

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
PHILIP J. BANKS	:	NO. 95-385-1

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

March 19, 1999

Defendant, Philip J. Banks ("Banks"), was convicted on November 8, 1995, following a jury trial, of conspiracy under 18 U.S.C. § 371 and for violation of the Clean Air Act, 42 U.S.C. § 7413 (c)(1) and § 7413 (c)(2). On May 8, 1996, he was sentenced to thirty months imprisonment, concurrent on all counts, followed by three years supervised release, a fine of \$30,000 and a special assessment of \$150.00. Banks' motions to correct sentence and to vacate sentence were both subsequently denied. On appeal, the following grounds were considered and rejected by the Court of Appeals:

1. Whether the Clean Air Act is in violation of the Commerce Clause of the Constitution;
2. Whether evidence of prior acts admitted pursuant to Federal Rule of Evidence 404(b) should have been excluded under Federal Rule of Evidence 403;
3. Whether the admission on rebuttal of statements implicating appellant made by a co-defendant violates the

Confrontation Clause of the Sixth Amendment;

4. Whether the Sentencing Guidelines were properly applied:

A. In increasing the severity for obstruction of justice (U.S.S.G. § 3C1.1);

B. In increasing the severity by four levels for an ongoing and repetitive discharge of a hazardous substance (U.S.S.G. § 2Q1.2(b)(1)(A)); and

C. In increasing the severity by four levels for transportation or disposal without a permit (U.S.S.G. § 2Q1.2(b)(4)) under circumstances where there was no federal or local requirement for a permit.

The judgment of the District Court entered May 10, 1996, was affirmed.

Banks had been indicted with a co-defendant, Michael Burrell ("Burrell"), who was also convicted of one count of conspiracy and two counts of violating the Clean Air Act. Burrell's original sentence was fifteen months imprisonment, two years supervised release and a fine of \$500.00, but his conviction on two counts was reversed on appeal by a three judge panel with one judge dissenting.¹ On the remaining count, the conviction was affirmed but the appellate panel held it was reversible error to

¹In the opinion of the Burrell appellate panel, the district court improperly charged on whether he was an owner or operator with regard to Counts Two and Three. The case was remanded for a new trial; the government subsequently dismissed these counts rather than retry them.

impose a sentencing enhancement under U.S.S.G. § 2Q1.2(b)(4) for not obtaining a local permit because this enhancement was appropriate only for failure to obtain a federal permit.

However, in Banks, a different three judge appellate panel , considering whether the Sentencing Guidelines were properly applied ". . . [i]n increasing the severity by four levels for transportation or disposal without a permit (U.S.S.G. §2Q1.2(b)(4)) under circumstances where there was no federal or local requirement for a permit," affirmed the judgment and sentence of the district court.

On November 30, 1998, defendant Banks filed a Motion to Set Aside, Vacate or Correct Sentence pursuant to 28 U.S.C. § 2255 on the following grounds:

1. Contradictory decisions by the Court of Appeals with regard to the sentencing of himself and Burrell for the same criminal offenses.

2. Improper four-level sentencing enhancement for repetitive discharge.

3. An EPA report showing no contamination (or less than the federal minimum standard for prosecution) was "mysteriously unavailable at trial."

The government filed a response and the defendant filed a "Traverse." Defendant then filed an amendment to his § 2255 motion asserting that results of tests taken by GA Environmental Services,

Inc. at the time of the asbestos removal show lack of repetitive discharge, so that a four-level enhancement was improper. Banks also seeks credit for thirty days custody in the Kintock halfway house prior to sentencing because he was in official detention subject to twenty-four hour supervision with the same restrictions as jailed prisoners with work release privileges.

1. Contradictory sentences.

It is correct that defendant Burrell and defendant Banks briefed and argued their appeals on a different schedule and the appeals were heard by different appellate panels of the Court of Appeals. The legal issue with regard to an enhancement under U.S.S.G. § 2Q1.2(b)(4) was the same: whether the enhancement applied for failure to obtain a local city or federal permit. In Burrell's case, two of the three appellate judges held the Sentencing Commission did not intend to include failure to obtain a local permit as grounds for enhancement. In the Banks case, the three appellate judges found nothing improper in a four-level enhancement for transportation or disposal without a local permit, even if there were no permit requirement under federal law. Banks raised the issue of an enhancement under U.S.S.G. § 2Q1.2(b)(4) on appeal and the Banks panel knew of the prior contrary Burrell decision in making its decision.

There is no constitutional right to an identical sentence for the same offense because different defendants may be differently

situated. See Moore v. Missouri, 159 U.S. 673, 678 (1895). Even if there were, a district court has no jurisdiction to correct either a negligent oversight or error of the Court of Appeals. This first contention provides no basis for granting Banks' § 2255 motion.

2. The four-level enhancement for repetitive discharge.

This contention was raised by Banks and rejected by the Court of Appeals on direct appeal. This court cannot and should not reconsider claims under 28 U.S.C. § 2255 that have been decided adversely to the defendant on direct appeal. See United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

3. Newly Discovered Evidence.

Banks submitted three sets of documents with his motion: (1) GA Environmental Reports ("GA Reports"); (2) an inspection report completed on July 7, 1994 by the City of Philadelphia's Air Management Services, Asbestos Control Unit ("inspection report") and (3) an EPA Criminal Investigation Division Emergency Response Report from July 9, 1994 ("Emergency Report").

Banks appears to argue that these reports are newly discovered evidence. He states, "the report was just supplied by Lynanne Westcott, Esq., counsel for Michael Burrell, co-defendant." However, the GA Report was a report prepared long before trial for Banks himself by GA Environmental Services, Inc. and sent by him to

others. In addition, Banks' trial counsel offered this report in evidence as exhibit PB-3 (N.T. 11/7/95 at 10), cross-examined a representative from GA Environmental Services, Michael Moschella, and elicited testimony from him that the air samples "indicated that there was no presence of airborne asbestos fibers in the areas sampled." (N.T. 11/3/95 at 153). This report was available to Banks at trial and is not newly-discovered evidence.

The investigation report, although not directly addressed by Banks in his § 2255 motion, was included with his initial motion. To the extent that Banks might be arguing that this investigation report is newly discovered evidence, this claim also fails. This report was government exhibit 6B; although the government did not move for its admission, it was available to Banks at trial and is not newly discovered evidence.

As for the Emergency Report, Banks argued in his initial motion that this report was "never given to the Jury during the trial, but were merely left as an exhibit after the defense rested" and asserted in his "Traverse" that the Emergency Report was "never shown to the Jury or defendant." Even though this report was not admitted in evidence, it is clear this report and the results of these tests were available to Banks at trial and do not constitute newly-discovered evidence. Admitting the report in evidence or showing it to the jury would not have changed the result at trial. Banks seeks to reassert his innocence and reargue his conviction,

notwithstanding its affirmance on appeal. This is not a sentencing issue.

4. Credit for Detention at Half-Way House.

Finally, Bank's contention that he is entitled to credit against his sentence for thirty days in a half-way house (as a condition of release on bail) is without merit. He claims he was subject to the same restrictions as prison inmates sent there on work release by the Federal Bureau of Prisons. The Supreme Court in Reno v. Koray, 515 U.S. 50, 115 S. Ct. 2021, 132 L.Ed. 2d 46 (1995), held that time spent by a prisoner at a community treatment center while released on bail under the Bail Reform Act was not "official detention." A defendant suffers "detention" only when committed to the custody of the Attorney General; a defendant admitted to bail, even on the restrictive conditions to which defendant was subjected, is "released" so that no credit is available.

The four contentions raised by Banks do not warrant relief; his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 will be denied.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of March, 1999, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, the Government's response thereto, and defendant's Traverse to Government's Response to Defendant's Motion Pursuant to Section 2255, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that defendant's Motion is **DENIED**.

S.J.