

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

UNITED STATES OF AMERICA : CRIMINAL NUMBER  
: NO. 98-233  
vs. :  
: CIVIL ACTION  
JOSEPH FAHEY : NUMBER 00-6185

**MEMORANDUM AND ORDER**

**YOHN, J.**

**JUNE , 2002**

On August 6, 1998 Joseph Fahey was convicted by a jury of transporting stolen figurines across state lines. On November 10, 1998, I sentenced him to twenty-four months in prison, followed by three years on supervised release. Fahey appealed his sentence to the United States Court of Appeals for the Third Circuit which affirmed his conviction, but remanded on the issue of restitution to reflect only the amount of goods sold out of state (an issue not discovered until after sentencing). On December 13, 1999, the restitution amount was adjusted accordingly. Fahey completed his prison sentence on September 5, 2001 and was released from federal custody. He is still considered to be “in custody” for purposes of this motion because he is on supervised release. *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)(holding that parole alone is enough of a deprivation of liberty to satisfy the “in custody” requirement).

Fahey now challenges his sentence pursuant to 28 U.S.C. § 2255.

**DISCUSSION**

Most of Fahey’s claims fail because they should have been raised on direct appeal.<sup>1</sup>

A defendant cannot use § 2255 to raise for the first time issues that could have been raised on direct

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<sup>1</sup> Habeas review is an extraordinary remedy and “will not be allowed to do service for an appeal.” *Reed v. Farley*, 512 U.S. 339, 354 (1994) (quoting *Sunal v. Large*, 332 U.S. 174, 178 (1947)); *see also Davis v. United States*, 417 U.S. 333, 345 - 46 (1974) (same).

appeal. If the defendant fails to raise a claim on direct appeal, the claim is procedurally defaulted, or waived, and cannot be collaterally reviewed pursuant to § 2255, unless the defendant can show cause for his default and actual prejudice attributable to the alleged constitutional violation. *Davis v. United States*, 411 U.S. 233, 243 - 45 (1973).<sup>2</sup> Cause here is defined as whether there was some objective factor external to the defense that impeded counsel's efforts to comply with procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488 - 89 (1986). Prejudice must be more than the impact of minor attorney error, *id.*; it must be from errors that worked to the defendant's "actual and substantial disadvantage," thereby "infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).<sup>3</sup>

In his Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 and his Addendum thereto, defendant raises a number of issues which are precluded because he failed to raise them on direct appeal and "cause and prejudice" are not alleged.

First, defendant contends he made a "coerced confession" when he was questioned by the FBI agents because they told him that he was only a witness and not a suspect. This claim fails because it was not raised on direct appeal. Moreover, even if the FBI agents told the defendant that he was not a suspect, only a witness, such an innocuous form of trickery would not invalidate whatever statement he may have made as a result thereof. Any allegation that the agents were not

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<sup>2</sup> See also *United States v. Frady*, 456 U.S. 152, 167 - 68 (1982) (expanding and elaborating on the 'cause and prejudice' standard).

<sup>3</sup> See generally *United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993) ("Since November 1, 1987, the effective date of the Sentencing Reform Act, defendants have had ample opportunity to raise their sentencing objections in the sentencing court and, if aggrieved by its rulings, to appeal directly. Therefore, we hold *Frady's* cause and prejudice standard applies to §2255 proceedings in which a petitioner seeks relief from alleged errors in connection with his sentence that he has not directly appealed.").

completely truthful concerning whether he might be prosecuted is clearly not sufficient to be considered so coercive as to create a constitutional violation. Defendant makes no other allegations as to the claimed “coercion” and, indeed, he was interviewed in his own store, was not in custody at the time and spoke to the agents voluntarily.

Defendant’s second contention is that his constitutional privilege against self-incrimination was violated by the FBI agents because they told him that he was only a witness and not a suspect and did not give him a *Miranda* warning. Again the claim fails because it was not raised on direct appeal. Moreover, even assuming that the statement of facts by the defendant is correct, those facts do not constitute a *Miranda* violation because defendant was clearly not in custody at the time of his statement since defendant concedes that the agents met him at his own store and did not arrest him.

Defendant’s next contention is that the FBI agents conducted an unconstitutional search and seizure at his home because they pressured his fifteen year old daughter into allowing them into the home and searching the premises. Once again, the claim fails because he did not raise it on direct appeal. Moreover, defendant fails to point out that in addition to his fifteen year old daughter consenting to allow the agents into his home on April 12, 1998, his wife was also present at the same time. In fact, Special Agent Jay B. Heine testified that “we were at his house looking for him and his wife let us in and we noticed two (figurines) . . . in his china cabinet or whatever you call it.” Transcript, August 5, 1998, page 250a. Thus, the contested figurines were in plain view. There is no other allegation that either defendant’s daughter or wife was pressured in any way.

Next defendant contends that the FBI agents knowingly committed perjury. Again, this issue fails because it was not raised on direct appeal. Moreover, defendant alleges no facts as to

the specific statements which he challenges other than his claim that because the alleged search of his home was illegal the prosecution was allowing an agent to perjure himself. This is clearly a non-sequitur.

Defendant then contends that he was subject to cruel and unusual punishment during his imprisonment because the presentence report included a conviction that was over thirteen years old which affected his prison classification. Under Federal Rule of Criminal Procedure 32, Fahey had the opportunity to object to the contents of his presentence report at and before the time of his sentencing and did not do so. Moreover, he failed to raise his objection on appeal to the Third Circuit. Nor does he state any legal basis that prohibits the inclusion of a thirteen year old conviction in his presentence report. Finally, because defendant has completed his period of incarceration there is no relief which the court could grant in a § 2255 proceeding with reference to his conditions of confinement.

Defendant's sixth contention is that he was subjected to psychological punishment while in prison in that he was not allowed to use the television room, he was given unusual and experimental medical treatment at FCI Petersburg and he was placed in the "hole" without an administrative complaint or reason. Again, because defendant has completed his period of incarceration, there is no relief which the court could grant in a § 2255 proceeding with reference to his conditions of confinement.

Next, defendant makes a claim that the court sentenced him for something that he had not been charged with which was not a federal crime. He also states that he was sentenced in violation of the *Apprendi* decision. Neither of these claims is comprehensible to the court as stated by the defendant.

Defendant's final two claims relate to allegations of ineffective assistance of counsel. The law in this circuit is well-established that claims of ineffective assistance of counsel are ordinarily not cognizable on direct appeal. *United States v. Tobin*, 155 F.3d 636 (3<sup>rd</sup> Cir. 1998). Ineffective assistance of counsel is sufficient to meet the "cause" standard of *Fradley*. In assessing whether there has been ineffective assistance of counsel, defendant must show that his defense counsel's performance was deficient and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In assessing the first prong of the *Strickland* test, the court must determine whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The court must defer to counsel's tactical decisions, not employ hindsight and give counsel the benefit of a strong presumption of reasonableness. *See id.* at 689 ("Judicial scrutiny of counsel's performance must be highly deferential...."); *Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1431 (3d Cir.1996). In assessing prejudice, the court must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Such a "reasonable probability" is one "sufficient to undermine confidence in the outcome of the proceeding." *Id.*, at 694. As the Third Circuit has reaffirmed, "there will be no award of relief unless the defendant affirmatively establishes the likelihood of an unreliable verdict." *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993).

Defendant first claims that his trial counsel was ineffective because he was denied his right of appeal because his trial counsel had vertigo which created a conflict of interest. Defendant is obviously incorrect factually because the record reflects that he did in fact appeal his conviction and sentence to the Third Circuit and the appeal was fully litigated. His allegation that

his trial counsel had vertigo and as a result there was a conflict of interest is another non-sequitur.

Finally, defendant contends that his appellate counsel was ineffective because she refused to file an ineffectiveness claim against trial counsel. This claim obviously has no merit since both attorneys were members of the Defender Association of Philadelphia, Federal Court Division and as such appellate counsel would be prohibited from raising the ineffectiveness of trial counsel.

Considering all of the issues raised by defendant, it is clear that none has merit, or even arguable merit.

An appropriate order follows.

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**ORDER**

**AND NOW**, this        day of June, 2002, upon consideration of defendant's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 and the government's response thereto, **IT IS HEREBY ORDERED** that the motion is **DENIED**.

**IT IS FURTHER ORDERED** that the defendant having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

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William H. Yohn, Jr., Judge