

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

THOMAS DANIELS

v.

UNITED STATES OF AMERICA

CIVIL ACTION

NO. 98-969

CRIMINAL ACTION

NO. 95-369

MEMORANDUM

Broderick, J.

June 29, 1998

Thomas Daniels has filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Daniels was sentenced to life imprisonment in 1996 after a jury found him guilty of distributing cocaine base ("crack") and cocaine in violation of 21 U.S.C. 841(a)(1). In his § 2255 motion, Daniels contends the he was denied effective assistance of counsel at trial and at sentencing because his counsel: (1) advised him to plead not guilty and go to trial; (2) failed to subpoena and investigate the government's confidential informant; (3) advised him to stipulate that the substance in question was "crack;" (4) failed to seek a downward departure at sentencing; and (5) failed to object to the use of his prior convictions to enhance his sentence. For the reasons set forth below, Daniels' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 will be denied.

## I. BACKGROUND

On July 12, 1995, a grand jury returned a four-count indictment against Thomas Daniels charging him with the following crimes: distribution of approximately 495.9 grams of cocaine on or about December 21, 1994, in violation of 21 U.S.C. § 841(a)(1) (Count I); distribution and aiding and abetting the distribution of approximately 231.3 grams of cocaine base ("crack") on or about March 15, 1995, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count II); use of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count III); and criminal forfeiture pursuant to 21 U.S.C. § 853(a)(1) (Count IV). The forfeiture charge (Count IV) was dismissed on March 12, 1996 upon motion of the government.

A jury trial commenced on March 6, 1996 for a period of thirteen days. On March 22, 1996, the jury returned with its verdict finding the defendant guilty as to the drug charges (Count I and II) and not guilty as to the gun charge (Count III). The Court denied the defendant's post-trial motion by Memorandum and Order dated June 6, 1996. United States v. Daniels, No. 95-369, 1996 WL 311444 (E.D. Pa. June 6, 1996). A summary of the evidence presented at trial may be found in the Court's June 6th Memorandum.

The Court held a sentencing hearing on June 26, 1996 in open court with Daniels and his counsel present. The Court adopted the factual findings and guideline application in the presentence report, including the calculation of Daniels' criminal history.

Daniels had been convicted of four previous drug crimes in the Court of Common Pleas of Philadelphia County, qualifying him as a career offender under United States Sentencing Guideline § 4B1.1. More significantly, Daniels' prior drug convictions along with his current conviction for distributing more than 50 grams of crack cocaine carried a mandatory term of life imprisonment without release pursuant to 21 U.S.C. § 841(b)(1)(A). Accordingly, the Court sentenced Daniels to life imprisonment without release on Count II, along with a concurrent term of thirty years imprisonment on Count I.

Daniels appealed to the United States Court of Appeals for Third Circuit, which affirmed the judgment of conviction and sentence in an unpublished opinion on June 11, 1997. United States v. Daniels, No. 96-1575, 118 F.3d 1578 (3d Cir. June 11, 1997) [table]. The United States Supreme Court denied Daniels' petition for a writ of certiorari. Daniels v. United States, No. 97-5932, 118 S. Ct. 324 (Oct. 14, 1997).

## **II. DISCUSSION**

Rule 8(a) of the Rules Governing Section 2255 proceedings provides that the Court shall determine whether an evidentiary hearing is required for the disposition of a § 2255 petition. The Court has examined the record in this case and has determined that an evidentiary hearing is not required in view of the fact that all of the petitioner's claims can be properly disposed of on the basis of the record. Government of the Virgin Islands v.

Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984), as modified by United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988).

Ineffective assistance of counsel claims are governed by the two-part standard enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). In that case, Justice O'Connor wrote:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. "More precisely, the claimant must show that (1) his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms, and, unless prejudice is presumed, that (2) there is a 'reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992) (quoting Strickland, 466 U.S. at 687-91 & 694).

A. Plea of Not Guilty

Daniels contends that his counsel was ineffective for advising him to plead not guilty and proceed to trial. Daniels claims that if he had known that he faced a mandatory life

sentence because of his prior criminal history, see 21 U.S.C. §§ 841(b)(1)(A) and 851, then he would have sought a plea agreement and plead guilty. Daniels' contention, however, is belied by the record in this case. Daniels was fully aware that he faced a mandatory life sentence as early as his pre-trial detention hearing before the United States Magistrate Judge and his appeal of the detention order to this Court. This Court relied heavily on the fact that the defendant faced a mandatory term of life imprisonment in affirming the magistrate judge's detention order, and the Court discussed in detail each of the defendant's past convictions. United States v. Daniels, No. 95-369, 1995 WL 517566 (E.D. Pa. Aug. 29, 1995). The Court found "that since the mandatory minimum sentence for which defendant is facing is life imprisonment, no condition or combination of conditions would reasonably assure the appearance of defendant at trial." Id. at \*2. Thus, the defendant was fully aware prior to trial that he faced a mandatory term of life imprisonment, and his counsel cannot be faulted for advising him to proceed to trial. Moreover, because the defendant's sentence to life imprisonment was required by 21 U.S.C. § 841, he would have been given the same sentence whether he pled guilty or was found guilty by a jury. There were no grounds for departing below the mandatory minimum sentence pursuant to 18 U.S.C. § 3553(e), nor has Daniels articulated any basis in his § 2255 motion for imposing a sentence below the statutory minimum. Accordingly, Daniels' ineffective assistance of counsel claim on this point fails to

satisfy either part of the Strickland standard, and his claim will be denied.

B. Subpoena of the Government's Confidential Informant

Daniels contends that his counsel was ineffective for failing to subpoena the government's confidential informant as a defense witness at trial. Daniels raised the substance of this claim in both his post-trial motion and in his direct appeal. As this Court and the Third Circuit found, the government made every effort to produce the informant as a witness at trial. See Daniels, No. 95-369, 1996 WL 311444, at \*5 (E.D. Pa. June 6, 1996); Daniels, No. 96-1575, slip op. at 7-8 (3d Cir. June 11, 1997). A government agent personally served the informant with a subpoena on March 1, 1996 to appear in Court to testify as a witness at trial. When the informant contacted the agent and told her that he refused to come to Court because he feared for the safety of his family, the Court issued a bench warrant for the informant's arrest and instructed the United States Marshal to make the arrest as soon as possible. Several months later when the informant was finally arrested, the Court held him in criminal contempt and sentenced him to time served awaiting his contempt hearing. Thus, the government and this Court made every effort to secure the informant as a witness at trial. Defense counsel cannot be faulted for failing to issue his own subpoena. Moreover, Daniels has not shown that he was prejudiced by his counsel's failure to subpoena the government's confidential

informant or to investigate or interview him. Accordingly, Daniels' claim for ineffective assistance of counsel on this point also fails the Strickland standard and will be denied.

C. "Crack" v. "Cocaine Base"

Daniels contends that his counsel was ineffective for advising him to stipulate at trial that the substance in question in Count II was "crack" cocaine. In United States v. James, 78 F.3d 851 (3d Cir. 1996), the Third Circuit ruled that the United States Sentencing Commission amended the definition of "cocaine base" in 1993 to distinguish between "crack" cocaine and other forms of "cocaine base," so that the 100:1 enhanced provisions for "cocaine base" in U.S.S.G. § 2D1.1 should only apply to the "crack" form of "cocaine base." Id. at 857-58. Daniels' claim has no merit. Although his counsel advised him at trial to stipulate that the substance was "crack" cocaine, his counsel vigorously challenged the identity of the controlled substance at the sentencing hearing. See Tr., June 26, 1996, at 4-14. Defense counsel's performance on this issue was not so unreasonable as to constitute ineffective assistance of counsel. Moreover, in sentencing the defendant, the Court relied on the government chemist's report in addition to Daniels' stipulation, and his conviction and sentence for distributing "crack" cocaine were affirmed by the Third Circuit. Accordingly, Daniels' claim of ineffective assistance of counsel on this point will be denied.

D. Downward Departure at Sentencing

Daniels contends that his counsel was ineffective for failing to seek a downward departure at sentencing pursuant to 21 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0. These sections provide that the sentencing court may impose a sentence outside the range of the Sentencing Guidelines if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Id. Although Daniels relies heavily on these sections and on Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035 (1996), they have no bearing on his sentence to life imprisonment. As heretofore discussed, Daniels was sentenced to a term of life imprisonment without release pursuant to 21 U.S.C. § 841(b)(1)(A), which states: "If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . ." Thus, Daniels was sentenced to life imprisonment in accordance with the express mandate of the United States Congress and not the guidelines adopted by the United States Sentencing Commission. Furthermore, there were no grounds for imposing a sentence below the statutory minimum pursuant to 18 U.S.C. § 3553(e). Accordingly, Daniels' claim for ineffective assistance of counsel on this point will be denied.

E. Use of Prior Convictions to Enhance Sentence

Daniels contends that his counsel was ineffective for failing to challenge the use of his past convictions to enhance his sentence under the procedures set forth in 21 U.S.C. § 851. This statute states that a defendant's sentence may not be enhanced for prior convictions "unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed." 21 U.S.C. § 851(b). Daniels relies on United States v. Collado, 106 F.3d 1097 (2d Cir. 1997), in which the Second Circuit knowingly adopted a position contrary to every other circuit that has examined § 851 and ruled that the statute was ambiguous and should be applied leniently. Id. at 1100-01. Collado is not binding in this circuit, and this Court will join the majority interpretation of § 851 rather than the Second Circuit's. See United States v. Spells, No. 96-315, 1998 WL 111339 (M.D. Pa. March 10, 1998) (Caldwell, J.) (citing decisions by the Courts of Appeals for the 7th, 8th, 9th, 10th, and 11th circuits). Daniels was afforded prosecution by indictment for his charge of distributing crack cocaine in violation of 21 U.S.C. § 841(a)(1), and this is all that § 851 requires. Id. Accordingly, Daniels' counsel cannot be faulted for failing to challenge the use of Daniels' prior convictions, and Daniels' claim of ineffective assistance of counsel will be denied.

### III. CONCLUSION

For the foregoing reasons, Daniels has failed to demonstrate that he was denied constitutionally effective assistance of counsel under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). The Court will therefore deny his pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Finally, there is no basis for issuing a certificate of appealability, as Daniels has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

An appropriate Order follows.

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ORDER

AND NOW, this 29th day of June, 1998; upon consideration of Thomas Daniels' motion pursuant to 28 U.S.C. § 2255, the government's response, and Daniels' reply; and for the reasons set forth in the Court's Memorandum of this date;

**IT IS ORDERED:** Thomas Daniels' pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Document No. 126) is DENIED.

**IT IS FURTHER ORDERED:** There are no grounds for issuing a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

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RAYMOND J. BRODERICK, J.