

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

UNITED STATES : CRIMINAL ACTION
 :
 V. :
 :
 NADEEM KHALIL : NO. 95-577-01

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

June 30, 1999

Petitioner Nadeem Khalil has filed a petition for writ of habeas corpus under 28 U.S.C. § 2255. His petition alleges that he was denied effective assistance of counsel at his sentencing. Because the petitioner's counsel was not ineffective, his petition will be denied.

I. FACTS

On April 10, 1996, on the eve of trial, Nadeem Khalil ("Khalil") entered a plea of guilty to conspiracy, copyright infringement, trafficking in counterfeit labels, and money laundering. Khalil and his codefendants mass-produced counterfeit audio cassette recordings of releases by performers of popular music. They infringed the copyrights of the performers and used the proceeds from sales to expand their operations.

After Khalil entered his guilty plea, this court ordered a Pre-Sentence Investigation Report ("PSI") prepared by the United States Probation Officer before Khalil's sentencing hearing. The

PSI discussed the application of the relevant United States Sentencing Guidelines ("Sentencing Guidelines" or "U.S.S.G.")¹ to Khalil's sentence. At the sentencing hearing, the attorneys for the Government and for Khalil stated they had read the PSI and had no objection to it. Khalil also stated he had read and reviewed the PSI with his attorney and had no objection to it. The court then granted the Government's motion for a downward departure under U.S.S.G. § 5K1.1.

In the PSI, the Probation Officer consolidated all the money-laundering counts into one "group" under U.S.S.G. §§ 3D1.2-.4 and all the copyright-infringement and trafficking-in-counterfeit-labels counts into another "group." The Base Offense Level ("BOL") for the money-laundering group, violations of 18 U.S.C. § 1956(a)(1)(A)(i), was 23. U.S.S.G. § 2S1.1(a)(1). Five levels were added because the total amount laundered (\$1,004,845.72) exceeded \$1 million but not \$2 million. § 2S1.1(b)(2)(F). There was an additional four-level increase for Khalil's role as leader or organizer of the criminal activity. § 3B1.1(a). The Adjusted Offense Level ("AOL") for the money-laundering counts was 32.

The BOL for the copyright-infringement/trafficking-in-counterfeit-labels group was 6. § 2B5.3(a). There was an

¹ All references to the Sentencing Guidelines are to the guidelines effective November 1, 1995, the guidelines in effect at the time of Khalil's sentencing.

increase of 15 levels because the total loss (estimated at \$19,351,700) exceeded \$10 million but not \$20 million. U.S.S.G. § 2F1.1(b)(1)(P). Four more levels were added because of Khalil's role in the offense. U.S.S.G. § 3B1.1(a). The AOL for this group was 25.

Because the money-laundering group had the higher AOL, it is considered the AOL for the entire offense. One more level was added to reach the Combined Offense Level ("COL") of 33. U.S.S.G. § 3D1.4. This figure was reduced by two levels for Khalil's acceptance of responsibility. § 3E1.1(a). Khalil's Total Offense Level ("TOL") was 31.

Khalil's Criminal History Category was I. For a TOL of 31, this presumes a sentence range of 108 to 135 months. The court granted a downward departure of 5 offense levels, U.S.S.G. § 5K1.1, and sentenced Khalil to a term of 72 months in prison.

Khalil contends he was denied effective assistance of counsel at sentencing because: (a) counsel failed to request that sentencing be based solely on the copyright-infringement/trafficking-in-counterfeit-labels violations because the money-laundering violations do not fall within the "heartland" of money-laundering offenses; Khalil contends this would reduce his AOL to 25 and eliminate the one level added under U.S.S.G. § 3D1.4, resulting in a TOL of 23, not 31; (b) counsel failed to request a downward departure to counteract the

Government's manipulation of the indictment in charging money laundering as a separate offense; Khalil's contention is identical to (a) above; (c) counsel failed to object to the separate grouping of the copyright-infringement/trafficking-in-counterfeit-labels offenses and the money-laundering offenses and to request that all of them be grouped together; this would have reduced his sentence by the one level added under U.S.S.G. § 3D1.4; (d) counsel failed to request a further one-level reduction for timely acceptance of responsibility under U.S.S.G. § 3E1.1(b)(1); (e) counsel failed to challenge the PSI's calculation of laundered funds and argue the total did not exceed \$1 million; this would have lowered Khalil's offense by one level.

The Government argues errors in sentence calculation under the Sentencing Guidelines do not constitute a violation of due process sufficiently serious to warrant relief under 28 U.S.C. § 2255. Sentencing errors normally neither pose a jurisdictional or constitutional problem nor create "a fundamental defect which inherently results in a complete miscarriage of justice," but petitioner asserts specific instances of sentencing miscalculations due to ineffective assistance of counsel. Ineffective assistance of counsel is a constitutional claim weighty enough to require, when proven, § 2255 relief. Hill v. United States, 368 U.S. 424, 428 (1962). See U.S. Const. amend.

VI; Strickland v. Washington, 466 U.S. 668 (1984). When raised for habeas review, a constitutional error in trial proceedings will result in setting aside a judgment if it had a "substantial and injurious effect or influence" in determining the outcome of the proceedings. Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). If an error is not so serious, it will be considered harmless and will not upset the outcome of the prior proceedings.

The Government also contends Khalil's claims are procedurally defaulted. Khalil was unable to raise the question of ineffective assistance of counsel on direct appeal because the attorney he now alleges was ineffective at sentencing was also his appellate counsel. "This court has clearly established that a defendant must raise ineffective assistance of counsel in a collateral proceeding under 28 U.S.C. § 2255 in order that the district court may create a sufficient record for review." Government of the Virgin Islands v. Forte, 806 F.2d 73, 77 (3d Cir. 1986) (refusing to address a claim of ineffective assistance of counsel on direct appeal and holding collateral proceedings the only avenue for such claim). "Because these claims could not have been raised in that appeal, they are properly before the court in this 28 U.S.C. § 2255 action." See United States v. Mannino, Nos. CRIM.89-003-02, CRIM.89-003-04, 1998 WL 376030, at *6 (E.D. Pa. July 2, 1998) (allowing claims of ineffective counsel to proceed under a § 2255 motion).

Finally, the Government disputes each alleged instance of ineffective assistance of counsel.

II. DISCUSSION

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has held "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984). Counsel's performance is deficient if it falls "outside the wide range of professionally competent assistance." Id. at 690. Counsel's deficient performance must also have prejudiced the accused. Id. at 687. Counsel's deficiency results in prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also United States v. Headley, 923 F.2d 1079, 1083 (3d Cir. 1991) (iterating the Strickland standard and holding defendant's trial counsel ineffective for failing to request a downward departure in sentencing due to defendant's minimal participation in a drug distribution scheme). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 695. Khalil has been unable to demonstrate that his sentencing counsel

failed to exercise reasonable professional judgment.

A. A "Heartland" Money-Laundering Offense

Khalil has attempted to characterize his money-laundering offenses as mere "receipt and deposit" money laundering, outside the "heartland" of money-laundering offenses, (Pet'r's Mot. at 1). Receipt-and-deposit money laundering was recently considered in United States v. Woods, 159 F.3d 1132 (8th Cir. 1998); the defendant was charged with bankruptcy fraud and money laundering after she deposited proceeds from the sale of stock not reported to the Bankruptcy Trustee in her husband's bank account. Id. at 1133. The Woods court held that this receipt-and-deposit money laundering fell outside the "heartland" of money-laundering offenses because the defendant's "deposit of the check had the effect of concluding, rather than promoting, the bankruptcy fraud." Id. at 1136.

Khalil, in contrast, did not simply deposit proceeds from the counterfeit and trafficking scheme into a bank account. Rather, he reinvested the proceeds in the scheme to increase and expand operations. This is precisely the type of activity which Congress sought to prohibit; trafficking in counterfeit labels, 18 U.S.C.A. § 2318 (West Supp. 1999) and criminal infringement of a copyright, 18 U.S.C. § 2319 (West Supp. 1999), are both specifically enumerated as "specified unlawful activity" under 18

U.S.C.A. §§ 1956(c)(7)(A) and 1961(1)(B).² Khalil's contention that his violations are not within the "heartland" of money-laundering offenses is without merit; his sentencing counsel's decision not to object to the inclusion of the money-laundering offenses in the calculation of Khalil's offense level was not deficient under Strickland.

B. Lieberman Departure

Khalil argues that his sentencing counsel was ineffective for failing to argue for a downward departure under United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992). In Lieberman, the defendant was convicted of embezzlement and tax evasion of the amount embezzled, and the sentencing judge believed he was foreclosed from grouping the offenses under U.S.S.G. § 3D1.2. Id. at 996. The court characterized this situation as "highly unusual," and affirmed the sentencing judge's two-level downward departure to counteract his perceived inability to group the offenses. Id. at 998-99.

Khalil's case presents no such "highly unusual" judicial

² The money-laundering statute, 18 U.S.C.A. § 1956(a)(1) (West Supp. 1999), in relevant part reads as follows:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -- (A)(i) with the intent to promote the carrying on of specified unlawful activity

predicament. His indictment charged two different crimes, not "substantially the same harm."³ U.S.S.G. § 3D1.2. Khalil's sentencing counsel was not deficient for failing to seek a Lieberman departure.

Even if counsel's assistance were defective, it would not have been prejudicial. At the sentencing hearing the court commented that one of the reasons a five-level downward departure was given after the Government's U.S.S.G. § 5K1.1 motion was granted was that Khalil's offense was at a relatively high level under the Sentencing Guidelines. A downward departure under Lieberman, if granted, would have lowered Khalil's TOL by the one level which was previously added under U.S.S.G. § 3D1.4, but it also would have prompted the court to reduce the § 5K1.1 downward departure proportionately. There would have been no difference in Khalil's sentence.

C. Proper Grouping under the Sentencing Guidelines

Khalil, citing to Application Note 5 of U.S.S.G. § 3D1.2,⁴ argues that his copyright-infringement and trafficking-in-counterfeit-labels counts were aggravating factors which increased the BOL for money laundering from 20, under U.S.S.G.

³ See discussion infra Part II.C.

⁴ The Application Note provides: "[W]hen conduct that represents a separate count . . . is also a specific offense characteristic in or other adjustment to another count, the count represented by the conduct is to be grouped with the count to which it constitutes an aggravating factor." Id.

§ 2S1.1(a)(2), to 23, under U.S.S.G. § 2S1.1(a)(1), and should be placed in a single group with the money-laundering counts so that the one level added to reach a COL under U.S.S.G. § 3D1.4 would be unnecessary.

This argument misconstrues the Application Note. The Application Note expressly states the separate counts which are "specific offense characteristic[s] in or other adjustment[s] to another count" may be considered an "aggravating factor." U.S.S.G. § 3D1.2 applic. n.5. The use of the BOL of 23 instead of 20 is not due to "specific offense characteristics" (which are enumerated in subsection (b), not in subsection (a), of U.S.S.G. § 2S1.1) or some "other adjustment." The BOL of 23 is mandated because Khalil pled guilty to 18 U.S.C. § 1956(a)(1)(A)(i), the statutory prohibition against "promotion" or "reinvestment" money laundering. The court applied no enhancements to reach a BOL of 23. The aggravating-factor argument is unpersuasive.

Khalil's alternative argument that the money-laundering counts and the copyright-infringement/traffic-in-counterfeit-labels counts constitute "Closely Related Counts" under U.S.S.G. § 3D1.2 is also unpersuasive. U.S.S.G. § 3D1.2, "Groups of Closely Related Counts," states:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. . . .

Neither subsection (a) nor subsection (b) applies. Both of these subsections require that the grouped counts "involve the same victim." The harm produced by the copyright infringement and the trafficking in counterfeit labels falls upon those whose copyrights have been infringed; whereas, "[t]he harm from [money laundering] transaction[s] does not generally fall upon an individual, but falls upon society in general." United States v. Thompson, 40 F.3d 48, 51 (3d Cir. 1994). Subsection (c) is also inapplicable for the same reasons that Application Note 5 was inapplicable.

The Second Circuit recently analyzed the question of whether fraud and money-laundering counts should be grouped under U.S.S.G. § 3D1.2(d) in United States v. Napoli, No. 98-1124, 1999 WL 366540 (2d Cir. Apr. 28, 1999). In Napoli, the defendant appealed his sentence for conspiracy, wire-fraud, bank-fraud, and money-laundering violations; his primary challenge was that the fraud and money-laundering counts should have been grouped

together under U.S.S.G. § 3D1.2(d). The Napoli court, affirming the district court's decision, held § 3D1.2(d) does not contemplate grouping fraud and money-laundering counts. Napoli, 1999 WL 366540, at *9.

Cases discussing the grouping of fraud and money-laundering counts provide helpful guidance for the grouping question at issue in Khalil's case because the Sentencing Guideline which deals with criminal infringement of a copyright or trademark, U.S.S.G. § 2B5.3, contains a cross-reference to the Specific Offense Characteristic table of § 2F1.1, dealing with fraud and deceit, to determine the number of levels to add for the resulting loss from copyright-infringement violations.

The Napoli court began by stating that the most promising argument for grouping under subsection (d) was based on the use of monetary values to measure the level of harm for both fraud and money-laundering offenses. Napoli, 1999 WL 366540, at *6. Subsection (d) requires grouping "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss." The Napoli court stated that fraud is an offense whose sentence is largely based on the amount of loss because its BOL is 6, but the offense level may increase by 18 levels depending on the total amount of loss. Napoli, 1999 WL 366540, at *7. The court contrasted money laundering because the BOL for money laundering is either 20 or 23, and the increase due to the total

laundered is at most 13. Napoli, 1999 WL 366540, at *7. The court concluded the two offenses measure different harms and cannot be grouped based upon a total level of harm. Napoli, 1999 WL 366540, at *7.

Other courts have reached the same conclusion. See United States v. Hildebrand, 152 F.3d 756, 763 (8th Cir. 1998) (affirming the district court's decision not to group fraud and money-laundering counts under U.S.S.G. 3D1.2(d) for defendants who reinvested money obtained from a fraudulent scheme because the Sentencing Guidelines for fraud and money laundering measure different types of harm); United States v. Kneeland, 148 F.3d 6, 16 (1st Cir. 1998) (affirming the district court's decision not to group fraud and money-laundering counts for defendants who breached agreements to loan people money after obtaining advance fees to provide the loans).

The Napoli court also dismissed the argument that fraud and money laundering must be grouped under the second component of subsection (d), requiring (1) the criminal conduct to have been "ongoing or continuous in nature" and (2) "the offense guideline [to have been] written to cover such behavior." The court, primarily focusing on the second element, distinguished Napoli from United States v. Mizrachi, 48 F.3d 651, 655 (1995) (grouping of arson and money laundering under U.S.S.G. § 3D1.2(d)'s "ongoing or continuous" component affirmed). In Mizrachi, the

defendant, convicted of arson, was sentenced under U.S.S.G. § 2K1.4(a)(3). This guideline provides a BOL of "2 plus the offense level from § 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud." U.S.S.G. § 2K1.4(a)(3). This explicit reference to a second offense guideline in calculating the first base offense level fulfilled the second element under subsection (d). The Napoli court found such an explicit reference lacking in the guidelines for fraud and money laundering, U.S.S.G. §§ 2F1.1 and 2S1.1, so it declined to group the two offenses together under the "ongoing or continuous" component of subsection (d). Napoli, 1999 WL 366540, at *6 n.5.

In Khalil's case, there is no explicit statement in the money laundering guideline that it was "written to cover" copyright infringement or trafficking in counterfeit labels. Khalil's argument that his two offenses should have been consolidated into one group would have failed; his sentencing counsel was not deficient in failing to request such a consolidation because it would not have been granted.

Even if the two series of counts should have been grouped, counsel's failure to raise the issue would not have been prejudicial because the court would have reduced the downward departure under the Government's § 5K1.1 motion; Khalil's offense level and sentence would not have been less.

D. Additional Downward Departure for
Acceptance of Responsibility

Khalil received a downward departure of two offense levels under U.S.S.G. § 3E1.1(a); he argues he should have received an additional one-level reduction under U.S.S.G. § 3E1.1(b)(1).⁵ U.S.S.G. § 3E1.1(b)(1) requires that acceptance of responsibility be "timely." Khalil decided to plead guilty the day a jury was to be selected; the Government was saved neither time nor expense in preparing its case. There was no "timely" acceptance of responsibility; the further one-level deduction was not warranted.

U.S.S.G. § 3E1.1(b)(1) states the departure will be granted when the defendant helps the Government both in the "investigation or prosecution of his own misconduct" and by "providing complete information . . . concerning his own involvement in the offense." Khalil assisted the Government in investigating and prosecuting others in similar cases, but he did not assist in his own case.

⁵ U.S.S.G. § 3E1.1(b)(1) provides:

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offenses

Khalil's counsel at sentencing was not ineffective for failing to request a further reduction under U.S.S.G. § 3E1.1(b)(1). If counsel had made such a request, it would have been denied so his failure to do so was not prejudicial. Had the offense-level reduction been granted, the court would have decreased the downward departure granted under U.S.S.G. § 5K1.1 so that the final offense level and the sentence would have remained the same.

E. Amount Laundered under 18 U.S.C. § 1956(a)(1)(A)(i)

Khalil contends that his counsel should have objected at sentencing to the inclusion of a dishonored \$8,712.00 check in the calculation of the total amount of laundered money. Khalil claims that but for its inclusion, the total amount would have been only \$996,133.72. His specific offense characteristic based on the amount laundered would have added only 4 levels under U.S.S.G. § 2S1.1(b)(2)(E) (\$600,000 but not \$1 million) not 5 levels under U.S.S.G. § 2S1.1(b)(2)(F) (\$1 million but not \$2 million).

The money-laundering statute, 18 U.S.C.A. § 1956(a)(1) (West Supp. 1999), criminalizes the attempt to launder money in unlawful financial transactions.⁶ Khalil attempted to launder \$8,712.00 when he wrote the "bad" check; he should not have been rewarded because the check was dishonored. Khalil's counsel was

⁶ See Note 2 supra.

not deficient in failing to object to the inclusion of the dishonored \$8,712.00 check; the objection would not have been sustained.

Even if counsel should have objected, his failure to do so was not prejudicial because the court would have decreased the downward departure granted to Khalil under U.S.S.G. § 5K1.1.

CONCLUSION

Khalil has failed to demonstrate that counsel was ineffective at sentencing; his motion for relief under 18 U.S.C. § 2255 will be denied. The Government's motion under U.S.S.G. § 5K1.1 in this case gave the court discretion to impose a fair and just sentence below the guidelines that would have otherwise obtained. It is true that the sentence calculated under the Sentencing Guidelines remains relevant as a starting point for an appropriate downward departure and should always be calculated before the downward or upward departure is granted. It is also true that even with a § 5K1.1 motion discretion is not absolute and the departure should have some rational relationship to the guidelines. However, in this case, the court gave full and fair consideration not only to the circumstances of the offense but also to the method by which the guidelines were calculated, the groupings, enhancements, and reductions in deciding on the scope of the departure. The sentence was just under the totality of the circumstances, and the matters of which petitioner complains

did not prejudice him under all the circumstances.

An appropriate order follows.

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

UNITED STATES	:	CRIMINAL ACTION
	:	
V.	:	
	:	
NADEEM KHALIL	:	NO. 95-577-01

ORDER

AND NOW this 30th day of June, 1999, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence under 18 U.S.C. § 2255 and the Government's response thereto, it is **ORDERED** that:

1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence is **DENIED** without hearing.

2. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, S.J.