

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

UNITED STATES OF AMERICA : CIVIL ACTION
 :
 v. :
 : NO. 98-4194
 SHERIF SALEH :

MEMORANDUM

R.F. KELLY, J.

NOVEMBER 3, 1998

Sherif Saleh has filed a Petition under 28 U.S.C. § 2255 alleging ineffective assistance of his defense counsel. Petitioner contends that his retained counsel was unconstitutionally deficient for three reasons: (1) he failed to object to the four-point increase made to the petitioner's offense level under U.S.S.G. § 2K2.1(b)(5); (2) that counsel did not challenge the indictment and the statutes under which petitioner was charged; and (3) that counsel failed to retain and explain the plea agreement to him.

In order to establish ineffective assistance of counsel, the petitioner must prove (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that his counsel's deficient performance was prejudicial to him, resulting in an unreliable or fundamentally unfair outcome. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Under the Strickland performance prong, the petitioner must show that his counsel made errors "so serious that [he] was not functioning as the counsel guaranteed the petitioner by the Sixth Amendment." 466 U.S. at 687. In evaluating the performance of counsel, courts "must be highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance." Id. at 689. As to the prejudice prong, the petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Thus, it is not enough for the petitioner to show that the errors had "some conceivable effect on the outcome of the proceeding." Id. If the court finds that the petitioner has failed to satisfy either prong of the Strickland test, it need not consider the other. Id. at 697.

**FAILURE TO OBJECT TO FOUR-POINT OFFENSE-LEVEL
INCREASE UNDER U.S.S.G. § 2K2.1(b)(5)**

Petitioner first contends that his attorney was ineffective for failing to object to the four-point offense level increase, pursuant to U.S.S.G. § 2k2.1(b)(5), recommended by the Probation Office in the defendant's Presentence Investigation Report("PSI") and imposed by the court at sentencing. See PSI ¶18.

Section 2K2.1(b)(5) of the Guidelines requires a four-point offense level increase if the defendant "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense."¹

The PSI stated that the enhancement applied because the

¹A destructive device, like a Molotov Cocktail, is a "firearm" under the statute violated by the defendant. 26 U.S.C. § 5845(a)(8).

defendant and his wife, Donna Altamuro, possessed Molotov Cocktails for the purpose of committing arson. PSI ¶18. The petitioner testified at his wife's trial that he and his wife had been ripped off by a drug dealer named "Mario" a few days before they were caught with the Molotov Cocktails. Petitioner stated that his wife Donna Altamuro intended to use those incendiary devices "to take care of his ass, which is Mario." Trial Transcript ("Tr.") at 122. Petitioner admitted that Altamuro's intent was to "get" Mario and "show him how to rip [her] off." Id. at 124.

Saleh pled guilty to possessing one of the Molotov Cocktails which he knew would be used to "take care of" Mario. Tr. at 115. He admitted that he was involved in the crime, that he knew the Molotov Cocktails were in the car and that he provided the car they used to drive to Mario's neighborhood. Id. at 115-16. Thus, it is clear that the defendant knew that the Molotov Cocktails would be used in connection with another felony offense. See U.S.S.G. § 2K2.1(b)(5).

Defendant also asserts that he should have received a mitigating role adjustment, pursuant to U.S.S.G. § 3B1.2, because he was less culpable than his wife. Petition at 17. Presumably, the defendant is claiming that his attorney was ineffective for failing to make that argument at sentencing. Counsel cannot be held to be ineffective for failing to make an argument that is obviously without merit.

Mitigating role downward adjustments are to be awarded infrequently. United States v. Sanchez, 908 F.2d 1443, 1449 (9th

Cir. 1990). "[T]he mere fact that [a] defendant was less culpable than his co-defendant does not entitle the defendant to 'minor participant' status." United States v. West, 942 F.2d 528, 531 (8th Cir. 1991). The intent of the Sentencing Guidelines is "not to 'reward' a guilty defendant with an adjustment merely because his co-conspirators were even more culpable." United States v. Lopez, 937 F.2d 716, 728 (2d Cir. 1991). Here, as the defendant admitted at trial, he was aware of the nature and scope of the criminal activity, he had a close relationship with his criminal cohort and his actions were important to the criminal venture. Thus, there was no basis for his attorney to seek a downward role adjustment.

Since the Section 2K2.1(b)(5) enhancement was so clearly applicable, the absence of an objection resulted in no prejudice to the defendant since the enhancement would have been applied even with an objection.

FAILURE TO CHALLENGE INDICTMENT AND CHARGING STATUTE

The defendant asserts also, that his attorney was ineffective for failing to challenge the indictment because the defendant's crime was more akin to "transporting" (26 U.S.C. § 5861(j)) rather than "possessing" (26 U.S.C. § 5861(d) a destructive device. Petition at 17-18. There was absolutely no basis to challenge the grand jury's determination that there was probable cause to believe that the defendant unlawfully possessed a destructive device. That determination was supported by the

defendant's guilty plea and the evidence produced at the trial of his co-defendant wife. Moreover, the defendant could not possibly have suffered any prejudice as a result of his lawyer's failure to argue that he should have been charged under Section 5861(j) of Title 26 instead of Section 5861(d). Both offenses are subject to precisely the same statutory penalties and governed by the same Sentencing Guidelines. See 26 U.S.C. § 5871; U.S.S.G. Appendix A.

ALLEGED FAILURE TO EXPLAIN GUILTY PLEA

The petitioner also claims that his attorney was ineffective because he failed to explain his plea agreement and the elements of the offense to him. Petition at 18-19. At his sentencing hearing, the defendant stated on the record that he was, in fact, satisfied with the legal representation which had been provided by his attorney. Plea Hearing at 3. In fact, he should have been satisfied with his counsel's representation because he negotiated a guilty plea agreement which resulted in a prison sentence for the defendant which was approximately half of the sentence imposed on co-defendant Altamuro. After advising petitioner of the elements of the offense with which he was charged, the defendant stated to the court that he understood those elements. ID. at 5. After the government outlined the terms of the plea agreement, the defendant stated that he understood those terms. ID. at 9.

The defendant also claims that his attorney failed to advise him of the immigration consequences of his plea agreement.

Petition at 18. While it is unclear whether such a failure, even if true, would support the defendant's ineffective assistance claim, see United States v. Nino, 878 F.2d 101, 105)3d Cir. (1989), it is clear that the claim fails under the Strickland prejudice prong. In view of the overwhelming evidence against the defendant (including, among other things, the testimony of all three police officers at the scene) and the significant benefits he reaped as a result of the plea agreement (a downward departure motion and roughly half as much prison time as Altamuro), there is no "reasonable probability" that the defendant would have gone to trial even if his attorney gave him the advice he allegedly failed to provide. See Parry v. Rosemeyer, 64 F.3d 110, 119 (3d Cir. 1995), cert. denied, 516 U.S. 1058 (1996). "A defendant alleging ineffective assistance of counsel in the guilty plea context must make more than a bare allegation that but for counsel's error he would have pleaded not guilty and gone to trial." Id. at 118. Here, the defendant did not even make that allegation, much less provide any support for it.

It is therefore clear from the record that the defendant was fully advised by his counsel and the court of the elements of the offense charged in the indictment and the terms of his guilty plea agreement. In any event, the defendant suffered no prejudice.

For the foregoing reasons, I hereby enter the following Order.

