

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

MONTRELL GARY

v.

UNITED STATES OF AMERICA |

| **CRIMINAL ACTION**

| **NO. 96-181-2**

| **CIVIL ACTION**

| **NO. 99-3820**

MEMORANDUM

Broderick, J.

April 7, 2000

Petitioner Montrell Gary ("Gary") is currently serving a sentence of 210 months imprisonment pursuant to this Court's sentence of July 1, 1997. Gary's conviction and sentence were affirmed by the United States Court of Appeals for the Third Circuit in an unpublished opinion docketed on August 4, 1998. Gary filed a timely pro se motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 ("§ 2255") alleging ineffective assistance by his trial counsel. Gary's motion was denied by this Court's Memorandum and Order of February 10, 2000. Presently before the Court is Gary's motion for reconsideration of this Court's February 10, 2000 Memorandum and Order. The government has not responded to this motion. For the reasons stated below, the Court will deny Gary's motion for reconsideration.

A detailed recitation of the facts concerning Gary's conviction and sentence was set forth in this Court's February 10, 2000 Memorandum and need not be repeated here. Gary's § 2255

motion alleged that he was denied effective assistance of his trial counsel because his counsel:

- (1) advised him to stipulate at trial that the controlled substance at issue was "crack" cocaine and
- (2) failed to request Jencks Act material. The Court, applying the two-part standard for ineffective assistance of counsel claims set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), concluded, based on a careful review of the record, that Gary was unable to show the necessary prejudice as a result of his counsel's allegedly defective performance. This Court concluded that Gary was not prejudiced by his stipulation at trial that the drugs were "crack" because the Court, in imposing the enhanced sentence for "crack" under the United States Sentencing Guidelines, did not rely on the stipulation in making its determination that the drugs were "crack." Rather, the Court relied on the testimony of the police department chemist and the testimony of Police Officer Wil Kane which established by a preponderance of the evidence that the drugs were "crack." This Court also found that Gary was not prejudiced by his counsel's failure to file a motion for so-called Jencks Act material because the record clearly demonstrated that Gary's counsel had received all such material from the government prior to trial.

In the instant motion for reconsideration, Gary asserts that he mistakenly forgot to include another instance of ineffective assistance of counsel which would have led this Court to a different conclusion in its consideration of his § 2255 motion. Gary asserts, although he does not explain why this is so, that excusable neglect exists for his failure to include all his grounds for relief in his original § 2255 motion. Gary also asserts that the Court made a mistake of fact in ruling that Gary was not prejudiced by his counsel's failure to request Jencks Act materials. Finally, Gary attacks the Court's conclusion that he was not prejudiced by the stipulation that the

drugs were "crack."

Gary brings his motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). Federal Rule of Civil Procedure 59(e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." The purpose of such a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). "It is not an opportunity for a party to re-litigate already decided issues or to present previously available evidence." Corrigan v. Methodist Hosp., 885 F. Supp. 127, 127 (E.D.Pa. 1995) (citing Harsco, 779 F.2d at 909). Furthermore, Rule 2 of the Rules Governing § 2255 Proceedings provides, in relevant part, that a motion pursuant to § 2255 "shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge...." Gary does not assert any newly discovered evidence in support of his right to raise an additional claim of ineffective assistance of counsel for the first time in the instant motion. Nevertheless, the Court will liberally construe Gary's claim pursuant to Haines v. Kerner, 404 U.S. 519, 520 (1972), and briefly address its merits.

Ineffective assistance of counsel claims are governed by the two-part standard enunciated by the United States Supreme Court in Strickland v. Washington:

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 [] sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687 (1984). Gary claims that he was denied effective assistance of counsel because his trial counsel failed to object to proceeding at Gary's second trial after evidence in possession of the Court was lost after the first trial. Gary alleges that he was prejudiced by his counsel's omission because he asserts that it was this evidence which undermined the testimony of the police officers at his first trial and led to the hung jury. In the absence of such evidence, he asserts, he could not demonstrate the inconsistencies in the officer's testimony and, thus, he was convicted.

The Court has reviewed, once again, the transcripts of both trials and finds that Gary's contentions are without merit. Gary's first trial commenced on November 20, 1996. This trial resulted in a hung jury and a mistrial was declared by this Court on November 25, 1996. See Tr. 11/25/96 at 50. Shortly after the mistrial was declared, it was discovered that items of evidence in possession of the Court were missing. See Tr. 2/5/97 at 153-154. These items included a white, plastic Dunkin' Donuts bag and a box of plastic sandwich baggies. See Tr. 2/5/97 at 153. It was surmised that these items had been inadvertently removed from the jury room by Court janitorial staff after the mistrial was declared. See Tr. 2/5/97 at 50-51, 155. All parties were informed of the missing evidence prior to the start of the second trial. See Tr. 2/4/97 at 33-36.

Gary alleges that his counsel did not object to proceeding without the missing evidence. Gary also asserts that he was prejudiced by proceeding without the missing evidence because a hole in the white Dunkin' Donuts bag led to the hung jury at his first trial. Gary asserts that the jury at the first trial attempted to recreate the alleged toss of the white Dunkin' Donuts bag filled with the packets of crack and saw that such a toss could not have happened in the manner the officers testified to. Gary also asserts that his counsel should not have advised him to stipulate at

trial that a proper chain of custody was maintained as to the evidence.

Gary's contentions are unsupported by the record. At both trials, police officers testified that they observed Gary's co-defendant, Dover, toss the white Dunkin' Donuts bag to Gary. See Transcript of 11/21/96 ("Tr. 11/21/96") at 23, 57, 98, 100; Tr. 2/4/97 at 49, 62, 65; Tr. 2/5/97 at 56. The officers testified that Gary caught the bag and ran down the street, dropping the bag as he was pursued by police. See Tr. 11/21/96 at 25-26; Tr. 2/4/97 at 51, 79; Tr. 2/5/97 at 56-57. The officers testified that after Gary and Dover were subdued, they retrieved the white Dunkin' Donuts bag and found in it a brown paper bag containing, inter alia, numerous packets of crack cocaine. See Tr. 11/21/96 at 27-28, 103, 163; Tr. 2/4/97 at 53-55; Tr. 2/5/97 at 36, 60, 124-125, 146. At the time of Gary's first trial there was a hole in the white Dunkin' Donuts bag. See Tr. 11/21/96 at 60, 163. Gary's counsel questioned the officers extensively regarding whether or not any of the packets of crack cocaine were found to have fallen out of the bag during the course of its flight through the air and its fall to the ground. See Tr. 11/21/96 at 60-62, 166-167. At trial, the officers testified that the bag was in the same condition as when it was initially recovered and that they did not observe any packets of crack cocaine fall out of the bag. See Tr. 11/21/96 at 60-62, 163, 166-167. Gary's counsel suggested that this testimony was not credible. See Tr. 11/22/96 at 43-44.

At the second trial, Gary's counsel did not ignore the missing evidence, as Gary alleges. Gary's counsel referred to the missing evidence in his opening statement and closing argument and suggested that the fact that the government could not produce such evidence was cause for reasonable doubt. See Tr. 2/4/97 at 33, 37; Tr. 2/6/97 at 65, 68. The jury was presented with testimony regarding the disappearance of the evidence. See Tr. 2/5/97 at 37-38, 50-51, 64, 80,

153-161. The Court's clerk was cross-examined extensively at the second trial about the whereabouts of the missing evidence. See Tr. 2/5/97 at 157-160. Gary's counsel also questioned the officers at the second trial extensively regarding the size of the hole in the bag, the condition of the bag, and the details of the toss, just as he did at the first trial. See Tr. 2/4/97 at 77-78; Tr. 2/5/97 at 9-10, 22-25, 87-89. At the second trial, the officers were also questioned by counsel for Gary's co-defendant about the condition of the bag, the details of the alleged toss and the recovery of the drugs. See Tr. 2/5/97 at 80-82, 84-86. Both counsel suggested in their closing arguments that the officers' testimony was not credible. See Tr. 2/6/97 at 57-58, 68, 84

In addition, the record demonstrates that the jurors at the first trial could not have attempted to recreate the toss as Gary alleges. No demonstration of the toss was made on the record at the first trial. In fact, during the trial, although there was testimony as to how the drugs appeared when they were recovered, the drugs were not placed in the brown paper bag and white Dunkin' Donuts bag. See Tr. 11/22/96 at 96-98. The packets of cocaine were not permitted to be in the jury room during deliberations. See Tr. 11/22/96 at 90. Although the jury was permitted, in open court, to observe the packets of crack and the brown paper bag and white Dunkin' Donuts bag in which the drugs were found, the jury's request, during deliberations, to have the packets of crack placed inside the brown paper bag was denied. See Tr. 11/22/96 at 93-98. Therefore, the members of the jury could not have placed the packets into either the brown paper bag or the white Dunkin' Donuts bag and attempted to recreate the toss.

Finally, the stipulation that Gary entered into at his second trial concerned only the chain of custody over the packets of crack cocaine and made no mention of a proper chain of custody being maintained over other items of evidence introduced at trial against Gary. See Tr. 2/5/97 at

174-175. Therefore, the Court finds that Gary's assertion that he was denied effective assistance of counsel concerning the missing evidence at his second trial is without merit.

The Court has also reviewed the record again concerning the involvement of Officer Sandra Haines in light of Gary's argument that her involvement in his case prior to trial suggests that he did not receive Jencks Act materials to which he was entitled. Officer Haines testified before the Grand Jury but did not testify at Gary's trial. Any involvement she may have had in the investigation of Gary's case is not relevant to this Court's determination that Gary received all the discovery materials to which he was entitled. Therefore, the Court finds that its earlier ruling that Gary was not denied effective assistance of counsel by his counsel's failure to request Jencks Act material is correct and shall remain in full force and effect.

Finally, the Court has also reviewed the record again concerning the testimony at sentencing that the substance at issue was "crack" cocaine. Gary asserts that there was evidence in the record, which his counsel should have brought to the Court's attention, that the substance was not "crack" cocaine but, instead, was some other form of cocaine base not subject to an enhanced sentence under the United States Sentencing Guidelines. The Court finds that its earlier ruling that the government proved by a preponderance of the evidence at trial that the substance was "crack" was correct and that this determination would not have been altered if Gary's counsel had called Mr. Schiller as a witness at sentencing. Mr. Schiller was no longer employed by the police department as a chemist by the time Gary was tried. See Tr. 11/21/96 at 192. At sentencing, Mr. Cherian, a forensic chemist employed by the Philadelphia Police Department, testified that his analysis was consistent with the earlier analysis done by Mr. Schiller. See Tr. 7/1/97 at 23. The Court has examined the reports of the analyses performed by

Mr. Schiller and Mr. Cherian and has not found them inconsistent as to the identity of the controlled substance. Therefore, the Court finds that its earlier ruling that Gary was not denied effective assistance of counsel by his counsel's advice to stipulate at trial that the drugs were "crack" is correct and shall remain in full force and effect.

Having heretofore found that the additional ground for relief asserted by Gary in his motion for reconsideration is unsupported by the record and without merit and having also reconsidered the findings made by the Court in its Memorandum of February 10, 2000 and found them to be fully supported by law and fact, the Court will deny Gary's motion for reconsideration in its entirety. This Court's Memorandum and Order of February 10, 2000 shall remain in full force and effect.

An appropriate Order follows.

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ORDER

AND NOW, this 7th day of April, 2000; Petitioner Montrell Gary ("Gary") having filed a motion for reconsideration of this Court's Memorandum and Order dated February 10, 2000 which denied Gary's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255; for the reasons stated in this Court's memorandum of the same date;

IT IS ORDERED that Gary's motion for reconsideration (Doc. No. 162) is **DENIED** and this Court's Memorandum and Order of February 10, 2000 shall remain in full force and effect.

RAYMOND J. BRODERICK, J.