

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

UNITED STATES OF AMERICA : CRIMINAL NO. 98-91-03  
 :  
 v. :  
 :  
 SHERWOOD L. ALLEN : CIVIL NO. 00-2994

**MEMORANDUM**

**I. INTRODUCTION**

On October 15, 1998, petitioner Sherwood Allen was convicted of conspiracy to launder money in violation of 18 U.S.C. § 1965(h) (conspiracy to launder monetary instrument) [1 count], 18 U.S.C. § 1956 (a)(1)(B)(i) (money laundering) [3 counts], and 26 U.S.C. § 6050I (f)(1)(B) (false statement on Form 8300) [1 count]. The conviction was affirmed on appeal on February 28, 2000. Petitioner now brings this motion to vacate sentence pursuant to 28 U.S.C. § 2255, alleging that his defense was impeded by ineffective assistance of counsel.

**II. FACTS**

Sherwood Allen was a mechanic at Parkway Motors, a used car business selling luxury automobiles in Upper Darby, Pennsylvania. (Supp. App. 5a). James Westburg was the owner of the business, and Renwick Mitchell was a salesman. Allen also had his own business in Chester, Pennsylvania, and referred customers looking to buy vehicles to Parkway Motors from his garage. (Def. App. 181, 182). These three defendants were charged with one count of conspiracy

to launder monetary instruments, three counts of money laundering, and one count of false statement on an Internal Revenue Service Form 8300. (Govt. Mem. at 4). The three defendants were tried in the same proceeding. The jury was instructed that the evidence had to be considered separately as to each defendant and each charge. (Tr. # 109, at 10-11). The charges related to numerous transactions that involved sales of luxury cars to young black males from Chester, Pennsylvania, an economically depressed area, whom the defendants were allegedly aware made their living by selling drugs. It was alleged that some such buyers came to Allen looking for cars. Allen referred them to Parkway Motors, which was owned and operated by Westburg. The buyers used straw parties for paperwork, and Parkway Motors accepted cash in excess of \$10,000. Purchases in excess of \$10,000 are required to be reported to the IRS by filing the 8300 Form. However, no 8300 Form was filed by Parkway Motors with regard to the charged transactions. (Govt. Mem. at 5- 20). A jury convicted all three defendants. Allen was sentenced to a term of imprisonment of 51 months. (Govt. Mem. at 4).

Petitioner Sherwood Allen sought federal habeas relief on the ground that his trial counsel was ineffective for the following five reasons.

First, Allen contends that his trial counsel was ineffective for failing to move for a mistrial or a severance when the counsel for co-defendant Westburg “opened the door” to a broader area of inquiry for the government’s cross-examination of Westburg. On direct examination, Westburg’s counsel asked Westburg if he ever had an awareness in his entire career as a car dealer that his customers were tendering money to him from the proceeds of illegal activity. (Tr. #59 at 31). Westburg responded that he had not. (Tr. #59 at 30-31). By asking this question, designed to establish his credibility, Westburg’s counsel opened the door for the

government to attempt to prove that, as to this assertion, Westburg was not truthful. On cross examination, the prosecutor attempted to impeach Westburg's credibility by bringing in evidence related to the "Derrick Way" transaction. (Tr. # 59 at 49-51). That transaction involved the sale of a 1986 Mercedes 300E from Parkway Motors to Derrick Way under the name of a straw party, Arlene Hawkins. The car was seized by the police as related to an illegal drug transaction. At the urging of Way, Westburg falsified a document asserting that Parkway Motors had a lien on the car, even though the car was fully paid. The car was turned over to Parkway Motors. Westburg turned the car over to Way. By falsifying a lease contract, Westburg enabled Way retrieve a car that was subject to confiscation from the police. (Tr. #59 at 49-61). Since, on direct examination, Westburg asserted generally that he had never knowingly involved himself in dealing with drug dealers, he opened the door to rebuttal evidence that he had acted contrary to that assertion. (Tr. # 59 at 43-48). The court instructed the jury immediately after the evidence was admitted, and in the final jury charge, on the limited purpose of this evidence, namely, that the evidence was admitted only as to Westburg. (Tr. #59 at 48; Tr. #93 at 109). The court reasoned that the scope of Westburg's direct examination was very broad, allowing a challenge to his credibility through cross-examination, and that questions regarding this specific transaction could be considered only as to Westburg's credibility. (Tr. #59 at 44-45).

There was evidence in the case about a 1991 transaction involving a Mr. Way and a Miss Hawkins and defendant, Westburg. That evidence was admitted only as to Mr. Westburg, and it was admitted only for the purpose of issues of credibility as to Mr. Westburg. He had testified in effect that he had not knowingly involved himself in any way with a drug transaction, and therefore the Government was permitted to attempt to impeach his credibility by this event. So again that is only for the purpose of judging for you the credibility of Mr. Westburg. It's for a limited purpose. The 1991 automobile transaction is not charged as a part of the indictment. (Jury Charge Tr. #93 at 109).

Nevertheless, Allen now contends that his trial counsel was ineffective for failing to request a mistrial or severance even though this evidence was admitted only as to Westburg. This contention is rejected as frivolous.

Second, Allen contends that his trial counsel was ineffective when he did not object when the prosecutor referred to the car buyers as drug dealers during closing arguments. (Pet. Mot. for Summary Judgment at 3). Characterizing this case as one in which the defendants gave drug dealers a place to spend their drug money, the prosecutor reminded the jury of the evidence that would support this conclusion during the closing argument. (Tr. #93 at 3-33). Allen argues that his trial counsel was ineffective for not objecting to this characterization and not moving for a mistrial. (Pet. Mot. for Summary Judgment at 3). This contention is rejected as frivolous.

Third, he argues that his trial counsel was ineffective when he did not cross-examine Anthony Johnson, a government witness and drug dealer and car buyer, with the buyer's order showing that the BMW 535 he bought was purchased by Westburg at a Newtown Square, Pennsylvania, auction, rather than at an auction in Manheim, Pennsylvania. Johnson testified in detail how he purchased the car from defendant Allen. (Tr. #53 at 122-37). Johnson testified during direct examination that in 1992 when he bought the car, he was making his living by selling drugs, and that he went to an auction in Manheim with Allen and Westburg to purchase the car he desired. He also testified that he put \$12,000 down in cash, which was arranged in thousand dollar stacks, in the name of the straw party, Mel Hunter. (Tr. #53 at 118-28). Allen now contends that his trial counsel was ineffective for failing to cross-examine Johnson with a document that would prove that Parkway purchased this car from a private dealer in Newtown Square, Pennsylvania, and that Johnson's entire testimony had to be false. Allen argues that the

testimony was crucial, because, if proven to be false, it would have shown that Allen was not involved in the transaction as alleged. This contention is rejected as frivolous.

Fourth, Allen contends that his trial counsel was ineffective when he failed to present any evidence seeking a downward departure at sentencing. At sentencing, Allen's trial counsel asked the court to consider the fact that Allen only played a minor role in this scheme and that he accepted responsibility for his action. Defendant produced three character witnesses at sentencing (Tr. #96 at 17, 22-33). The court found no basis for downward departure. (Tr. #96 at 17). This contention is rejected as frivolous.

Finally, Allen complains that the district court did not charge the jury with regard to agency, even though Allen was not charged with criminal responsibility based upon an agency relationship. The court instructed on conspiracy, since he was charged with a criminal conspiracy. (Tr. #93 at 110-12). The court instructed that every member of a conspiracy, who is a knowing participant in it, is an agent for every other member of the conspiracy, and is responsible for the acts of the conspirators done in furtherance of the conspiracy, even if the member does not know the specific act undertaken by the co-conspirator. (Tr. #93 at 110). The court further instructed that the conspiracy law makes no distinction between someone who is a "big fish" and a "little fish," and that all members of the conspiracy are equally responsible as participants, as co-conspirators. (Tr. #93 at 110). The trial judge instructed:

So the essence of a conspiracy is that every person who is a knowing participant in the conspiracy is an agent every other person in the conspiracy, and is responsible for the acts and conduct of that other person, that other member of the conspiracy, when that act is done in furtherance of the common goals and aims of the conspiracy. (Tr. #93 at 110).

Allen now contends that his counsel was ineffective when he failed to object to the jury

instruction and to demand an instruction that Allen, as an employee of Parkway, was not responsible for the acts of his employer, Westburg. (Pet. Mot. under 28 U.S.C. § 2255, ¶ 3). This contention also is rejected as frivolous.

### III. DISCUSSION

The United States Supreme Court established a two-part standard for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984).

First, the defendant must show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 687. This requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Second, the defendant must show that the deficient performance prejudiced the defense. Id. This requires that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Unless defendant makes both showings, the court cannot find that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

As to the first element, a petitioner who asserts that counsel's performance was deficient must show that counsel's representation fell below the objective standard of reasonableness. Id. at 688. What is reasonable must be judged in light of all the circumstances. Id. at 688. However, a court's "scrutiny of counsel's performance must be highly deferential." Id. at 689.

Second, a mere mistake on the part of the counsel is insufficient to establish deficient representation. Even if a defendant shows that particular errors of counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense. Id. at 693. It is

not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding, since virtually every act or omission of counsel would meet that test. Id. The defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The standard for determining whether habeas relief must be granted is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)) (allowing a first-degree murder conviction to stand despite the failure by defense counsel to object to the prosecutor's implications that the defendant's post-Miranda silence impeached his credibility).

Even when improper comments are made in trials, usually their effect may be cured by the judge's timely and explicit action. Since the effect of the comment can be sufficiently neutralized by the trial judge's immediate and effective action, an error by such a comment would not have substantial effect on the jury's verdict. In Moore v. Morton, 255 F. 3d 95, 103 (3d Cir. 2001), the third circuit affirmed the district court's findings that the prosecutor's conduct, considered within the context of the entire trial, including the judge's curative instructions, the evidence and the correct jury charge, did not "infect the trial with unfairness." See also, State v. McLaughlin, 226 A.2d 47, 48 (N.J. Super. 1967); Peel v. United States, 316 F.2d 907, 912 (5th Cir. 1963).

Using the Strickland standard, the third circuit follows the principle that the evaluation of reasonableness must begin with "a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689; See also Government of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1431 (3d Cir. 1996) (refusing to find ineffective representation despite counsel’s failure to demand a mistrial after it became apparent that a juror had been exposed to outside information.). The burden of demonstrating Strickland’s second element falls upon the petitioner. United States v. Nino, 878 F.2d 101, 105-06 (3d Cir. 1989).

After consideration of Allen’s claims, the court finds that none of them amounts to such a serious error as to deprive him of his constitutional right to counsel. Petitioner is compelled to demonstrate (1) that counsel acted unreasonably, and (2) that such unreasonable actions substantially and prejudicially affected his ability to get a fair trial. Strickland, 466 U.S. at 687. Even if this court were to accept his allegations as accurate, Allen has not satisfied these standards.

1. Allen’s first allegation refers to the testimony of co-defendant Westburg. Allen contends that his trial counsel was ineffective for failing to request a mistrial or a severance of trials when Westburg’s attorney “opened the door” to a broader area of inquiry for the government’s cross-examination. He argues that the evidence of the prior illegal act of his co-defendant, which was not charged in this case, is irrelevant and prejudicial, and that his trial counsel was obligated to move for a mistrial or a severance, since its prejudicial impact necessarily “spilled over” against him. This claim does not have merit, because the trial court specifically gave a curative instruction on the limited purpose of this evidence.

The district court has wide discretion in determining the permissible scope of cross-

examination. United States v. Dansker, 537 F.2d 40, 60 (3d Cir. 1976). The nature of a crime is a relevant fact for the reason that it is rightfully assumed that some types of crimes have a more immediate direct bearing than others on the element of veracity. Beaudine v. United States, 368 F.2d 417, 421 (5th Cir. 1966).

In this case, the district court found that the evidence was properly introduced on cross-examination because it bore on the witness's credibility and knowledge, because Westburg's intentional assistance was relevant to rebut the defense that he did not know that the money came from proceeds of illegal activities. (Tr. #59 at 31, 44-45).

Further, a defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than that against him. United States v. Dansker, 537 F.2d at 62. Rather, in determining whether disparate proofs require a severance, the proper inquiry is whether the evidence is such that the jury cannot be expected to "compartmentalize" it and then consider it for its proper purposes. Id. (citing United States v. De Larosa, 450 F.2d 1057, 1065 (3d Cir. 1971)). The court must consider all the circumstances in determining whether the counsel's assistance was defective. Strickland v. Washington, 466 U.S. at 690.

In this case, the jury was given a curative instruction on the limited purpose of the evidence and it should be assumed that the jury was able to compartmentalize it. Further, the prompt and effective action by the judge cured any potential error. State v. McLaughlin, 226 A.2d at 48. The failure of Allen's counsel to move for a mistrial did not fall below an objective standard of reasonableness under the overall circumstances, nor did it have any prejudicial effect on the outcome of the trial. Even if any harm was done by failing to move for a mistrial or a severance after Westburg's testimony, such harm was cured by the trial court's specific

instruction to the jury that this evidence was admitted only as to Mr. Westburg, and that it was admitted only for the purpose of issues of credibility as to Mr. Westburg. (Tr. #59 at 48; Tr. #93 at 109). Therefore, Allen fails to establish both prongs of Strickland; first, his counsel's failure to move for severance was not deficient, and second, this failure did not prejudice the defense.

2. Second, Allen contends that his trial counsel was ineffective when he did not object when prosecutor referred to the car buyers as drug dealers during closing arguments. This claim overlooks the fact that there was substantial evidence supporting this characterization; the buyers testified that they were drug dealers. Government witnesses Anthony Johnson, Joseph Jenkins, and Chris Jones, each admitted to the jury that they were drug dealers when they bought cars from the defendants. (Tr. #53 at 119-21 (Johnson); Tr. #54 at 43-45 (Jenkins); Tr. #53, at 11-13 (Jones)). Further, special agent James Agnew testified that Allen admitted to him that he thought the car purchasers at issue were drug dealers. (Tr. #53 at 155). In addition to the substantial evidence proffered at the trial, the district judge cautioned the jury not to consider the closing argument as evidence. The judge instructed the jury:

The evidence is only the sworn testimony of witnesses, people who testified from the witness stand as they were testifying; any documents admitted into the record, and any stipulations of fact between the attorneys. That's it. Nothing else is evidence. Opening statements, closing arguments, the charge on the law, all are not evidence. (Jury Charge, Tr. #93 at 97).

Therefore, Allen has not demonstrated that his counsel's performance was deficient when he did not object the prosecutor's characterization of the car buyers as drug dealers. He also failed to show that this omission had any prejudicial effect on the judgment by virtue of the judge's curative instruction.

3. Allen's third allegation of error claims that his trial counsel was ineffective when he

did not cross-examine Anthony Johnson with the buyer's order indicating that the BMW 535 was purchased in Newtown Square, Pennsylvania, rather than Manheim, Pennsylvania. Allen argues that if the jury knew that Parkway obtained the car from the dealership in Newtown Square, and not from the auction in Manheim, it would have shown that Johnson's testimony was inaccurate or fabricated.

This claim, however, fails to establish that the trial counsel's performance was deficient; i.e. , that the counsel made errors so serious that he was not functioning within the range of competence demanded of attorneys in criminal cases. Strickland, 466 U.S. at 687.

Allen fails to establish how his trial counsel's decision not to cross-examine Johnson with the paperwork at issue was an error so serious that it showed that he was not functioning within the range of competence demanded of attorneys in criminal cases. Assuming arguendo, that Johnson's testimony was fabricated as to the place of the public auction, as Allen contends, nevertheless, there was no dispute that the vehicle was purchased through Parkway Motors by a drug dealer using a straw party. Therefore, Allen fails to demonstrate that first, his counsel was deficient, and second, he suffered any prejudice as a result of his trial counsel's decision not to cross Johnson about the paperwork from the dealership.

4. Allen's fourth allegation claims that his trial counsel failed to present any evidence seeking a downward departure at sentencing. In United States v. Sally, 116 F.3d 76, 81 (3d Cir. 1997), the third circuit held that when an offender demonstrates an exceptional or extraordinary degree of responsibility, a court may depart downward. The district court must determine whether a defendant's post-conviction rehabilitation efforts are remarkable and indicate real, positive behavioral change. Id. In reaching this decision, the district court should set forth

specific findings concerning what post-conviction rehabilitation efforts demonstrated a degree of acceptance of responsibility expressed by post-offense rehabilitation that is substantially in excess of that of ordinarily present. Id. The third circuit held that there must be evidence demonstrating that a defendant has made concrete gains toward “turning his life around” before a sentencing court may properly rely on extraordinary post-conviction rehabilitation efforts as a basis for a downward departure. Id. The third circuit views the opportunity for downward departures based on extraordinary or exceptional post-conviction rehabilitation efforts as a chance for a truly repentant defendant to earn reduction in their sentences based on a demonstrated commitment to repair and to rebuild their lives. Id. Post-offense rehabilitation may not serve as a basis for a downward departure unless the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present. United States v. Sally, 116 F.3d at 80 (citing United States v. Lieberman, 971 F. 2d 989, 996 (3d Cir. 1992)).

Allen contends that he is entitled to a downward departure based on post-conviction rehabilitation and that his trial counsel was ineffective for failing to present evidence and seeking a downward departure. Allen claims to have withdrawn from the conspiracy for a period of at least five years prior to the indictment, and therefore qualifies for a downward departure under the principles set forth in Sally.

Allen argues that he should receive a downward departure based on post-offense rehabilitation, merely because of his lack of criminal activity during the passage of time between the end of the conspiracy and the indictment. However, he offers no cognizable basis for the conclusion that merely refraining from participating in criminal activity demonstrates

commitment to repair and rebuild one's life to an extraordinary or exceptional degree. Simply refraining from criminal conduct is not enough to meet the Sally test. Id. at 81. (Govt. Mem. at 28). Furthermore, Allen's trial counsel at sentencing did bring forth three character witnesses for Allen and did ask the court to consider that Allen played only a minor role in this entire scheme. (Tr. #96 at 22-31). Therefore, the performance of Allen's counsel at sentencing was not deficient because he had no ground to move for a downward departure based on post-conviction rehabilitation. Thus, this claim for relief must be denied.

5. Finally, Allen contends that the district court improperly instructed the jury, in that it never instructed the jury that as an employee, Allen could not be responsible for acts of his employer. (Govt. Mem. at 24-26). Allen further objects to the charge because he claims that the court referred to government witness Anthony Johnson's testimony when it charged the jury on the issue of conspiracy.

Since Allen was charged with conspiracy, an instruction on the definition on conspiracy was necessary. An instruction on agency and not conspiracy would have constituted trial error.

Therefore, the performance of Allen's trial counsel was not deficient, and the claim that his counsel was ineffective lacks merit.

#### **IV. CONCLUSION**

Petitioner has failed to establish ineffectiveness of counsel. The motion to vacate is denied as frivolous, as being totally contrary to the record evidence and law.

An appropriate order follows.

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

UNITED STATES OF AMERICA                   :       CRIMINAL NO.     98-91-03  
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  :  
SHERWOOD L. ALLEN                         :       CIVIL NO.     00-2994

**ORDER**

AND NOW, this \_\_\_\_ day of September 2001, for the reasons detailed in the above memorandum, it hereby is ORDERED that Petitioner's Motion Filed Pursuant to 28 U.S.C. § 2255 is DENIED. There is no probable cause for a certificate of appealability to issue.

BY THE COURT:

\_\_\_\_\_  
JAMES T. GILES                               C.J.

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