

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

UNITED STATES OF AMERICA : CIVIL ACTION  
 :  
 v. : No. 00-3219  
 :  
 F. CHARLES ROSSI, JR. : (Criminal No. 96-526-1)

**MEMORANDUM**

**Ludwig, J.**

December 6, 2000

Petitioner F. Charles Rossi, Jr., pro se, moves to vacate, set aside or correct his sentence, 28 U.S.C. § 2255.<sup>1</sup>

On March 10, 1997, petitioner pleaded guilty to one count of conspiracy, 18 U.S.C. § 371; six counts of false odometer statements, 15 U.S.C. §§ 1988, 1990(c), 49 U.S.C. § 32705(a); interstate transportation of falsely made, forged, altered or counterfeit securities, 18 U.S.C. § 2314; and two counts of mail fraud, 18 U.S.C. § 1341. Under a plea agreement, the remaining counts of the 29-count indictment were dismissed.

On August 28, 1997, petitioner was sentenced to 64 months custody and three years supervised release.<sup>2</sup> He appealed the sentence, which was affirmed by our Court of Appeals.<sup>3</sup> United States v. Rossi, 185 F.3d 864, No. 97-

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<sup>1</sup> A pro se petitioner's § 2255 claims should be liberally construed, United States v. Miller, 197 F.3d 644, 646 (3d Cir. 1999).

<sup>2</sup> On June 18, 1997, petitioner's sentencing hearing was continued to give him an opportunity to assist the government by testifying against his co-conspirator, Vincent Castelli. Tr. June 18, 1997 at 11.

<sup>3</sup> On June 26, 1998, his trial attorney, who also appointed appellate counsel, was permitted to withdraw. On March 15, 1999, his second  
(continued...)

1699, slip op. (3d Cir. June 22, 1999). He now challenges the sentence on two grounds – 1) the government acted in bad faith by not filing a downward departure motion, U.S.S.G. § 5K1.1, and 2) ineffective assistance of trial counsel.

### 1. Bad Faith

On March 9, 1997, petitioner signed a substantial assistance plea agreement that gave the government sole discretion to decide whether to file a downward departure motion, U.S.S.G. § 5K1.1.<sup>4</sup> In 1998, our Court of Appeals

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<sup>3</sup>(...continued)  
court-appointed attorney filed an Anders v. California, 386 U.S. 738 (1967) motion to withdraw alleging that there were no non-frivolous issues for appeal. On April 7, 1999, the Court of Appeals granted petitioner leave to file a pro se brief; he did not do so.

<sup>4</sup> The relevant terms of the agreement are as follows:

(2.a.) Defendant agrees to provide truthful, complete, and accurate information and testimony. . . .

(2.b.) Defendant agrees to provide all information concerning his knowledge of, and participation in, odometer fraud and any other crimes about which he has knowledge.

\* \* \*

(2.d.) Defendant agrees to testify as a witness before any grand jury, hearing, or trial when called upon to do so by the government.

(2.e.) Defendant agrees to hold himself reasonably available for any interviews the government may request.

\* \* \*

(3.b.) The parties stipulate that the loss to consumers from the defendant's conduct is between \$2,500,000 and \$5,000,000, resulting in a 13 level enhancement under § 2F1.1(b)(1)(I). The parties stipulate that the loss suffered by each consumer for each of the at least 700 cars sold by R&T Auto Sales of Dunellen, Inc., Hallmark Leasing Co., Inc., and Easy Lease, Inc. with altered

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held that the government is required to exercise such discretion in good faith, and if it does not do so, a sentencing judge (other than the judge who adjudicated the bad faith) may depart as though the motion had been filed.<sup>5</sup> United States v.

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<sup>4</sup>(...continued)

odometers averages \$4,000 per car, reflecting the higher price paid by the consumer in reliance on the false odometer reading, as well as increased maintenance costs, reduced resale value, and other costs.

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(3.d.) The parties stipulate that the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]

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(5) If the government, in its sole discretion, determines that the defendant has provided substantial assistance in investigation or prosecution of another person who has committed an offense, the government will make a motion to allow the Court to depart from the Sentencing Guidelines pursuant to Sentencing Guideline § 5K1.1.

Plea Agreement at 2, 4-6. Sentencing Guideline § 5K1.1 states, in part:

Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

U.S.S.G. § 5K1.1.

<sup>5</sup> The government's decision not to file a § 5K1.1 motion was considered on appeal, although not raised by petitioner. United States v. Rossi, 185 F.3d 864, No. 97-1699, slip op. at 3 (3d Cir. June 22, 1999). In affirming the sentence, the opinion states:

In accordance with the mandate established in Anders, we have conducted an independent examination of the record before us in order to determine whether it presents any non-frivolous issue that would justify review . . . . Regarding the Government's  
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Isaac, 141 F.3d 477, 484 (3d Cir. 1998); accord United States v. Huang, 178 F.3d 184, 188 (3d Cir. 1999) (however, a sentencing court has “a very limited role in reviewing the Government's refusal to move for a downward departure”). A

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<sup>5</sup>(...continued)

refusal to recommend a downward departure pursuant to U.S.S.G. § 5K1.1, judicial review of this determination is limited. To trigger judicial review, a petitioner must allege that the government acted in bad faith. . . . At the sentencing hearing, petitioner’s trial counsel maintained that the government should have filed a § 5K1.1 letter, and realized that since it did not, he would have to allege bad faith. Counsel stated that he was “not yet in the position to say that affirmatively.” Appellate counsel does not proffer a possible argument that could be made to support a contention that the government acted in bad faith by refusing to request a § 5K1.1 departure. At the sentencing hearing, the government stated that petitioner had not provided assistance that it would qualify as substantial. We fail to perceive a viable argument of bad faith from our review of the record.

Id. at 2-4 (citations omitted).

In light of this discussion, the government maintains that petitioner’s bad faith claim is procedurally defaulted or, in the alternative, has already been decided on appeal. Ordinarily, where a claim has not been presented at sentencing or on direct appeal, it cannot be raised in a § 2255 motion unless “cause” for the failure and “actual prejudice” are shown. United States v. Frady, 456 U.S. 152, 167, 102 S. Ct. 1584, 1594, 71 L. Ed. 2d 816 (1982). However, since “there is no requirement that a defendant object to the violation of a plea agreement at the time of sentencing, a defendant's claim that his plea agreement was violated is not waived by his failure to raise the issue at sentencing [or on appeal] . . . .” Paradiso v. United States, 689 F.2d 28, 30 (2d Cir. 1982) (per curiam), cert. denied, 459 U.S. 1116, 103 S. Ct. 752, 74 L. Ed. 2d 970 (1983). Because this is the first time petitioner himself asserted the claim, it will be reviewed on the merits.

petitioner's burden to establish violation of a plea agreement is by a preponderance. Huang, 178 F.3d at 187.<sup>6</sup>

It is undisputed that on March 9, 1997, before the plea agreement was signed and again on March 10, 1997, after the plea colloquy, AUSA Linda Marks strongly encouraged petitioner to meet with the FBI. Petitioner's counsel also claims to have advised him to "take the initiative" and, between March 10 and June 1, 1997, to have told him a number of times that "his only chance to avoid jail was to make himself available and provide useful information to the government." Govt.'s mem. exh. G. ¶¶ 18, 19 (Lieberman decl.). Nevertheless, petitioner points to only two occasions between his plea colloquy and sentencing in which he met with the government.

The first was with FBI Special Agent Pollice.<sup>7</sup> Petitioner characterizes the meeting as a "sham" – he maintains that the interview lasted no longer than 10 minutes. According to Agent Pollice, however, petitioner tried throughout the

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<sup>6</sup> Once bad faith is alleged, the government is given the rebuttal opportunity to explain for its decision not to file the motion. Isaac, 141 F.3d at 484. Petitioner, in turn, may present evidence contradicting the government's explanation as to require an evidentiary hearing. Id. If, as here, the government's reasons are plausible, and defendant's version of the events is not supported by a proffer of evidence, no hearing is necessary. Id. Moreover, petitioner has not requested a hearing.

<sup>7</sup> The date and circumstances of the meeting are in dispute. petitioner asserts that after calling his counsel numerous times to express concern about not having met with the FBI, a meeting was finally arranged on August 20, 1997, to occur the following day. The government maintains that on March 27, 1997, Agent Pollice contacted petitioner to set up the meeting and petitioner never called back. Govt.'s mem. exhs. F ¶ 6 (Pollice decl.). According to Pollice, a meeting took place on May 14, 1997. Id. ¶ 7.

meeting to minimize his role in the conspiracy and provided false information. Govt's mem. exh. F ¶ 7 (Pollice decl.). Pollice states that he was "already aware of the people named by [Rossi], and he did not add or offer any new information that would assist, much less substantially assist, an investigation." Id. ¶ 8. After the interview, the two did not contact each other, despite Pollice's apparent willingness to meet again. Id. ¶ 9.

Second, petitioner claims that, prior to the sentencing hearing of his co-conspirator, Vincent Castelli, he provided useful information to AUSA Marks. However, the testimony he gave as a court-ordered witness was adjudicated unworthy of belief. His own motion for a downward departure was denied for the same reason.<sup>8</sup> Tr. Aug. 28, 1997 at 10 ("The argument for a downward departure on behalf of Mr. Rossi depends on the crediting of Mr. Rossi's testimony. And accordingly, the request for a downward departure in this case must be denied."). This lack of credibility finding undermines his argument that the government's decision not to file a § 5K1.1 motion was made in bad faith.

At sentencing, although the government acknowledged Rossi's assistance, it concluded that it was not enough to justify a § 5K1.1 motion. Tr. Aug. 28, 1997 at 9 (AUSA Marks: "Mr. Rossi's testimony as a court witness . . .

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<sup>8</sup> According to petitioner, the government's decision not to call him as a witness was made in bad faith. On June 11, 1997, petitioner was directed to appear as a court witness for the Castelli hearing. See Fed. R. Evid. 614. Although petitioner did not testify as a government witness, the government did consider his testimony in deciding not to file for downward departure, tr. Aug. 28, 1997 at 9.

and anything else . . . he provided to the Government did not rise to the level of substantial assistance.”). Given the record, it cannot be said that the government’s position was “not based on an honest evaluation of the assistance provided . . . .” United States v. Isaac, 141 F.3d 477, 484 (3d Cir. 1998).

As to his argument that he was not given an adequate opportunity to cooperate – and the government never intended to file a § 5K1.1 motion – Rossi proffers no evidence to that effect, and the facts simply do not support the assertion. His reliance on United States v. Laday, 56 F.3d 24, 25 (5th Cir. 1995), in which bad faith was found because the government did not interview or afford petitioner any opportunity to assist, is misplaced. Here, unlike the Laday petitioner, Rossi has not shown that the government realized he did not possess useful information when it entered into the plea agreement. Laday, 56 F.3d at 25; see also United States v. Almodovar, 100 F. Supp. 2d 301, 308 (E.D. Pa. 2000) (Ludwig, J.) (bad faith for the government to ignore history of petitioner’s cooperation, his credibility weaknesses were known early on, and seven sentencing continuances were granted to provide opportunities to cooperate). Accordingly, defendant’s claim of bad faith must be denied.

## 2. Ineffective Assistance of Counsel<sup>9</sup>

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<sup>9</sup> Generally, a petitioner need not show cause or prejudice for his failure to claim ineffectiveness on appeal. See United States v. DeRewal, 10 F.3d 100, 101 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). Moreover, having not been raised by the government, procedural default will not be considered. Smith v. Horn, 120 F.3d 400, 407-09 (3d Cir. 1997), cert. denied, 522 U.S. 1109, 118 S.Ct. 1037, 140 L. Ed. 2d 103 (1998).

Petitioner asserts that his trial counsel was ineffective by: 1) misinforming him of his sentencing exposure, 2) allowing him to sign the plea agreement that included “things [he] believed were not true and accurate,” 3) not arranging opportunities for his cooperation with the government, and 4) not arguing the government’s bad faith. He also maintains that counsel was ineffective in ignoring an order issued by the Court of Appeals to show cause for his failure to appear.

To succeed on an ineffective assistance of counsel claim in the context of a guilty plea, a petitioner must show that:

- (1) his or her counsel’s representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases; and
- (2) there is a reasonable probability that, but for counsel’s errors, he or she would have proceeded to trial instead of pleading guilty.

United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (citing Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985)). “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674 (1984).

Petitioner maintains that, prior to signing the plea agreement, counsel informed him that he faced “someplace between” 36 and 48 months, but with cooperation, he could receive probation. Petitioner also contends that prior to signing the agreement, he advised counsel of its false terms – i.e., he was not the leader of the conspiracy, he sold fewer than 700 vehicles, and the \$4,000 per

vehicle loss to the consumer was excessive. But even if these allegations are true,<sup>10</sup> Rossi cannot show prejudice. The guilty plea record demonstrates that Rossi was aware of the sentencing guidelines range of 57 to 71 months and that he understood the factual predicate for the plea and that the filing of the § 5K1.1 motion based on his cooperation was solely within the government's discretion.

The guilty plea was knowing and voluntary. Fed. R. Crim. P. 11. At the plea colloquy, the government proffered the facts of its case, tr. March 10, 1997 at 3-9, and petitioner acknowledged that those facts were correct and were sufficient to prove him guilty of conspiracy, fraudulent odometer statements, interstate transportation of falsely made, forged, altered and counterfeit securities, and mail fraud. *Id.* at 9. More specifically, he agreed to the correctness of the facts he now claims to be false. He was also advised of the essential elements of

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<sup>10</sup> According to counsel, he went over with petitioner "in full and complete detail the terms of the plea agreement, going over it paragraph by paragraph[.]" and Rossi knew he would be sentenced at 57 to 71 months, unless a 5K letter was obtained. Govt.'s mem. exh. G ¶¶ 13-14 (Lieberman decl.). At the plea colloquy, when asked whether he was fully satisfied with the services of his counsel, petitioner replied, "Yes, I am." Tr. March 10, 1997 at 16.

On June 16, 1997, prior to sentencing, petitioner's counsel filed a letter-memorandum, arguing for a sentence below the Guidelines range. The letter stated the following: defendant did not agree with the \$4,000 loss, applying points for both organizer and leader (four points) and more than minimal planning (two points) amounted to double counting, and petitioner's cooperation entitled him to a § 5K1.1 motion from the government or a downward departure based on extraordinary acceptance of responsibility, § 5K2.0. At the first sentencing hearing, counsel argued that the Guidelines calculations overstated the criminal activity, tr. June 18, 1997 at 5-6, 8-11. At the second sentencing hearing, he argued that petitioner should have received a § 5K1.1 letter from the government, or downward departure, based on his substantial assistance and cooperation, tr. Aug. 28, 1997 at 6-7.

each crime and the necessity of proof beyond a reasonable doubt. *Id.* at 10-12. Rossi stated that he understood the criminal charges, that it was his decision to plead guilty, and that he had concluded that pleading guilty was “right and the best thing for [him] to do.” *Id.* at 15-16.

Nothing in the record suggests that Rossi would not have pleaded guilty but for his counsel’s now alleged misrepresentations as to the sentencing range, or the truth of the plea agreement’s terms. *See Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1977) (“Solemn declarations in open court carry a strong presumption of verity.”). Moreover, counsel’s decision not to argue bad faith at sentencing was not ineffective assistance because the argument obviously lacked merit.<sup>11</sup> Rossi has not shown that the government acted in bad faith or that his counsel was ineffective. Accordingly, his motion to vacate, alter or amend sentence must be denied.<sup>12</sup> 28 U.S.C. § 2255.

An order accompanies this memorandum.

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Edmund V. Ludwig, J.

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<sup>11</sup> Also, he cannot show that his counsel’s being ordered to show cause for failure to appear before the Court of Appeals affected his sentence.

<sup>12</sup> Insofar as Rossi’s response memorandum attempts to assert sentencing errors, those claims are procedurally barred. *United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993) (“§ 2255 is no longer a necessary stand-in for the direct appeal of a sentencing error because full review of sentencing errors is now available on direct appeal”).



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**ORDER**

AND NOW, this 5th day of December, 2000, petitioner F. Charles Rossi's motion to alter, amend, or vacate his sentence is denied with prejudice. 28 U.S.C. § 2255. Because Rossi has not made a substantial showing of denial of a constitutional right, a certificate of appealability is inappropriate. 28 U.S.C. § 2253(c)(2).

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Edmund V. Ludwig, J.