

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

LONNIE DAWSON : CRIM. NO. 82-128-01
 :
v. :
 :
UNITED STATES OF AMERICA : CIVIL NO. 97-7420

MEMORANDUM AND ORDER

BECHTLE, J.

NOVEMBER , 1999

Presently before the court in this 28 U.S.C. § 2255 action are petitioner Lonnie Dawson's ("Dawson") motion filed pursuant to 28 U.S.C. § 2255, the government's response thereto, the United States Magistrate Judge's Report and Recommendation, the Objections thereto and the record. For the reasons set forth below, the court will approve and adopt the Magistrate Judge's Report and Recommendation, will grant the motion in part and deny the motion in part, will vacate Dawson's conviction and sentence for the conspiracy charged in Count One of the Indictment and will not issue a certificate of appealability.

I. BACKGROUND

On June 23, 1982, Dawson and three co-defendants were charged in a 22 count superseding indictment. Dawson was charged in all counts except counts Twelve, Fifteen, Seventeen, Eighteen and Twenty-One. Count One charged that Dawson, Robert Hoskins ("Hoskins"), Robert Hardwick ("Hardwick") and Kenneth Shank ("Shank") conspired to distribute heroin, cocaine and methamphetamine in violation of 21 U.S.C. § 846. Count Two

charged that Dawson and Hoskins engaged in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. Counts Three through Eight charged Dawson with several instances of possessing or distributing heroin, cocaine or methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 844(a) and 18 U.S.C. § 2(a). Counts Nine, Ten, Eleven, Thirteen, Fourteen and Sixteen charged Dawson with using a telephone to facilitate a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 843(b). Count Nineteen charged that Dawson and Hardwick used force or intimidation to prevent Lawrence Simons ("Simons") from communicating information concerning criminal offenses to DEA and FBI agents. Count Twenty charged that Dawson participated in a conspiracy to injure Simons in exercising his civil rights in violation of 18 U.S.C. § 241. Count Twenty-Two charged that Dawson and Hardwick used a firearm to commit the offenses charged in counts 19 and 20 in violation of 18 U.S.C. § 924(c)(1).

A jury trial commenced and on October 29, 1982, Dawson was convicted on all counts with which he was charged except counts Three, Seven and Twenty-Two. On December 13, 1982, the court sentenced Dawson to 134 years incarceration. The conviction was affirmed by the Third Circuit. On February 8 and June 1, 1984, Dawson filed motions to correct and/or reduce his sentence pursuant to Federal Rule of Criminal Procedure 35. On January 23, 1985, the court granted the motions and reduced Dawson's sentence to 65 years. Dawson is currently serving this sentence.

On December 8, 1997, Dawson filed his fourth petition under 28 U.S.C. § 2255, alleging four claims. First, Dawson asserts that Rutledge v. United States, 517 U.S. 292 (1996), rendered his conviction for conspiracy under 21 U.S.C. § 846 and for a CCE under 21 U.S.C. § 848 invalid. Second, Dawson asserts that his trial counsel was ineffective due to a conflict arising from his prior representation of Simons, a government witness in Dawson's case. Third, Dawson asserts that the court's instructions to the jury for a CCE were defective in that the court did not instruct the jury that its verdict had to be unanimous as to the identity of the three predicate acts that formed the basis of the CCE conviction. Fourth, Dawson asserts that the government withheld information in violation of Brady v. Maryland, 373 U.S. 83 (1963).

On April 30, 1999, United States Magistrate Judge Diane M. Welsh ("Magistrate") issued a Report and Recommendation. With respect to Dawson's first claim, the Magistrate recommended that Dawson's conspiracy conviction and sentence be vacated. With respect to Dawson's remaining claims, the Magistrate recommended that his 28 U.S.C. § 2255 motion be denied. The Magistrate also recommended that a certificate of appealability should not be granted.

On March 19, 1999, attorney Anthony D. Jackson, Esq. entered his appearance on behalf of Dawson. On May 10, 1999, Dawson's attorney filed Objections to the Report and Recommendation. These Objections did not challenge the Magistrate's finding with

respect to Dawson's first claim, but did challenge the Magistrate's findings with respect to Dawson's other claims. On May 17, 1999, Dawson filed Pro Se Objections to the Report and Recommendation, which challenged all the Magistrate's findings. Thus, the court will review all four of Dawson's claims in his § 2255 motion.

II. STANDARD OF REVIEW

Under the relevant statute,

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255. If the court finds that such claim has merit, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

III. DISCUSSION

The court will approve and adopt the Magistrate's Report and Recommendation. The court will review each of Dawson's four claims in his § 2255 motion separately.

A. Claim Based on Rutledge v. United States

Dawson asserts that his CCE conviction and sentence should be vacated. In Rutledge v. United States, 517 U.S. 292, 307 (1996), the Supreme Court held that a conviction for a CCE under 21 U.S.C. § 848 necessarily includes a finding that the defendant also participated in a conspiracy under 21 U.S.C. § 846. Id. at 307. Thus, the Court held that "'one of [those] convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense,'" and must be vacated. Id. (citations omitted). The Court did not specify whether the greater or lesser offense should be vacated.

Since Rutledge, several circuit courts have held that the conspiracy count should be vacated. United States v. Wilson, 135 F.3d 291, 303-04 (4th Cir. 1998); United States v. Dixon, 132 F.3d 192, 196 (5th Cir. 1997); United States v. Boyd, 131 F.3d 951, 954-55 (11th Cir. 1997) (stating that "[t]he proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense"); United States v. Avery, 128 F.3d 966, 971-72 (6th Cir. 1997); United States v. Hoyle, 122 F.3d 48, 49 n.1 (D.C. Cir. 1997); United States v. Jones, 101 F.3d 1263, 1268 (8th Cir. 1997).

In his pro se Objections, Dawson argues that his CCE

sentence should be vacated because his conspiracy sentence was imposed first. Dawson cites no legal authority, and the court finds none, to support this proposition. In light of the precedent applying Rutledge, the court finds that Dawson's conspiracy conviction and sentence should be vacated. Because the fifteen-year sentence for the conspiracy count was to run concurrently with the fifty-year sentence for the CCE count, the court need not resentence Dawson. Therefore, the sentence remains in force.

B. Claim Based on Trial Attorney's Conflict of Interest

Dawson asserts that his trial counsel, Daniel Preminger, Esq. ("Preminger"), operated under a conflict of interest that rendered his representation ineffective. The court disagrees. To maintain such a claim, Dawson must show that Preminger: (1) operated under an actual conflict of interest; (2) which adversely affected his performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). A showing of prejudice is not required. Id. at 349-50.

Dawson argues that the strongest evidence that Preminger operated under an actual conflict of interest is "the government's own motion that such a conflict existed." (Objs. to Rep. & Recomm. at 2-3.) The government filed two motions to disqualify Preminger due to a conflict of interest: the first motion was based on Preminger's earlier representation of Simons and the second motion was based on the ground that Preminger might be called as a witness in Dawson's trial. On June 15,

1982, the court denied both government motions to disqualify Preminger. (Tr. 6/15/82 at 10, 13 & 14.)

The government's first motion to disqualify Preminger was based on Preminger's previous brief representation of Simons. Simons had been convicted of felony murder and had his conviction reversed on grounds of prosecutorial misconduct. (Tr. 6/15/82 at 3.) Simons then appealed from an order granting him a new trial. Id. Simons asserted that double jeopardy barred his retrial. Id. During the pending appeal, Simons retained Preminger, who entered an appearance on Simons' behalf and asked for a continuance of the case. Id. The government argued that if the court permitted inquiry into Simons' homicide case, then Preminger's previous representation of Simons would limit his cross-examination. (Tr. 6/15/82 at 3-4.) Preminger stated that his representation of Simons was brief and that there was nothing he knew about Simons' homicide case "that [he] could not find out by simply walking into City Hall and asking the Clerk of the Court . . . to allow me to look at the file." (Tr. 6/15/82 at 7.) Preminger further stated that he withdrew from his representation of Simons because he "never kept appointments, never discussed the case with Mr. Preminger, remitted less than ten per cent (10%) of the fee . . . and never discussed a single fact of his personal or legal affairs with Mr. Preminger." (Def.'s Ans. to Gov't's Mot. to Disqualify Counsel on the Ground of a Conflict of Issue ¶ 13.) The court found that Preminger would not be inhibited in his cross examination of Simons because

there were no confidential communications between Simons and Preminger to which Simons could assert his attorney-client privilege. (Tr. 6/15/99 at 8.) The court found no conflict of interest, and thus, denied the government's motion to disqualify Preminger. Dawson has presented no additional evidence that Preminger's previous representation of Simons inhibited his cross examination of Simons. Thus, Dawson's argument that Preminger labored under a conflict of interest which rendered his assistance ineffective cannot succeed on this ground.

The government's second motion to disqualify Preminger was based on the likelihood that Preminger would be a witness in Dawson's case. The government asserted that Dawson headed a narcotics trafficking organization known as the Black Brothers. (Mem. Gov't's Mot. to Disqualify Counsel at 1-2.) In October, 1981, Simons was incarcerated at Holmesburg Prison, working as a government informant and present at a meeting of various persons associated with Dawson. Id. at 2. The persons at the meeting concluded that Robbie Brown ("Brown"), a member of Dawson's organization, was an informant and developed a plan to murder him. Id. Simons was asked to contact Dawson for the purpose of asking Dawson to contact Preminger to ask his view of whether Brown was an informant. Id. Simons was told that Preminger was in possession of a file that would reveal whether Brown was an informant. Id. This conversation was taped by the government. Id. The government sought to introduce this evidence under Federal Rule of Evidence 404(b) to show that "Dawson had a

criminal organization and a motive to protect it by ferreting out informants and disposing of them." Id. at 4. The government's theory was that the plan to murder Brown was similar to the attempt made on Simons' life, which was a charge against Dawson in this case. Id. The government planned to call Preminger as a witness to have him testify about the taped phone call. Id. The court, however, stated that it would not allow such evidence because its prejudice would outweigh its probative value and that it was too remote "to allow the jury to reasonably infer that previous conduct similar to what is charged in the present case is evidence that what happened in the present case is so." (Tr. 6/15/99 at 12.) The court also stated that, "[c]onsequently, there is no way that Mr. Preminger can become a witness on that point, because even if he did show Dawson the file for some reason, I would not allow that as a basis to suggest that there is evidence to suggest Dawson would do it again." Id. at 13. Thus, the court denied the government's second motion to disqualify Preminger. Id. In fact, Preminger never did testify as a witness in Dawson's criminal case. Thus, Dawson's argument that Preminger labored under a conflict of interest which rendered his assistance ineffective cannot succeed on this ground.

Dawson also argues that Preminger acted under an actual conflict of interest because he was the subject of an investigation involving the same criminal acts for which he was representing Dawson. (Pro Se Objs. to Rep. & Recomm. at 2.) The

Magistrate Judge found that although Simons did in fact allege that Preminger was part of Dawson's criminal organization, "there is no indication in the record that the government ever believed Mr. Simons' allegation or that the government sought to investigate whether defense counsel participated in [Dawson's] criminal activity." (Rep. & Recomm. at 7.) Upon careful review of the record, the court agrees with the Magistrate Judge's finding. Thus, Dawson's argument that Preminger labored under a conflict of interest which rendered his assistance ineffective cannot succeed on this ground.

Last, Dawson argues that Preminger operated under an actual conflict of interest because Simons, the government's witness, accused Preminger of being a part of Dawson's criminal organization involved in this case, the Black Brothers. Dawson asserts that Preminger was preoccupied with defending himself against the allegations made by Simons, rather than with his concerns for the interests of his client.¹ (Mem. Mot. Under 28 U.S.C. § 2255 at 4.)

In Government of the Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984), the Third Circuit stated that "when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges he has an actual conflict of interest." Id. at 136. Zepp involved the defendant's challenge to her convictions

¹ The Magistrate Judge did not address Dawson's argument on this issue. However, the court addresses it now.

for destruction of evidence and drug possession. Id. at 127. The defendant alleged that her trial counsel was ineffective because he labored under a conflict of interest. On the destruction of evidence count, the facts showed that the defendant and her attorney were alone in a house when cocaine was allegedly flushed down the toilet. Id. at 136. The defendant asserted that her trial counsel "had an actual conflict of interest due to his potential criminal liability for the same charges on which [the defendant] was tried." Id. The Third Circuit held that the defendant's counsel had an actual conflict of interest which required his withdrawal or disqualification. In so holding, the Third Circuit rejected the argument that no actual conflict existed because the defendant's counsel was never subjected to criminal charges. Id. Instead, the Third Circuit found that an actual conflict existed because the defendant's counsel "could have been indicted for the same charges on which he represented [the defendant.]" Id. The Third Circuit concluded that "it is unrealistic . . . to assume that [the defendant's] attorney vigorously pursued his client's best interest entirely free from the influence of his concern to avoid his own incrimination." Id.

In contrast to Zepp, the record in this case does not reflect that Preminger was subject to criminal liability for the same charges on which he represented Dawson. As discussed above, no evidence in the record suggests that the government was even investigating Preminger for his potential involvement in Dawson's

criminal organization. In fact, the only evidence remotely related to this assertion is Simons' uncorroborated and general allegation that Preminger was a member of Dawson's criminal organization. This allegation points to nothing that would suggest Preminger had any personal information, independent of his representation, regarding facts underlying the charges against Dawson. Nor does this allegation point to anything that would suggest Preminger faced any potential liability for the charges leveled against Dawson. Upon careful review of the record, the court finds that Simons' bald-faced allegation that Preminger was involved in Dawson's criminal organization is insufficient for the court to find that he represented Dawson under an actual conflict of interest.

Moreover, Dawson is unable to show how Preminger's interests and his own interests "diverged with respect to a material factual or legal issue or to a course of action." At Dawson's trial, Preminger asked only two questions regarding Simons' allegation that he was a part of Dawson's criminal organization:

[PREMINGER]: [D]o you remember telling the Court in [an] unrelated proceeding that I was also part of a criminal organization run by Mr. Dawson?

[SIMONS]: Yes, I do.

[PREMINGER]: Yes. And, in fact, you still believe that; you believe I am a tool of Mr. Dawson and am functioning as a criminal in the courts of law; isn't that right, yes or no?

[SIMONS]: Yes, that's my belief, you are a criminal.

(Tr. 10/15/82 at 4-165.) In light of the fact that Simons'

testimony was taken over the course of four days and that Preminger's cross-examination of Simons lasted over the course of two of those days, the court does not find that Dawson has shown that Preminger was preoccupied by the prospect of any personal potential criminal liability for the facts underlying the charges against Dawson. Thus, Dawson's argument that Preminger labored under a conflict of interest which rendered his assistance ineffective cannot succeed on this ground.

In sum, Dawson has failed to show any grounds for the court to find that Preminger, his trial counsel, ineffectively represented Dawson due to an actual conflict of interest that adversely affected his performance.

C. Claim Based on Court's Instructions to Jury

Dawson asserts that the court's jury instructions on the CCE count were erroneous. Specifically, Dawson argues that the court failed to instruct the jury that they had to unanimously agree on the same three predicate offenses in order to convict Dawson on the CCE count.

In order to prove a CCE in violation of 21 U.S.C. § 848, "the government must establish: 1) a felony violation of federal narcotics laws; 2) as part of a continuing series of violations of federal narcotics laws; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; and 5) from which he derives substantial income or resources." United States v. Motto, 1991 WL 175365, at *1 (E.D. Pa. Sept. 5, 1991) (citations omitted). The "series" of violations requires a

minimum of three predicate acts. Id. "Any felony violation of subchapters I and II of Chapter 13 of Title 21, United States Code, including a conspiracy under 21 U.S.C. § 846, is an eligible predicate offense." Id. The government need not indict or convict a defendant of the three predicate acts; it must simply prove them at trial. Id. In 1988, the Third Circuit held for the first time that the jury must be instructed that they are required to unanimously agree on the same three related predicate offenses committed by the defendant in order to convict him on a CCE count. United States v. Echeverri, 854 F.2d 638, 642-43 (3d Cir. 1988); see United States v. Edmonds, 80 F.3d 810, 815 (3d Cir. 1996) (reaffirming unanimity requirement). Dawson was sentenced in 1982, and the court did not instruct the jury on the unanimity requirement.

The Magistrate Judge found that Dawson's argument regarding the court's jury instructions on the CCE count could not succeed because he could not show actual prejudice resulting from the errors of which he complains. Dawson objects to this finding by the Magistrate Judge.

Dawson did not raise this claim at trial or on direct appeal. In order "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 167-68 (1982). Because the court finds that Dawson cannot

demonstrate actual prejudice, the court need not address whether he has demonstrated cause.

To establish actual prejudice, Dawson must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170. "A mere possibility is not enough to show actual prejudice." Motto, 1991 WL 175365, at *3 (citing Frady, 456 U.S. at 170). Dawson argues he was prejudiced by the court's failure to instruct the jury on the unanimity requirement in that, without such instruction, there was a substantial likelihood that the jury would not unanimously agree upon three predicate acts committed by Dawson in order to convict him on the CCE count. Specifically, Dawson argues that some of the violations for which he was convicted were not committed in furtherance of the CCE. Dawson asserts that: (1) the methamphetamine he distributed to Simons at Mr. Silk's bar on April 5, 1982, was a gift (Count Eight); (2) the phone call where Petitioner requested a person to bring him an 1/8 of cocaine was for personal use (Count Nine); and (3) he did not participate in the distribution of drugs to Simons in March of 1982, although he was present when his co-defendant made such a distribution (Count One, ¶¶ 14 & 15; Count Six). (Pro Se Objs. to Rep. and Recomm. at 3-4.)

With respect to Dawson's third argument, Dawson was

convicted of conspiracy in Count One of the indictment, so that all the substantive offenses committed by his co-conspirators are attributable to him. United States v. Pungitore, 910 F.2d 1084, 1147-48 (3d Cir. 1990); see United States v. Hernandez-Escarcega, 886 F.2d 1560, 1572-73 (9th Cir. 1989) (applying conspiracy doctrine to CCE charge); United States v. Michel, 588 F.2d 986, 999 (5th Cir. 1979) (same). With respect to Dawson's first and second arguments, even if the court accepts as true Dawson's assertions that his convictions on Counts Eight and Nine were not in furtherance of a CCE, the jury still convicted him on several other Counts which all qualify as predicate acts of a CCE. The jury convicted Dawson on: Count One for conspiracy under 21 U.S.C. § 846; Counts Four, Five and Six under 21 U.S.C. § 841(a); and Counts Ten, Eleven, Thirteen, Fourteen and Sixteen under 21 U.S.C. § 843(b).

In addition, overwhelming evidence of Dawson's guilt was introduced at trial:

The government's first witness, Simons, gave testimony on the details of the drug organization operated by defendants Dawson, Hoskins and Hardwick from February, 1981, to April 5, 1981. . . . Consensual Body recordings in which defendants Dawson and Hoskins discussed the manufacture and distribution of controlled substances with informant Simons on six separate occasions were heard by the jury and admitted into evidence. . . . These consensual body recordings, as well as other testimony and evidence, independently corroborated the testimony of Simons with respect to the drug conspiracy, continuing criminal enterprise, and individual distributions of controlled substances in violation of the Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-966. Wiretapped conversations of defendants Dawson, Hoskins and Hardwick were also admitted into evidence as the result of intercepts of

telephone conversations during August and September, 1981, and March and April, 1982, by federal officials pursuant to court authorization. . . . This evidence formed the basis for the substantive counts under Counts Nine through Eighteen of the indictment for the unlawful use of a communication facility to facilitate drug law violations and further corroborated the testimony of Simons with respect to the activities of the drug organization.

United States v. Dawson, 556 F. Supp. 418, 421-22 (E.D. Pa. 1982). The court found that the evidence sufficiently established that Dawson engaged in a CCE. Id. at 424-25. "Sufficient evidence was introduced to show that the drug operation was large in scale and that Dawson and Hoskins obtained a substantial income by virtue of their management positions." Id. at 425.

Dawson has not set forth any evidence that he did not commit a series of three related predicate offenses. In addition, even assuming the truth of Dawson's assertions that his convictions under Counts Eight and Nine were not in furtherance of a CCE, Dawson's convictions under Counts One, Four, Five Six, Ten, Eleven, Thirteen, Fourteen and Sixteen make clear that the jury unanimously agreed on at least three predicate acts required for conviction of CCE. The court finds that Dawson cannot show he was actually prejudiced by the court's jury instructions because there is no substantial likelihood that, if the jury was instructed that it had to unanimously agree upon the three predicate acts for a CCE, it would have failed to do so and acquitted Dawson on the CCE charge. Thus, Dawson's 28 U.S.C. § 2255 motion cannot succeed on this ground.

Dawson also argues that his trial attorney's failure to object to the court's instructions, or his appellate counsel's failure to raise this issue, demonstrates ineffective assistance of counsel. To show ineffective assistance of counsel, Dawson must show that his attorney's performance was unreasonable under prevailing standards and that he suffered prejudice from counsel's error. Strickland v. Washington, 466 U.S. 668, 687 (1984). Dawson cannot prevail under either prong of Strickland. First, Dawson's attorney's performance cannot be deemed deficient. Dawson was convicted in 1982 and the conviction was affirmed in 1984. Echeverri was not decided until 1988. Dawson puts forth no argument, and the court finds none, which would support the argument that Dawson's counsel should have anticipated the unanimity requirement for jury instructions on a CCE charge at the time of Dawson's conviction or at the time the conviction was affirmed by the Third Circuit. Second, as discussed above, Dawson is unable to establish that he suffered prejudice from the court's failure to instruct the jury on the unanimity requirement. See Motto, 1991 WL 175365, at *8 (stating that prejudice requirement of Strickland is similar to actual prejudice requirement of Fraday) (citing Mercer v. Armontrout, 864 F.2d 1429, 1434 (8th Cir. 1988)). Thus, Dawson's 28 U.S.C. § 2255 motion cannot succeed on this ground.

D. Claim Based on Government's Failure to Disclose Material Evidence

Dawson asserts that the government withheld material that

"would have in all likelihood been enough to impeach Mr. Simons, the government's key witness, and cast doubt on the government's case as a whole." (Objs. to Rep. and Recomm. at 5.)

Specifically, Dawson asserts that the government failed to disclose that it had agreed to assist Simons with a pending state court homicide charge in return for his testimony against Dawson. Dawson argues that had this information been disclosed, it could have been used to: (1) impeach Simons' testimony that he had not requested and did not want government assistance with his state homicide charge; (2) show that Simons was biased against the defendant because he had an interest in currying favor with the government; and (3) show that Simons lied when he said that he engaged in more than one taped conversation with defendant. Further, Dawson asserts that Simons' testimony was the only evidence the government put forth to show Dawson's involvement in a CCE, and thus, the government's withholding of evidence materially affected the outcome of his trial. The Magistrate Judge held that, even assuming the truth of Dawson's assertions, it would not undermine confidence in the outcome of the trial. Dawson objects to this finding by the Magistrate judge.

The government has a duty to disclose material evidence that is favorable to the defendant, whether it be with respect to guilt or impeachment of a witness. Kyles v. Whitley, 514 U.S. 419, 432 (1995); see Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different.'" Kyles, 514 U.S. at 432 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). A reasonable probability of a different outcome is shown when the evidence withheld by the government "'undermines the confidence in the outcome of the trial.'" Id. at 434 (quoting Bagley, 473 U.S. at 678).

The court agrees with the Magistrate Judge that, assuming the truth of Dawson's assertions, the government's withholding of such evidence does not undermine confidence in the outcome of the trial. Even if Dawson could have used this information to undermine Simons' credibility in the eyes of the jury, Simons' testimony was independently corroborated by other overwhelming evidence.² Consensual body recordings independently corroborated Simons' testimony with respect to the drug conspiracy, the CCE and individual distribution of controlled substances.

(Consensual Body Recordings, Transcripts, C-3(t), C-4(t), C-5(t), C-6(t), C-7(t), C-8(t) and C-9(t) (recording conversations involving Dawson and describing his role in distribution of illegal drugs).) See Dawson, 556 F. Supp. at 421-22 (describing consensual body recording evidence compiled against Dawson). Also, wiretapped conversations of Dawson, Hoskins and Hardwick further corroborated Simons' testimony with respect to the

² The court notes that although the consensual body recordings and wiretaps presented as evidence at Dawson's trial were not preserved by the court reporter in making a record of Dawson's trial, the court has retrieved transcripts of that evidence from the government and has reviewed it in considering the claims Dawson advances here.

activities of the drug organization. (Wiretap Conversations, Transcripts, W-1(t), W-2(t), W-5(t), W-8(t), W-9(t), W-10(t), W-11(t), W-15(t), W-16(t), W-17(t), W-19(t), W-22(t), W-25(t), W-26(t), W-27(t) and W-29(t) through W-44(t) (recording conversations involving Dawson and describing his role in distribution of illegal drugs).) See Dawson, 556 F. Supp. at 422 (describing wiretap evidence compiled against Dawson). In light of this evidence which independently corroborated Simons' testimony, the court does not find that the evidence allegedly withheld by the government undermined the confidence in the outcome of Dawson's trial. Thus, Dawson is unable to show that any evidence the government may have withheld was material, and thus, his claim must fail under the standard announced in Brady.

E. Certificate of Appealability

For the reasons stated above, the court finds that Dawson has not made a substantial showing of the denial of a constitutional right. See Third Circuit Local Appellate Rule 22.2 (stating that "[i]f an order denying a petition under . . . § 2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate [of appealability] references the opinion or report"). Thus, the court will deny Dawson's application for a certificate of appealability.

IV. CONCLUSION

For the above reasons, the court will approve and adopt the

Magistrate Judge's Report and Recommendation, will grant the motion in part and deny the motion in part, will vacate Dawson's conviction and sentence for the conspiracy charged in Count One of the Indictment and will not issue a certificate of appealability.

An appropriate Order follows.

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

LONNIE DAWSON : CRIM. NO. 82-128-01
 :
v. :
 :
UNITED STATES OF AMERICA : CIVIL NO. 97-7420

ORDER

AND NOW, TO WIT, this day of November, 1999, upon consideration of petitioner Lonnie Dawson's motion filed pursuant to 28 U.S.C. § 2255, the government's response thereto, the United States Magistrate Judge's Report and Recommendation, the Objections thereto and the record, IT IS ORDERED that:

- (1) the Magistrate Judge's Report and Recommendation is APPROVED and ADOPTED;
- (2) the motion is GRANTED IN PART and DENIED IN PART;
- (3) petitioner Lonnie Dawson's conviction and sentence for the conspiracy charged in Count One of the Indictment is VACATED;
- (4) in all other respects, the motion is DENIED; and
- (5) petitioner Lonnie Dawson's application for a certificate of appealability is DENIED.

LOUIS C. BECHTLE, J.