

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

RICHARD BRESSI	:	
	:	CIVIL ACTION No. 01-407
v.	:	
	:	(Criminal No. 99-276)
	:	
UNITED STATES OF AMERICA	:	

MEMORANDUM ORDER

Petitioner pled guilty to charges of distribution of cocaine, possession of cocaine and methamphetamine with intent to distribute, and possession of firearms after conviction for a felony and in violation of 18 U.S.C. § 924(c)(1). He was sentenced to imprisonment for 97 months, which includes the 60 month mandatory penalty required by 18 U.S.C. § 924(c)(1)(A)(i).¹

Petitioner has filed a petition pursuant to 28 U.S.C. § 2255 to set aside the conviction and sentence for the § 924(c)(1) charge in count five of the indictment. He contends that the plea on this count should not have been taken since he was not guilty of the offense on the facts of the case and that his trial counsel was thus ineffective in allowing him to plead guilty to this charge.²

¹Petitioner had an offense level of 19 and a criminal history category of III. He thus faced a sentence of 37 to 46 months plus the 60 months on the firearms charge at issue.

²Petitioner was represented by new counsel at his sentencing. It is petitioner's sentencing counsel who has filed the instant petition. Interestingly, during the sentencing proceedings he raised no question about the propriety of the plea and imposition of the additional 60 month sentence under § 924(c), and no direct appeal was ever taken.

The pertinent facts are uncontroverted. Following an undercover purchase of cocaine from petitioner, police officers executed a search of his home pursuant to a warrant. The officers saw a locked safe in petitioner's bedroom. He voluntarily agreed to give the officers the combination. They opened the safe and found bags containing cocaine, methamphetamine and marijuana, drug packaging materials, \$4,500 in cash which included a pre-recorded bill used in the undercover purchase and a loaded automatic pistol. Petitioner acknowledged under oath that he shared control of the safe and gun with one other person, that the gun was available to protect the drug supply and that he had placed in the safe the drugs found by the officers. He acknowledged that he was holding the cocaine and methamphetamine for sale.³

Petitioner relies on the holding of the Supreme Court in Bailey v. U.S., 516 U.S. 137 (1995) that to constitute "use" under § 924(c)(1), a firearm must be actively employed and argues that such a showing of active employment was not made in the instant case. The principal problem with petitioner's argument is that he was not charged with use of a firearm. He was charged with and pled guilty to "possession" of a firearm in furtherance

³Because petitioner claimed at the plea colloquy that the marijuana seized was intended for his personal use, the court declined to take a guilty plea to the charge in count four of possession of marijuana with intent to distribute. The government dismissed that count.

of the offence of drug possession with intent to distribute under a post-Bailey 1998 amendment to § 924(c)(1).⁴

In ascribing to the term "use" its active connotations, the Supreme Court stressed the failure of Congress to use instead the broader term "possession." See Bailey, 516 U.S. at 148. Congress "was convinced the Bailey decision was a setback for law enforcement and crime control." U.S. v. Studifin, 240 F.3d 415, 421 (4th Cir. 2001) (citation omitted). It added the "possession in furtherance" language "to broaden the reach of the statute" and fill the loophole resulting from Bailey. U.S. v. Alaniz, 235 F.3d 386, 389-90 (8th Cir. 2000).

In assessing whether a firearm was possessed in furtherance of a drug offense, pertinent factors include the type of drug activity, accessibility of the firearm, whether it was loaded, its proximity to drugs or drug profits and the circumstances in which it was found. U.S. v. Ceballos-Torres, 218 F.3d 409, 414-15 (5th Cir. 2000) (upholding possession in furtherance conviction where firearm was in defendant's bedroom in proximity to cocaine, cash and scale and accessible to defend drugs and drug profits). Petitioner was involved in the sale of cocaine and methamphetamine on a continuing basis. Petitioner had constructive possession of a loaded pistol which was in close

⁴The charges against petitioner arise from conduct on February 27, 1999, after enactment of the amendment.

proximity to drugs he acknowledged holding for sale and drug profits, including cash received from an undercover purchase, and which was readily accessible to defend this stash.

There was a factual basis for the plea. Petitioner's trial counsel, an experienced criminal defense lawyer, was not ineffective in recommending or permitting the guilty plea.⁵

ACCORDINGLY, this day of April, 2001, **IT IS HEREBY ORDERED** that petitioner's petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and this action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁵As a result of the plea and plea agreement, petitioner received a three offense level reduction which reduced his sentencing exposure by 17 months.