

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

UNITED STATES OF AMERICA : CIVIL ACTION  
: (Crim. A. No. 95-296-01)  
:   
v. :   
:   
WILLIAM L. BULLOCK : NO. 98-CV-5072

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**NOVEMBER 25, 1998**

Presently before the Court is William L. Bullock's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence (Document No. 646). In consideration of this motion, and the government's response thereto, the Court concludes Petitioner has failed to state any meritorious claim. The Court therefore denies Petitioner all of the relief he demands, including his request that this Court hear argument concerning several of his claims.

The focus of Petitioner's first argument is "jurisdictional and constitutional," that Congress acted unconstitutionally when it declined to equate the penalties for distributing crack cocaine and powder cocaine. Every court of appeals that has considered this argument has rejected it, under rational review, in consideration of Congress's reasons for providing a higher penalty for distributing crack cocaine: crack cocaine is more addictive, more available, and associated with more violence than powder cocaine. See, e.g., United States v. Hanna, 153 F.3d 1286, 1289 (11th Cir. 1998); United States v. Washington, 127 F.3d 510, 517 (6th Cir. 1997), cert. denied, 118 S. Ct. 2348 (1998); United States v. Burgos, 94 F.3d 849, 877 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 708 (1997); United States v. Teague, 93 F.3d 81, 85 (2d Cir. 1996), cert. denied, 117 S. Ct. 708 (1997); United States v. Carter, 91 F.3d 1196, 1198 (8th Cir.

1996); United States v. Jackson, 84 F.3d 1154, 1161 (9th Cir.), cert. denied, 117 S. Ct. 445 (1996). The Court finds these courts of appeals' reasoning to be persuasive, and concludes the sentencing guideline is constitutional.

Petitioner's second alleged jurisdictional and constitutional defect is that the district court did not have jurisdiction to authorize the installation of a pole camera because the government lacked standing to move for the camera's installation.<sup>1</sup> Petitioner claims that because the government made its request during its investigation, no case or controversy yet existed, and the Court could not find jurisdiction existed under either Federal Rule of Criminal Procedure 57(b) or the All Writs Act, 28 U.S.C. § 1651 (1994). This argument, however, leads to the absurd result that no district court could ever entertain any pre-indictment or pre-information government request, presumably even for a search warrant, because the government would not have standing. Under the Petitioner's reasoning, the government would have to complete its investigation before it would have standing to request mechanisms, like pole cameras, to investigate a target. To the contrary, it is beyond dispute that the government, even in the investigation stage, may request court approval for surveillance measures like the pole camera. See Judgment Order, Appeal No. 96-1639, dated Sept. 18, 1997. Accordingly, the Court rejects Petitioner's second argument.

Petitioner next argues his counsel was ineffective at trial and on appeal, alleging a multitude of deficiencies. He claims his counsel failed to adequately investigate the facts of his case and possible defenses, but fails to state which facts his counsel failed to discover or which

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<sup>1</sup>Petitioner raised a related issue on direct appeal of whether the government properly used the All Writs Act to obtain the authority to install the remote camera. The Third Circuit rejected this claim. See Judgment Order, Appeal No. 96-1639, dated Sept. 18, 1997.

defenses his counsel failed to raise. He apparently tries to demonstrate his counsel's ineffectiveness by claiming the statutes under which he was convicted, 21 U.S.C. §§ 841, 846 (1994),<sup>2</sup> were "not duly promulgated," but does not support this claim in any way. He alleges his counsel was ineffective for not recognizing and arguing the jurisdictional issue of whether the government had standing to request the surveillance camera, but again fails to show why that argument has any merit. He contrasts the number of motions his original counsel filed with those his trial counsel filed and concludes his trial counsel should have filed more pre-trial motions, but never states which issues remained or which motions counsel should have filed. He finds his trial counsel did not spend enough time with him to understand the complexities of the case or learn enough to impeach each cooperating co-defendant about his drug use, but ignores the fact that he was acquitted of all but one count and his counsel cross-examined each co-defendant about his use of drugs. He claims his counsel failed to adequately consult with him, but fails to provide what information his counsel never shared with him. The Court finds all of these claims to be vague, unsupported, and without merit.

Petitioner presents several other arguments that his counsel was ineffective, but these claims, although slightly more complicated, are no more persuasive. Petitioner argues his counsel failed to raise or preserve issues on direct appeal, citing as support his attorney's refusal to argue the governmental standing issue and Petitioner's belief that, under 21 U.S.C. § 841(b)(1)(A), the Court could not aggregate the amount of cocaine base Petitioner conspired to distribute. Based upon the Court's earlier conclusion, counsel's refusal to present the

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<sup>2</sup>Petitioner specifically was convicted under § 846, but § 841 also is relevant as it is the statute under which Petitioner was sentenced. United States v. Chapple, 985 F.2d 729, 731 (3d Cir. 1993), cert. denied, 508 U.S. 980 (1993).

governmental standing issue demonstrates his effective, not ineffective, representation. With respect to Petitioner's sentencing argument, because he was convicted of conspiracy, the Court properly can consider all quantities of drugs others foreseeably distributed in furtherance of the conspiracy and within the scope of the defendant's agreement. United States v. Price, 13 F.3d 711, 732 (3d Cir. 1994), cert. denied, 512 U.S. 1241 (1994), and cert. denied, 513 U.S. 853 (1994), and cert. denied, 514 U.S. 1021 (1995). Accordingly, the Court's aggregation of the amounts Petitioner conspired to distribute was appropriate. Cf. United States v. Lewis, 110 F.3d 417, 422-23 (7th Cir. 1997), cert. denied, 118 S. Ct. 149 (1997). For this reason, and the fact that Petitioner's counsel did raise this issue at the sentencing, (see Sentencing Tr. at 19-29), the Court concludes Petitioner's claim is baseless, and counsel's refusal to object to the sentencing on this ground does not constitute ineffective assistance of counsel.

Petitioner also argues his counsel was ineffective because he failed to object to the government's use of cooperating witnesses, and demands that the Court exclude the testimony these witnesses provided. In support of this claim, Petitioner relies upon the reasoning underlying United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), which the Tenth Circuit vacated pending rehearing en banc just nine days after it issued its opinion. Unfortunately for Petitioner, Singleton is not the law of any circuit. In fact, no circuit has come even vaguely close to adopting its reasoning. Petitioner's claim, therefore, lacks any precedential support. Moreover, Petitioner's counsel did raise this issue at the sentencing. (Sentencing Tr. at 31.) The Court therefore concludes this basis for claiming ineffective assistance of counsel also is without merit.

Petitioner's penultimate ineffective assistance of counsel claim is that his counsel was

deficient for not noticing that the government failed to prove the substance he conspired to distribute was crack. Specifically, Petitioner claims, on the authority of the Sentencing Guidelines, that the government must prove sodium bicarbonate was present in the substance at issue, and the testimony of a D.E.A. chemist that the substance was crack cocaine, corroborated by Petitioner's co-defendants, was insufficient to show that the substance was crack cocaine. Petitioner ignores the facts, however, that the D.E.A. chemist did testify that cocaine base is a form of cocaine made by heating cocaine hydrochloride mixed with sodium bicarbonate or sodium carbonate, and that the street term for the cocaine base is "crack." (N.T. 2/14/96 at 90-91.) Petitioner also ignores the extensive testimony of his co-defendants, who each testified that he received crack directly or indirectly from Petitioner. (See N.T. 2/15/96 at 110-13, 119-20 (testimony of Anthony Thomas); N.T. 2/15/96 at 168-71, 173, 176 (testimony of Troy Robinson); see also Gov't Sentencing Mem. at 4-7.) Further, Petitioner's argument lacks merit on a second ground: so long as sufficient proof exists that the substance at issue was crack cocaine, testimony regarding the specific analysis of the substance, although preferred, is not required. United States v. Dent, 149 F.3d 180, 190 (3d Cir. 1998); United States v. Roman, 121 F.3d 136, 141 (3d Cir. 1997), cert. denied, 118 S. Ct. 722 (1998). Cf. United States v. Brooks, No. 97-1367, 1998 WL 785933, at \*8-\*9 (10th Cir. Nov. 12, 1998); United States v. Jones, No. 97-5222, 1998 WL 770238, at \*12 (6th Cir. Nov. 6, 1998); United States v. Brown, 156 F.3d 813, 816 (8th Cir. 1998); United States v. Taylor, 154 F.3d 675, 685 (7th Cir. 1998). Therefore, the Court finds, as it did at trial, that the government satisfied its burden of proof in this respect, and also finds that Petitioner has failed to state a valid ineffective assistance of counsel claim.

Petitioner's final ineffective assistance of counsel claim is based on his belief that he

couldn't have been guilty of conspiracy because he was acquitted on the substantive counts pending against him, and counsel, therefore, should have challenged the sufficiency of the evidence underlying his conspiracy conviction. Petitioner attempts to rely on United States v. Wexler, 838 F.2d 88 (3d Cir. 1988), to support his claim, apparently hoping to argue that the mere fact he kept "bad company" does not itself prove he had knowledge of the illegal objective contemplated by the conspiracy. See id. at 91. Unlike in Wexler, however, in Petitioner's case there was more than enough evidence, provided in particular by the cooperating co-defendants, "tending to prove that defendant entered into an agreement and knew that the agreement had the specific unlawful purpose charged in the indictment." See id. (citing United States v. Scanzello, 832 F.2d 18, 20 (3d Cir. 1987)). Further, Petitioner's counsel and Petitioner himself challenged the sufficiency of the evidence in post-trial motions. (See Sentencing Tr. at 6-9, 39-40.) Accordingly, this claim joins Petitioner's other ineffective assistance of counsel claims as lacking merit.

In addition to these alleged deficiencies in his counsel's representation, Petitioner claims the Court made two errors in sentencing him. Petitioner first alleges the Court neglected to attach its findings and determinations to the Pre-Sentence Report ("PSR"), which he claims is required by Federal Rule of Criminal Procedure 32(c)(3)(D). Rule 32(c)(3)(D), amended in 1994, no longer requires district courts to attach its findings and determinations to the PSR. Rule 32(c)(1) has partially adopted this requirement; district courts must attach their findings and determinations only when they relate to a controverted matter. In Petitioner's case, the Court made specific findings at the sentencing relating to Petitioner's objections to the PSR that are preserved on the record. (See Sentencing Tr. at 37-38.) Accordingly, the record as to the Court's

determination is clear for any appeal, see United States v. Walker, 29 F.3d 908, 911 (4th Cir. 1994), and even if this amounts to a technical violation, resentencing is not warranted, United States v. Gutierrez-Hernandez, 94 F.3d 582, 584-85 (9th Cir. 1996), cert. denied, 117 S. Ct. 752 (1997).

Petitioner secondly claims the Court erred in setting his total offense level at 40 because the Court, in making its factual findings underlying its sentence, relied upon witnesses without sufficient indicia of reliability. Petitioner tries to support his claim by recounting their drug use and piecing together fragments of each witness's testimony, demonstrating various inconsistencies that he is certain shows these witnesses were unreliable. These disparities in testimony, even if viewed in a light most favorable to his position, do not convince the Court that the testimony was so unreliable as to undermine the foundation for the Court's findings; when each witness's testimony is viewed as a whole, the Court finds now, as it found at the sentencing, (see Sentencing Tr. at 37-40, 50) that the testimony was sufficiently credible and reliable. The Court therefore finds this claim to be as lacking in merit as Petitioner's others.

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UNITED STATES OF AMERICA                   :       CIVIL ACTION  
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WILLIAM L. BULLOCK                         :       NO. 98-CV-5072

**ORDER**

AND NOW, this 25th day of November, 1998, in consideration of Petitioner's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 646), and the government's response thereto, it is hereby **ORDERED**:

1. Petitioner's motion is **DENIED**; and
2. No probable cause exists for a certificate of appealability.

BY THE COURT:

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JAMES McGIRR KELLY