

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 DALE DONOVAN FOSTER : NO. 98-127

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 11, 1999

Petitioner Dale Donovan Foster ("Foster") has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255 to vacate his sentence because of the alleged ineffective assistance of his sentencing counsel. Because Foster's counsel was not ineffective, the petition for writ of habeas corpus will be denied.<sup>1</sup>

**BACKGROUND**

Foster plead guilty to aiding and abetting the distribution of marijuana in violation of 21 U.S.C. § 41(a)(1) and 18 U.S.C. § 2. The offense was committed while he was incarcerated for an unrelated New Jersey drug charge. At sentencing, the offense level would have been 14 but, because Foster was a "career offender," the offense level was 24 and his criminal history level was VI. With a three level credit for acceptance of responsibility, Foster's sentencing range was 77-86 months. Defendant was sentenced on September 14, 1998 to 84 months in custody to run consecutive to the New Jersey sentence he was

---

<sup>1</sup>By letter dated May 27, 1999, Foster also requested the court appoint counsel to represent him on this § 2255 petition. Because the instant petition is clearly without merit, appointment of counsel is not necessary.

serving at the time. No appeal was taken from the sentence imposed.

Foster now contends his counsel was ineffective in conceding that the United States Sentencing Guidelines mandated a consecutive sentence instead of arguing the court retained discretion to impose a concurrent sentence. Foster is correct that this judge was of the opinion that a concurrent sentence would have been preferable. In imposing a consecutive sentence, this court stated it was constrained to do so by the United States Sentencing Guidelines and that if the court had the discretion it would make the sentence concurrent. At the conclusion of the sentencing hearing, this court stated, when addressing Mr. Foster:

I will tell you, Mr. Foster, that if it weren't for the Federal Sentencing Guidelines, I would arrange at least for your sentence to be concurrent and not consecutive. I have no choice about that. Congress has decided to remove a great deal of the discretion of the Judges.

(N.T. 9/1/498 at 58).

The specific Sentencing Guideline this court was referring to is U.S.S.G. § 5G1.3(a). That guideline provides that "if the instant offense was committed while the defendant was serving a term of imprisonment . . . the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." U.S.S.G. § 5G1.3(a).

## **DISCUSSION**

### **I. Standard for an Ineffective Assistance of Counsel Claim**

In order for Foster to prevail on his claim that sentencing

counsel was ineffective, he must comply with the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984).

Under Strickland, Foster must prove both of the following prongs:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

As to the first prong of Strickland, a reviewing court must judge counsel's performance measured by "reasonableness under prevailing legal norms." Id. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

As the Strickland Court stated:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689.

In reviewing the second prong of Strickland, which examines whether counsel's actions were so ineffective as to prejudice the

outcome of the case, the Court stated the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also McNeil v. Cuyler, 782 F.2d 443, 447-49 (3d Cir.), cert. denied, 479 U.S. 1010 (1986) ("Strickland encourages courts to resolve cases wherever possible on grounds of prejudice . . .").

## II. Foster's Petition

In this case, Foster can not show any deficient performance of his counsel at sentencing. The Third Circuit's decision in United States v. Higgins, 128 F.3d 138 (3d Cir. 1997) had clearly established that any argument that defendant could have raised regarding imposition of a consecutive rather than a concurrent sentence would have been meritless.

In Higgins, the defendant was sentenced for an offense while serving a previous term of imprisonment. The district court ordered a portion of the sentence to run concurrently with the previously imposed sentence. The government appealed the court's criminal sentencing order on the issue of whether the court properly construed its discretion to order concurrent sentencing in view of United States Sentencing Guideline 5G1.3. In finding the district had employed an erroneous legal standard in ordering a concurrent sentence, the Court of Appeals stated:

Thus, in two instances 5G1.3 removes a sentencing court's discretion to impose a concurrent or consecutive sentence: (1) when the subsequent offense

was committed while serving (or awaiting to serve) a term of imprisonment, in which case consecutive sentencing is mandatory; and (2) when the prior offenses have already been taken into account in determining the offense level, in which case concurrent sentencing is mandatory. In any other circumstances, the choice of a concurrent or a consecutive sentence is at the discretion of the district court.

Higgins, 128 F.3d at 140.

Although the language of U.S.S.G. 5G1.3(a) uses the mandatory term "shall," other appellate courts have held that courts still possess the discretion under 18 U.S.C. § 3584(a) to impose concurrent sentences in cases such as this. See United States v. Schaefer, 107 F.3d 1280, 1285 n.7 (7th Cir.)(collecting cases from eight circuits recognizing district courts' discretion to order concurrent sentences pursuant to 18 U.S.C. § 3584(a) notwithstanding the apparently mandatory language in U.S.S.G. 5G1.3(a)), cert. denied, --U.S.--, 118 S. Ct. 701 (1998). These courts have recognized that this discretion to impose a concurrent sentence may be exercised by way of a downward departure.

Higgins is in the clear minority of circuits deciding that § 5G1.3(a) does not permit a consecutive sentence. The issue here is whether Foster's counsel was ineffective for failing to object to the imposition of a consecutive sentence under Higgins to enable Foster to preserve the issue for appeal followed by a petition for certiorari because of the split in the circuit opinions. An attorney has not rendered ineffective assistance for failing to anticipate a possible change in the law. See

Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996). "Only in a rare case would it be ineffective assistance by a trial attorney not to make an objection that would be overruled under prevailing law." Id. at 671. An example of such a "rare case" can be found in Government of the Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989), in which trial counsel's refusal to honor her client's request to preserve a Batson challenge when Batson was pending in the Supreme Court was held ineffective. But the Forte court urged that its decision was based on counsel's refusal to honor her client's "reasonable request," not for failure to preserve the challenge with Batson pending. See Forte, 865 F.2d at 63.

A more typical case is exemplified by Honeycutt v. Mahoney, 698 F.2d 213 (4th Cir. 1983), in which trial counsel failed to object to a jury charge that was valid law in North Carolina at the time, although the First Circuit had struck it down as unconstitutional and the Supreme Court had intimated that it might find it unconstitutional. Eight months later, the offending charge was struck down by the Supreme Court. The Honeycutt court, over dissent, held that trial counsel was not ineffective. Honeycutt, 698 F.2d at 217.

Not only is Foster's case more like Honeycutt than Foster, but there are also strong policy arguments for rejecting his argument. The Supreme Court's admonition to review counsel's conduct in a "highly deferential" manner, see Strickland, 466 U.S. at 689, is inconsistent with an imposition of the stringent

requirement that trial counsel keep abreast of all splits in authority in order to preserve issues in the remote chance that the Supreme Court might grant certiorari and reverse then-controlling law. This court's opinion that the law in this circuit mandated a consecutive sentence was correct and required under Higgins. Defense counsel was not ineffective for failing to argue that the law was to the contrary in other circuits.

#### **CONCLUSION**

The petition under § 2255 will be denied without an evidentiary hearing. No attorney will be appointed but, in view of petitioner's letter of May 27, 1999 stating that his legal papers were lost when the United States Marshal's Service transferred him to FCI-Lompoc, the court will return copies of whatever papers he requests of the court's deputy clerk, Madeline Ward.

An appropriate order follows.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 DALE DONOVAN FOSTER : NO. 98-127

ORDER

AND NOW this 11th day of August, 1999, upon consideration of Petitioner Dale Donovan Foster's ("Foster") petition for writ of habeas corpus under 28 U.S.C. § 2255, the government's response in opposition, Foster's letter request for appointment of counsel, and in accordance with the attached Memorandum, it is **ORDERED** that:

1. Foster's petition for writ of habeas corpus is **DENIED** without an evidentiary hearing.
2. Foster's request for appointment of counsel is **DENIED**.
3. Papers will be returned to Foster on request.
4. There is no probable cause to issue a certificate of appealability.

---

Norma L. Shapiro, S.J.