

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

UNITED STATES : CIVIL ACTION
 : NO. 98-2227
 v. :
 :
 IBRAHIM KHALIL : CRIMINAL NO. 95-577-2

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 19, 1998

Ibrahim Khalil ("Khalil"), filing a petition for writ of habeas corpus, alleged that his sentencing guidelines were calculated incorrectly. Because Khalil's criminal offense calculation erroneously included certain funds post-dating Khalil's involvement in the criminal enterprise, his petition for writ of habeas corpus will be granted. His claims of ineffective assistance of counsel will be denied.

BACKGROUND

Khalil conspired to manufacture and distribute counterfeit audio-cassette tapes and labels. On April 10, 1998, the day his trial was to begin, he pled guilty to conspiracy, copyright infringement, trafficking in counterfeit labels, money laundering, and criminal forfeiture.

Khalil was held accountable for laundering \$1,004,845.72; the original offense level of 24 was subject to a plus 5 level adjustment for laundering more than \$1,000,000 but less than \$2,000,000. U.S.S.G. § 2S1.1.(b)(2)(F). After a 2 level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1.(a), the court found an adjusted offense level of 27 and criminal history category I. This finding was consistent with

the calculations in the Presentence Investigation Report ("PSI"), to which the parties did not object.

The government moved for a downward departure under U.S.S.G. § 5K1.1 because of Khalil's assistance in another action. The court granted a downward departure of 6 levels to offense level 21, and criminal history category I. The guideline range was then 36 to 46 months, and the court sentenced Khalil to 40 months imprisonment.

DISCUSSION

Khalil argues that his "offense level under the Sentencing Guideline's [sic] money laundering provisions of U.S.S.G. § 2S1.1 was erroneously calculated," because "[a]t least \$8,100 in funds that post dated [Khalil's] involvement in the offense were erroneously attributed to [him] in calculating his offense level." (Petition for Writ of Habeas Corpus, p. 1.) At sentencing, Khalil did not object to the presentence report, which included these funds in calculating his criminal offense level.

The government concedes that "[Khalil] . . . has correctly pointed out that \$8,100 in laundered funds that post-dated his involvement in the conspiracy was erroneously attributed to him in calculating his offense level under U.S.S.G. § 2S1.1." (Memorandum in Response to Petition, p. 3).

Had the \$8,100 not been included in his sentencing calculation, Khalil would have been held accountable for laundering \$996,745.72; this would have required a plus 4 level adjustment for laundering more than \$600,000 but less than

\$1,000,000. U.S.S.G. § 2S1.1.(b)(2)(E). Prior to the downward departure, Khalil's offense category would have been level 26, rather than level 27. The inclusion of these funds was erroneous and resulted in an illegal sentence. The applicable habeas statute, 28 U.S.C. § 2255, provides that Khalil may move this court to set aside, vacate, or correct his sentence if "the sentence was imposed in violation of the . . . laws of the United States." 28 U.S.C.A. § 2255 (West 1994). Khalil's habeas petition will be granted so the court may sentence him correctly. See United States v. Pollen, 978 F.2d 78, 90 (3d Cir. 1992) (court's improper calculation of defendant's offense level, resulting in a higher Guideline sentencing range, was plain error that seriously affected defendant's substantial rights), cert. denied, 508 U.S. 906 (1993).

In the alternative, Khalil alleges he was denied effective assistance of counsel because counsel (and Khalil himself) failed to notice the inclusion of the extra \$8,100 in the PSI and failed to object to it at the sentencing hearing. The court is granting Khalil's habeas because he received an illegal sentence, so his ineffective assistance of counsel claim on the same basis is moot.

Khalil also argues that his counsel was ineffective for failing to request an additional one level reduction under U.S.S.G. § 3E1.1.(b)(1), "for . . . having timely disclosed to the Government information concerning his own and others involvement in the offense." (Petition, p. 18).

Khalil's ineffective assistance of counsel claim is controlled by Strickland v. Washington, 446 U.S. 668 (1984). To establish ineffective assistance of counsel, defendant must show both: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance so prejudiced the defendant that the outcome was unreliable or fundamentally unfair. Id. at 687. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 687. A defendant must overcome the presumption that, under the circumstances, counsel's actions might be considered sound strategy. Id. at 689.

Under part two of Strickland, Khalil must demonstrate "prejudice," defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 697. Khalil cannot establish prejudice because, even if his lawyer had moved for an additional reduction under U.S.S.G. § 3E1.1, the court would have denied the motion.

Section 3E1.1.(b)(1) provides that a defendant can qualify for an additional 1 level reduction if he "has assisted authorities in the investigation and prosecution of his own misconduct by . . . (1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." U.S.S.G. § 3E1.1.(b). The Commentary to U.S.S.G.

§ 3E1.1.(b)(1) states that timeliness of the defendant's acceptance of responsibility is a consideration under this subsection, and is context specific. "In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) . . . will occur particularly early in the case." U.S.S.G. § 3E1.1, Application Note 6.

Khalil argues he provided complete information to the Government when he discussed the conspiracy at a meeting in February 1996; the Government admitted he "did come in and speak with the Government well before the guilty plea . . . about the crimes . . . about his involvement in this activity." (N.T. 7/25/96, p. 5). But he did not plead guilty until April 10, 1996, the first day of trial.

Khalil withdrew from the conspiracy in March 1994, when the government executed a search warrant on the factories where the tapes and labels were counterfeited. The indictment in this action was returned in October, 1995. Even if the court were to conclude that he provided full and complete information of the criminal activity in February, the court would not have granted an additional departure under U.S.S.G. § 3E1.1.(b)(1). Providing information two months before the trial was to begin was not "particularly early," since Khalil became aware of the government's investigation following the search of the tape factories two years before. Khalil was not entitled to an additional one point reduction under U.S.S.G. § 3E1.1.(b)(1).

CONCLUSION

Khalil's sentence was based on an incorrect calculation under the Sentencing Guidelines. His petition for writ of habeas corpus will be granted on this ground. His allegation of ineffective assistance of counsel for the same reason is denied as moot. His petition for writ of habeas corpus because counsel failed to move for an additional reduction under U.S.S.G. § 3E1.1.(b)(1) is denied because he has failed to establish prejudice as required under Strickland.

An appropriate order follows.

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AND NOW this 19th day of August, 1998, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, and the government's response in opposition thereto, it is **ORDERED** that:

1. The petition for writ of habeas corpus is **GRANTED** in part:

a. The court miscalculated his criminal offense level and will resentence Khalil for laundering an amount more than \$600,000 and less than \$1,000,000, at an initial offense level of 26, after a two level reduction for acceptance of responsibility.

b. At resentencing, the court will hear argument on any appropriate reduction of sentence under U.S.S.G. § 5K1.1 from criminal offense level 26, criminal history category I.

DENIED: 2. The petition for writ of habeas corpus is otherwise

a. Khalil's petition for writ of habeas corpus on the grounds that he was denied effective assistance of counsel for failure to object to the miscalculation of his criminal offense level is moot.

b. Counsel was not ineffective for failing to request an additional one level reduction under U.S.S.G. § 3E1.1.(b)(1).