

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

UNITED STATES OF AMERICA : CIVIL ACTION
 : (Crim. A. No. 95-296-02)
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MONROE BULLOCK : NO. 98-CV-5023

MEMORANDUM AND ORDER

J. M. KELLY, J.

FEBRUARY , 1999

Presently before the Court is Monroe Bullock's ("Bullock") Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence. 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 hold an evidentiary hearing concerning several of his claims.

EVIDENTIARY HEARING

If a prisoner's § 2255 allegations raise an issue of material fact, the Court is required to hold an evidentiary hearing in order to make findings of fact and conclusions of law, unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. See Walker v. Johnson, 312 U.S. 275, 285 1941; United States v. Costanzo, 625 F.2d 465, 468 3d Cir. 1980. In exercising the discretion of whether to grant such a hearing, the court must accept the truth of the factual allegations, unless they are

clearly frivolous on the face of the existing record. Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1980). The court must decide whether the allegations are material using a two step inquiry. United States v. Essig, 10 F.3d 968, 976-77 (3d Cir. 1993). First, was a petitioner's failure to object a procedural waiver? Id. If there was not a procedural waiver, the court must determine if an error is alleged that is serious enough to permit collateral review under § 2255. Id. Since petitioner must meet both elements, if either element is not met, the Court may dismiss the petition.

RELITIGATION PROHIBITED

A prisoner may not use a § 2255 motion as a vehicle to relitigate an issue that has been raised on direct appeal. United States v. DeRewal, 10 F.3d 100, 105 n. 4 (3rd Cir. 1993). Many of the issues raised in Bullock's § 2255 Motion were raised and rejected in his direct appeal of his conviction. Consequently, they are inappropriately raised here.

PROCEDURAL DEFAULT

An issue that could have been raised on direct appeal, but was not, is subject to procedural default. United States v. Frady, 456 U.S. 152, 162-67 (1982). Such claims are waived unless the prisoner can show either actual innocence or cause excusing the procedural default, and actual prejudice resulting from the error. Id. at 168.

DISCUSSION

The focus of Bullock'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. Bullock did not raise this issue on direct appeal and has not shown either actual innocence or cause. In addition, 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. Therefore, Bullock has also failed to show actual prejudice.

Bullock'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. Bullock raised this issue on direct appeal, consequently it is improperly raised in his § 2255 motion. Because Bullock uses this issue to attack the jurisdiction of the Court, the Court shall explain why Bullock, in fact, does not have standing to raise this issue as framed in his § 2255 motion. Initially, Bullock moved for summary judgment on this issue because he claims the government has defaulted by not responding. The Court finds that the Government's response was sufficient. Bullock misconstrues the reason for the Government's Motion and 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). In fact, the government was required to file the application for leave to install the pole camera only because the assistance of a third party was required. Cf. United States v. New York Telephone Co., 434 U.S. 159 (1977)(court may order utility to assist in setting up pen register if government reimburses cost). There is nothing about the installation of a surveillance camera in a public area that deviates from standard investigatory procedures such that a defendant's privacy

interests are implicated, requiring judicial scrutiny.

This argument also 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 conduct a routine investigation of a target. To the contrary, it is beyond dispute that the government, even in the investigation stage, may request court approval for third party assistance in installing surveillance measures like the pole camera. 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 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),¹ were "not duly

¹Petitioner 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).

promulgated," but does not support this claim in any way. Indeed, this issue was also a subject of Bullock's appeal. 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 each co-defendant was cross-examined 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 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). 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) ("Singleton I"), which the Tenth

Circuit vacated pending rehearing en banc just nine days after it issued its opinion. The en banc Tenth Circuit has now rejected the panel decision. United States v. Singleton, No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999). In fact, no circuit has come even vaguely close to adopting its reasoning and the panel decision has been roundly criticized. See United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) ("the chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are . . . about the same as discovering that entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns"). Petitioner's claim, therefore, lacks any precedential support. 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). 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, 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-5023

ORDER

AND NOW, this day of February, 1999, 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, the
government's response thereto, the Petitioner's Motion for
Partial Summary Judgment, and the government's Response thereto,
it is ORDERED:

1. The Motion for Partial Summary Judgment (Doc. No. 666)
is DENIED.

2. The Motion To Vacate, Set Aside, Or Correct Sentence By
A Person In Federal Custody (Doc. No. 645) is DENIED; and

3. No probable cause exists for a certificate of
appealability.

BY THE COURT:

JAMES MCGIRR KELLY