

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

JAMES MOTT : CIVIL ACTION
: No. 99-251
v. :
:
UNITED STATES OF AMERICA : (Criminal No. 95-648-1)

M E M O R A N D U M

WALDMAN, J.

June 17, 1999

Presently before the court is petitioner's petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

On July 29, 1996, petitioner pled guilty to charges of conspiring to distribute and possessing with intent to distribute more than five kilograms of cocaine. Petitioner had two prior convictions for felony drug offenses. Had the government not moved for a departure pursuant to 18 U.S.C. § 3553(e), petitioner would have faced a statutorily mandatory sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A).

With petitioner's assistance, 40 kilograms of cocaine were seized and seven individuals were convicted for drug offenses. The government moved for a departure from the statutory minimum sentence pursuant to § 3553(e) and for a downward departure under the Sentencing Guidelines pursuant to U.S.S.G. § 5K1.1. Petitioner's offense level was 34. Because of his prior felony drug convictions, petitioner was a career offender under U.S.S.G. § 4B1.1, resulting in a criminal history

category of VI. The Guidelines sentencing range was thus 262 to 367 months of imprisonment.

The court granted the motions for departure and sentenced petitioner to 84 months of imprisonment, to be followed by a term of supervised release.

Petitioner filed and, after retaining new counsel, later voluntarily dismissed an appeal from that sentence.

Petitioner now argues that his career offender classification significantly overstated his prior criminal conduct. Petitioner argues that his offense level should have been 31 and his criminal history category should have been III, and then reasons that if the court had granted the same 14-level departure, his sentencing range would have been 30-37 months.

Whether to depart from the Sentencing Guidelines range is a matter of discretion. See United States v. Abuhouran, 161 F.3d 206, 209 (3d Cir. 1998), cert. denied, 119 S. Ct. 1479 (1999); United States v. Harrison, 918 F.2d 30, 31 (5th Cir. 1990) (per curiam) (abuse of discretion standard applies to court's decision not to depart downward on ground career offender status overstated defendant's criminal history). Moreover, even an error in calculating a defendant's sentence under the Guidelines is not a ground for collateral relief under § 2255 unless it results in "a complete miscarriage of justice." Jones v. United States, --- F.3d ---, 1999 WL 335775, *5 (6th Cir. May

28, 1999); United States v. Cervantes, 132 F.3d 1106, 1109 (5th Cir. 1998); Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996); United States v. Schlesinger, 49 F.3d 483, 484 (9th Cir. 1995); Knight v. United States, 37 F.3d 769, 773-74 (1st Cir. 1994); Scott v. United States, 997 F.2d 340, 342-43 (7th Cir. 1993).

Petitioner attempts to overcome this obstacle to review by framing his claim as one for ineffective assistance of counsel. He argues that counsel's failure to file a formal sentencing memorandum objecting to his classification as a career offender under the Guidelines constituted ineffective assistance. A claim that sentencing errors arose from constitutionally ineffective assistance of counsel may be raised in a § 2255 petition. See Smullen v. United States, 94 F.3d 20, 23 & n.3 (1st Cir. 1996); Auman v. United States, 67 F.3d 157, 162 (8th Cir. 1995).

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. United States v. Moscony, 927 F.2d 742, 748 (3d Cir.), cert. denied, 501 U.S. 1221 (1991); United States v. Patrick, 985 F. Supp. 543, 552 (E.D. Pa. 1997), aff'd, 156 F.3d 1226 (3d Cir. 1998). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was "so deficient that it fell below an objective standard of

reasonableness under prevailing professional norms." Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999). This requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., 166 F.3d at 169 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; Buehl, 166 F.3d at 169.

The Guidelines do not and cannot alter a relevant criminal statute. See United States v. Higgins, 128 F.3d 138, 141 (3d Cir. 1997). Petitioner was sentenced pursuant to 21 U.S.C. § 841(b)(1)(A) which requires a sentence of life imprisonment for "any person" with two or more prior felony drug convictions. The statute does not provide an exception when a long period has elapsed since a conviction occurred or when the prior crimes involve "principally marijuana" rather than "harder" drugs. When granting a motion pursuant to 18 U.S.C. § 3553(e), a court may depart from an otherwise mandatory minimum sentence under § 841(b)(1)(A) for only one reason and that is the defendant's substantial assistance. See United States v. McMutuary, --- F.3d ---, 1999 WL 274542, *8 (7th Cir. May 5,

1999); United States v. Rabins, 63 F.3d 721, 727 (8th Cir. 1995),
cert. denied sub nom Johnson v. United States, 516 U.S. 1153
(1996); United States v. Campbell, 995 F.2d 173, 175 (10th Cir.
1993) (granting downward departure pursuant to § 3553(e) does not
open door for additional downward departures under Sentencing
Guidelines since "when a sentence is fixed by statute, any
exception to the statutory directive must also be given by
statute"); Pitre v. United States, 834 F. Supp. 128, 132
(S.D.N.Y. 1993) (§ 3553(e) permits departures only for
substantial assistance).

The only other statutory basis for a departure is the
so-called "safety-valve" provision which was inapplicable because
of petitioner's criminal history. See 18 U.S.C. 3553(f)(1).
Petitioner's reliance on United States v. Shoupe, 988 F.2d 440
(3d Cir. 1993) is misplaced. The defendant in Shoupe was
sentenced pursuant to 21 U.S.C. § 841(b)(1)(C) which does not
require a mandatory sentence unless "death or serious bodily
injury" resulted from the use of the controlled substance. See
21 U.S.C. § 841(b)(1)(C); United States v. Shoupe, 929 F.2d 116,
119 (3d Cir.), cert. denied, 502 U.S. 943 (1991).

Petitioner received a very substantial departure. He
was sentenced to seven years of imprisonment rather than life in
prison without possibility of release. The court would not have
departed further from the otherwise required statutory sentence

even if it had the discretion to do so.

As the argument petitioner claims his sentencing counsel should have raised is devoid of merit, petitioner suffered no prejudice from counsel's failure formally to raise it. Counsel obtained an exceptional sentence departure for petitioner. Petitioner has not remotely demonstrated that the performance of counsel was professionally deficient. Petitioner has not made a substantial showing of the deprivation of any constitutional right.

Accordingly, the petition will be denied. An appropriate order will be entered.

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

JAMES MOTT : CIVIL ACTION
 : No. 99-251
 v. :
 :
 UNITED STATES OF AMERICA : (Criminal No. 95-648-1)

O R D E R

AND NOW, this day of June, 1999, upon
consideration of petitioner's Petition to Vacate, Correct or Set
Aside Sentence Pursuant to 28 U.S.C. § 2255 (Doc. #59), and the
government's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Petition is **DENIED** and
the above-captioned action is **DISMISSED**.

A certificate of appealability is not issued.

BY THE COURT:

JAY C. WALDMAN, J.