

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

UNITED STATES OF AMERICA	:	CRIM. ACTION
	:	NO. 97-274
v.	:	CIVIL ACTION
	:	NO. 98-4022 &
FRANK LEEPER	:	NO. 98-4312

**MEMORANDUM AND ORDER**

Yohn, J. April , 1999

Frank Leeper pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. § 1341, and to one count of credit card fraud, in violation of 15 U.S.C. § 1644(a). Leeper was sentenced to a term of imprisonment followed by supervised release, to pay restitution and to pay a special assessment of \$200. Leeper did not appeal his sentence. He has now filed a motion to vacate, set aside or correct sentence, under 28 U.S.C. § 2255. He has also applied for a writ of mandamus. In response, the Government filed a motion to dismiss.<sup>1</sup> For the reasons set forth below, the Government's motion to dismiss will be granted. The motion to vacate, set aside or correct sentence having been dismissed, there is no basis for the writ of mandamus, so it will be dismissed as moot.

**I. Factual Background**

Frank Leeper was the manager of a USA Video store in Philadelphia. His home

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<sup>1</sup> See Fed. R. Gov. § 2255 4 & 5 & advisory committee notes (referencing rules regarding § 2254 proceedings authorizing “other pleading[s]” in response to § 2255 motions including motions to dismiss).

was searched pursuant to a search warrant where evidence was discovered that indicated that Leeper had opened numerous credit cards using fraudulent information. Some of the credit cards were in Leeper's own name, while others were in other parties' names.

Leeper apparently used information from customers' applications for rental accounts at USA Video to obtain these credit cards. Additionally, he fabricated W-2s and other information to bolster the credit card applications. See Sentencing Hearing Transcript, Oct. 28, 1997, p. 13.

Leeper was charged by information on June 17, 1997 with one count of mail fraud and one count of credit card fraud. He pleaded guilty on July 16, 1997. On October 28, 1997, he was sentenced to imprisonment for 14 months, three years of supervised release, full restitution to the credit card companies in the amount of \$211,118.33, and a special assessment of \$200. Leeper did not appeal his sentence. He has now filed a motion to vacate, set aside or correct his sentence and an application for writ of mandamus. Leeper was released from incarceration on December 31, 1998, but remains subject to the sentence of supervised release and restitution.

## II. **Standard for 28 U.S.C. § 2255**

As the Third Circuit has stated, “[s]ection 2255 does not afford a remedy for all errors that may be made at trial or sentencing. . . . The alleged error must raise 'a fundamental defect which inherently results in a complete miscarriage of justice.’” United States v. Essig, 10 F.3d 968, 977 n.25 (3d Cir. 1993) (citing United States v. Addonizio,

442 U.S. 178 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). Thus, relief will not be granted under section 2255 unless the end result is demonstrated to have been fundamentally unfair.

An evidentiary hearing is not required on a motion under section 2255 if “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255. As discussed below, none of Leeper's claims presents a colorable basis for relief under section 2255, and therefore, no evidentiary hearing is necessary.

### III. **Discussion of Motion under 28 U.S.C. § 2255**

#### A. **Jurisdiction**

In his motion, Leeper listed five grounds for relief. He did not, however, make it clear what relief he was seeking. Leeper was released from incarceration on December 31, 1998. This court only has jurisdiction to hear a § 2255 motion if the movant is “in custody.” 28 U.S.C. § 2255. See Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). As the Third Circuit has stated, one is “in custody” where he is “subjected to restraints not shared by the public generally -- he [can]not come and go as he please[s], and his freedom of movement rest[s] in the hands of state judicial officers.” See United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420, 423 (3d Cir. 1975). A challenge to a sentence of supervised release will satisfy the “in custody” requirement of § 2255, as the movant's liberty is still subject to restraint by the state. See United States v. Essig, 10

F.3d 968, 970 n.3 (3d Cir. 1993). The court does not, however, appear to have jurisdiction to hear a challenge under § 2255 to the restitution order. See Smullen v. United States, 94 F.3d 20, 22 (1st Cir. 1996); United States v. Segler, 37 F.3d 1131, 1137 (5th Cir. 1994); United States v. Marron, 1996 WL 677511, at \*3-4 (E.D. Pa. 1996).

I will, therefore, assume that Leeper is attacking the supervised release component of his sentence as well as the restitution. Because even if the court were to find jurisdiction to hear the challenge to the restitution order, it would be without merit, I will also address the merits of Leeper's claim that the restitution order was an abuse of discretion.

**B. Claim that Conviction was Obtained by use of Evidence Gained Pursuant to an Unconstitutional Search and Seizure**

As Leeper was told during his guilty plea hearing, by pleading guilty he gave up certain rights, such as “the right to challenge how the Government obtained information against you and charged you.” See Guilty Plea Hearing Transcript, July 16, 1997, p. 11-14. Leeper was explicitly told that “[Y]ou can't come into this Court or any other Court and say that as to these offenses you are not guilty, or that your rights were violated.” Id. at 13. Leeper informed the court that he understood this. See id. Throughout the colloquy at the hearing, Leeper informed the court that he understood the effects of

pleading guilty. See generally id.<sup>2</sup>

As Leeper did not raise this claim (or any other) at the guilty plea or sentencing hearing or on direct appeal, the cause and prejudice standard applies. See United States v. Frady, 456 U.S. 152, 167-68 (1982). Under this standard, Leeper “must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains.” Id. at 168. Leeper has failed to allege any cause for his failure to raise his claims instead of pleading guilty. Leeper was advised by the court of the effect his guilty plea would have on his future ability to claim that the evidence against him was improperly obtained, and yet he still pleaded guilty. Because no cause has been alleged, it is unnecessary for the prejudice prong to be discussed. Although a showing of a fundamental miscarriage of justice will excuse the failure to raise the claim earlier, Leeper has made no allegation that would rise to the level of a fundamental miscarriage of justice.

**C. Claim of Ineffective Assistance of Counsel**

Leeper claims that his counsel was ineffective. He discusses every aspect of his case in this claim but the grounds for ineffectiveness that he is alleging appear to be: (1) counsel failed to return his phone calls in a timely manner; (2) counsel failed to inform him that the government would call witnesses at the sentencing hearing; (3) counsel did

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<sup>2</sup> In addition, Leeper's claim is stated in such vague and general terms that it is without merit on that basis as well.

not listen to his claims that the fraud total was overstated; and (4) with effective counsel, there is a reasonable probability that the outcome would have been different.

The Sixth Amendment of the United States Constitution guarantees criminal defendants assistance of counsel at their trials. U.S. Const. amend. VI. The purpose of this constitutional guarantee is to make sure that the trial is fair. Strickland v. Washington, 466 U.S. 668, 686 (1984); see United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989). Thus, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686.

To establish ineffective assistance of counsel, two components must be shown. Strickland, 466 U.S. at 687. First, movant must demonstrate that counsel made errors of sufficient magnitude that the Sixth Amendment guarantee of counsel is implicated, which would require that counsel's errors call the trial's fairness into question. Id. Second, counsel's deficiencies must have prejudiced movant, by “depriv[ing] [movant] of a fair trial.” Id. The Strickland two-part test also applies to judging whether counsel was effective in the guilty plea process. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); see United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997). In the context of a guilty plea, movant “must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill, 474 U.S. at 59.

The errors which Leeper has ascribed to counsel do not rise to the Strickland level. First, Leeper has not alleged that counsel's failure to return phone calls prejudiced him in any way. It appears from his description of their contacts that whenever counsel received information relating to Leeper's case, counsel contacted Leeper. Thus, her failure to return phone calls in a timely manner would not constitute constitutional ineffectiveness. Second, counsel's failure to inform Leeper that the government would call witnesses at the sentencing hearing does not rise to the level of Strickland ineffectiveness. Third, Leeper's claim that counsel refused to help reduce the fraud total does not appear to be consistent with the facts presented in Leeper's section 2255 motion or the record of the case. Leeper states that counsel met with him and the postal inspector to discuss the fraud total. Further, Leeper agreed to the fraud total at the guilty plea hearing. Although in his section 2255 motion Leeper claims that some of the credit cards included were in his name, he admitted at the guilty plea hearing that fraudulent information had been used to obtain them. See Guilty Plea Hearing Transcript, July 16, 1997, p. 23. Thus, they were legitimately included in the fraud total. Also, Leeper agreed to the amount of restitution in the Presentence Investigation Report, which he stated had no errors. See Sentencing Hearing Transcript, Oct. 28, 1997, p. 3. Although Leeper claims that effective counsel would have generated a different result, this claim is too vague to evaluate. Further, most importantly in the guilty plea context, Leeper does not claim that he would not have pleaded guilty were it not for counsel's errors so that the prejudice prong is not met.

**D. Claim that Court Erred in Application of U.S.S.G. § 2F1.1 of Sentence Guidelines**

The Third Circuit decided in Essig that the Frady cause and prejudice standard applies where a criminal defendant does not object to sentencing errors at the sentencing hearing or on direct appeal. See Essig, 10 F.3d at 979. Leeper did not object to any misapplication of the Sentence Guidelines at his sentencing and he did not directly appeal his sentence. There was no cause for this failure alleged in his section 2255 motion.

Leeper's basic claim is also completely without merit. He alleges that the court erred in the application of U.S.S.G. § 2F1.1 of the Sentence Guidelines when computing the movant's probable fraud loss. The court's application of the sentencing guideline at issue, however, was correct. The commentary to the guideline states that:

In fraudulent loan application cases . . . , the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

U.S. Sentencing Guidelines Manual § 2F1.1, Application Note 7(b) (Nov. 1995 & Supp. May 1997). Further, the Guidelines' commentary specifies that the loss calculation need only be a “reasonable estimate . . . given the available information.” Id. at Application Note 8. Thus, by analogy, Leeper applied for credit cards using fraudulent information,

which made the credit card companies think that he was someone else, thereby misinforming the credit card issuer of the true nature of the borrower. Further, during the guilty plea hearing, Leeper agreed that the information in the guilty plea agreement, regarding the amount of the credit card loss, was accurate. See Guilty Plea Hearing, July 16, 1997, p. 23; see also Sentencing Hearing Transcript, Oct. 28, 1997, p. 3. Therefore, the court was using the best information available to calculate the expected loss, as movant agreed to the information which was used.

**E. Claim that Movant's Restitution Order Should be Vacated because of Court's Abuse of Discretion**

As discussed in III. A., the court probably does not have jurisdiction over this claim. However, even if I do have jurisdiction, this claim is invalid on the merits because the court did not have any discretion regarding whether to order restitution. The relevant statute provides that restitution shall be mandatory in “an offense against property under this title, including any offense committed by fraud or deceit.” See 18 U.S.C. § 3663A (a)(1) & (c)(1)(A)(ii). This statutory provision applies “for sentencing proceedings in cases in which the defendant is convicted on or after the [April 24, 1996].” Pub. L. No. 104-132, § 211, reprinted in 18 U.S.C. § 2248 (statutory notes). Thus, because Leeper pleaded guilty to mail fraud, 18 U.S.C. § 1341, in July 1997, mandatory restitution applies. Leeper's mail fraud scheme continued from January 1988 through September 12, 1996. See Information, 6/17/97, ¶ 3. Therefore, the scheme continued after the effective

date of the statute, and there is no ex post facto issue resulting from the application of the statute. See United States v. Duncan, 42 F.3d 97, 104 (2d Cir. 1994) (stating that “continuing offenses such as conspiracy and bank fraud do not run afoul of the Ex Post Facto Clause if the criminal offenses continue after the relevant statute becomes effective.”); United States v. Rosa, 891 F.2d 1063, 1068 (3d Cir. 1989) (stating that where a conspiracy was ongoing the “judge was bound to apply the law in effect at the conclusion of the offense in question.”); United States v. Goldberger, 197 F.2d 330, 331 (3d Cir.) (per curiam) (same), cert. denied, 344 U.S. 833 (1952).

Leeper also claims that restitution should only be ordered for the \$5,908.17 mentioned in Count II, the credit card fraud count. See Information, 6/17/97, Count II. Leeper, however, pleaded guilty to both counts charged in the Information. See Guilty Plea Agreement, ¶ 1. Count I, the mail fraud count, specifically states that Leeper fraudulently obtained 88 credit cards and used them to obtain \$211,118.33 in various goods and services. See Information, 6/17/97, ¶¶ 8-9. Thus, the \$211,118.33 amount that the court ordered as restitution was specifically mentioned in the Information, to which Leeper pleaded guilty. What Leeper may not understand is that although full restitution must be ordered, the amount to be paid is determined by Leeper's ability to pay, which the court determined was \$400 per month. See 18 U.S.C. § 3664(f)(2)(A)-(B) & (3)(B); Sentencing Hearing Transcript, Oct. 28, 1997, p. 38. Leeper has not disputed his ability to pay this amount.

**F. Claim that Mail Fraud Conviction Should be Dismissed because the Movant's Conduct was not within the Scope of the Statute**

The movant claims that his conviction under the mail fraud statute should be dismissed because his conduct was not within the scope of the statute, because he was not charged with depriving others of the “intangible right to honest services.” As discussed above in III. B., Leeper failed to raise this claim at his guilty plea or sentencing hearing or on direct appeal. He was fully informed at his guilty plea hearing of the effect pleading guilty would have on his rights. Thus, since the cause and prejudice standard applies, and Leeper has shown no cause for his failure to challenge this count of his conviction, this claim has been waived by Leeper. The claim is, moreover, without any validity because the statute provides that:

[w]hoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341. By utilizing the U.S. mails to fraudulently apply for credit and receive fraudulent credit cards, Leeper's conduct fits squarely within the statute to which he pleaded guilty.

**IV. Application for Writ of Mandamus**

Leeper also filed an application for writ of mandamus, requesting the court to compel the postal inspector to accept responsibility for harm caused to Leeper. The facts alleged are the same as those discussed above from the section 2255 motion. Because the section 2255 is being dismissed, there is, a fortiori, no basis for relief in the form of a writ of mandamus.

V. **Conclusion**

Because Leeper's section 2255 motion and application for writ of mandamus state no basis for relief, the Government's motion to dismiss the section 2255 motion will be granted and the application for the writ of mandamus will be denied as moot. An appropriate order follows.