position is that it will have to be an open plea without any assurances or promises by the government."

Petitioner stated under oath that no one had suggested to him that he would be in a better position if he then pled guilty than if he proceeded with the trial. Petitioner stated under oath that no promises or assurances regarding his sentence had been made to him by anyone.

Petitioner was informed by the court that it could well credit the testimony of Mr. Dumas as to petitioner's role and conduct. Petitioner was identified as a major wholesale distributor in Chicago. Mr. Dumas testified that he sold 250 kilograms of cocaine to petitioner during the course of the conspiracy and personally delivered 80 kilograms to petitioner. Mr. Dumas also testified to the transportation for him by petitioner of hundreds of thousands of dollars in drug proceeds from Philadelphia and Detroit. Petitioner did not object to the finding in the PSR that "he received at the very least 180 kilograms" and "as high as 250 kilograms of cocaine for resale."

Petitioner has provided no explanation for the contradiction of his prior sworn statements and for his silence or memory lapse in the years since the alleged oral plea

agreement. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977)(a defendant's "declarations in open court carry a strong presumption of verity"); United States v. Gonzales, 970 F.2d 1095, 1100-01 (2d Cir. 1992) (unsupported allegations contradicting defendant's statements at plea colloquy properly rejected); United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)(defendant bears "heavy burden" to show statements under oath at plea colloquy were false).

Petitioner's claim of a plea agreement is clearly belied by the record, including his own unexplained contradictory sworn statements, and is unaccompanied by any supporting submission or proffer. See United States v. Cervantes, 132 F.3d 1106, 1110 (5th Cir. 1998) (allegation of undisclosed promises to induce plea properly rejected summarily where petitioner fails to present independent corroboration and claim is inconsistent with petitioner's prior conduct and record in case); Bryon v. United States, 492 F.2d 775, 780 (5th Cir. 1974) (relief summarily denied where petitioner merely contradicts prior in court statements), cert. denied, 419 U.S. 1117 (1975); Nwachia v. United States, 891 F. Supp. 189, 195-96 (D.N.J. 1995) (summarily rejecting allegations of unwritten agreement with government without explanation for contradictory statements during plea colloquy), aff'd, 77 F.3d 463 (3d Cir. 1996).

Petitioner also contends that he was denied effective assistance of counsel. A § 2255 petition is the appropriate vehicle for asserting such a claim. See United States v. Gaydos, 108 F.3d 505, 512 n.5 (3d Cir. 1997); United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994).

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; U.S. v. Nino, 878 F.2d 101, 103 (3d Cir.1989).

Petitioner contends that his attorney was ineffective for failing to file a pre-trial discovery motion. Correspondence of record documents that the government voluntarily provided all required discovery to petitioner's counsel prior to trial, and thus there was no need to file a motion to secure discovery.

Petitioner has not remotely demonstrated that the failure to file a discovery motion in the circumstances was professionally deficient or prejudiced him in any way.

Petitioner claims that counsel also was ineffective for not notifying petitioner that the government had petitioned the court for a writ of habeas corpus ad testificandum for Julian Claude Dumas to testify at petitioner's trial. Petitioner seems to suggest that if he knew earlier that Mr. Dumas had agreed to testify, petitioner could have pled guilty before trial commenced and thus before the damaging testimony of Mr. Dumas regarding additional cocaine transactions. It appears from the petition and docket that the request for a writ of habeas corpus was not sent to petitioner's counsel, and ordinarily would not be. In any event, petitioner clearly knew Mr. Dumas was prepared to testify before the trial commenced. It was clearly petitioner who elected to wait until he could assess the impact of Mr. Dumas on the witness stand. Moreover, even without a trial, the government clearly could have presented the same testimony at a sentencing hearing.

Petitioner also claims his counsel was ineffective in not cross-examining Mr. Dumas regarding the amount of cocaine he testified he sold to petitioner.

Whether and how to conduct cross examination of witnesses is a tactical decision that is within the discretion of

trial counsel. Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1434 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). Petitioner's attorney effectively questioned Mr. Dumas about his self-interest in testifying for the government to avoid a life sentence and about his own extensive illegal activities. Counsel made a sound strategic decision to try to undermine generally the credibility of Mr. Dumas by confronting him with things he could not deny. To attempt to get Mr. Dumas, a particularly convincing and resolute witness, to change on cross-examination his factual recitation of events on direct examination would have needlessly underscored that recitation and been a most dubious tactic.

Petitioner has not remotely demonstrated that his attorney was professionally deficient in any way, let alone that he was prejudiced by professionally unreasonable conduct which undermined the proper functioning of the adversarial process.

Accordingly, petitioner's petition will be denied. an appropriate order will be entered.

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O R D E R

AND NOW, this day of June, 1998, upon
consideration of petitioner's 28 U.S.C. § 2255 petition to
vacate, set aside or correct sentence and the response of the
government thereto, consistent with the accompanying memorandum,
IT IS HEREBY ORDERED that said petition is **DENIED** and the above
action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.