

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

ARTHUR WILLIAMS : CIVIL ACTION

v. :

UNITED STATES OF AMERICA : NO. 01-5903

UNITED STATES OF AMERICA : CRIMINAL ACTION

v. :

ARTHUR WILLIAMS : NO. 00-361-03

MEMORANDUM

Dalzell, J.

August 7, 2002

Arthur Williams was indicted on two counts of armed bank robbery and two counts of brandishing a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. §§ 2113(d) and 924(c). These charges arose out of a January 31, 2000 robbery of First Republic Bank and a March 13, 2000 robbery of Mellon Bank, both in Philadelphia. On October 6, 2000, Williams pleaded guilty to all counts, and on January 19, 2001, we sentenced him to 447 months in prison, to be followed by three years of supervised release.

Before us now is Williams's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, in which he challenges his conviction and sentence in four respects. First, Williams argues that this Court was without subject matter jurisdiction over the indictment. Second, he contends that he was convicted in violation of the Double Jeopardy Clause of the Fifth Amendment with respect to his conviction under 18 U.S.C. § 924(c) for the robbery of the second

bank. Third, he asserts his counsel was ineffective under the Sixth Amendment for failing to consult with him in a meaningful manner before he pleaded guilty and was sentenced. Last, he maintains that counsel was also ineffective in failing to file a notice of appeal.

The Government responds that, while the first two arguments Williams makes are frivolous and can be dismissed without a hearing, a hearing is necessary for Williams's ineffective assistance of counsel claims. For the reasons below, we agree with the Government. We briefly write to explain our reasons and elucidate the scope of the evidentiary hearing.

Analysis

Williams, as a prisoner in federal custody, may move under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or [] the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." Id. To prevail, he must demonstrate a constitutional error of such magnitude that it had a "substantial and injurious effect or influence" on the criminal proceedings. Brecht v. Abramson, 507 U.S. 619, 637-38 (1993); United States v. Khalil, Crim. No. 95-577-01, 1999 U.S. Dist. LEXIS 10017, at *5-6 (E.D. Pa. June 30, 1999). The Court must order an evidentiary hearing on the motion "unless the motion and

the files and records of the case conclusively show" that Williams is entitled to no relief. § 2255; United States v. Day, 969 F.2d 39, at 41-42 (3d Cir. 1992).

Williams's first two challenges fail as a matter of law. Williams's attack on federal subject matter jurisdiction over the indictment may be disposed of swiftly. Williams was indicted pursuant to 18 U.S.C. §§ 2113(d) and 924(c). Both criminal offenses are valid exercises of Congress's legislative power. Under the Commerce Clause¹, Congress may regulate any activity that substantially affects interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995). Robbery of a federally-insured bank is unquestionably such an activity. See United States v. Spinello, 265 F.3d 150, 159 (3d Cir. 2001). Carrying a firearm during and in relation to such bank robbery necessarily affects interstate commerce as well.²

Likewise, Williams's challenge to his convictions arising from the second bank robbery, as violating the Double Jeopardy Clause, is also devoid of merit. The Double Jeopardy Clause³ forbids multiple prosecutions for the same conduct unless

¹ The Commerce Clause of the United States Constitution provides, "The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

² Cf. United States v. Singletary, 268 F.3d 196 (3d Cir. 2001) (upholding Congress's Commerce Clause authority to outlaw carrying of a firearm that has traveled in interstate commerce).

³ The Double Jeopardy Clause of the Fifth Amendment
(continued...)

each offense involves an element the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Bentancourt, 116 F.3d 74, 75 (3d Cir. 1997). Williams robbed First Republic Bank on January 31, 2000 and Mellon Bank on March 13, 2000. The Government charged him with two counts of bank robbery, under 18 U.S.C. § 2113(d), and two counts of carrying a firearm during and in relation to a crime of violence, under 18 U.S.C. § 924(c). While it is true that Williams was twice charged for the same offense, he was twice charged for the same offense only because he committed two bank robberies. Since he was not twice prosecuted for "a single course of conduct," the Double Jeopardy Clause is not implicated. See Garrett v. United States, 471 U.S. 773, 787 (1985) (defining "same conduct" as "a single course of conduct" every aspect of which is as relevant to one criminal charge as the other). The Double Jeopardy Clause does not stop the Government from prosecuting Williams for violating the same laws twice.

Williams next raises two claims of Sixth Amendment ineffective assistance of counsel⁴. To prove that counsel was ineffective Williams must demonstrate (1) counsel's

³(...continued)
states, "No person shall...be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

⁴ The Sixth Amendment states that "the accused shall enjoy the right...to have the Assistance of Counsel for his defence," U.S. Const. amend. VI., and guarantees "reasonably effective" legal assistance, Strickland v. Washington, 466 U.S. 668, 687 (1984).

representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced him.

Strickland, 466 U.S. at 688, 694; Solis v. United States, 252 F.3d 289, 293 (3d Cir. 2001).

Williams first alleges that his counsel did not interview him before his guilty plea. He states: "counsel did not, and would not come to conduct any pre-trial interviews with his client (The Movant), before telling Movant 'I can't do anything for you plead guilty [sic]."⁵ Mem. L. in Supp. Mot. to Vacate, at 5. Williams alleges that counsel did not inform him about the benefits and disadvantages of pleading guilty and of the sentence he could face under the Sentencing Guidelines. Williams claims that he did not know the seriousness of the mandatory minimum sentence under the Sentencing Guidelines before he pleaded guilty, and that had he known that he would have received a three-level reduction for timely acceptance of responsibility, see U.S.S.G. § 3E1.1(b)(2), he would have pleaded guilty earlier. Mem. L. in Supp. Mot. to Vacate, at 5-6.

As there is no record of defendant's conversations with counsel,⁶ we cannot decide the veracity of these allegations without an evidentiary hearing. While the Sixth Amendment does

⁵ According to defendant, counsel's only pre-guilty-plea interview with him consisted of the following: "Movant saw Attorney [] at his arraignment, for about five(5) minutes, behind the screen at 6th & Market St." Id.

⁶ We note without elaboration that we covered all these subjects in the plea colloquy.

not demand that defense counsel "give each defendant anything approaching a detailed exegesis of the myriad arguably relevant nuances of the Guidelines," it is also true that "a defendant has the right to make a reasonably informed decision whether to accept a plea offer." Day, 969 F.2d at 43. The plea bargain process is a critical stage at which the right of effective assistance of counsel attaches. Id. Advice about the desirability of a plea bargain and possible sentence exposure can be 'cause' for ineffective assistance of counsel under Strickland. Both quantitatively and qualitatively, the consultations Williams says he received raise the issue of whether defense counsel's performance was professionally unreasonable. Assuming defense counsel's performance was professionally unreasonable (as we must at this procedural juncture), there is a reasonable probability that the outcome of the proceeding would have been different, amounting to prejudice, see Strickland, 466 U.S. at 694, in that Williams may have admitted to his criminal responsibility earlier and received an additional one-level reduction for timeliness at sentencing.⁷

A hearing is required to determine whether Williams was advised in a reasonably effective manner about pleading guilty and sentencing and, if not, whether any prejudice came of it.

⁷ As such reduction would change his sentencing range to 441 to 455 months, there is indeed prejudice, even though the sentence he received is within the hypothesized lower range.

Williams also claims that his counsel was ineffective for not filing a notice of appeal. He alleges: "[A]t sentencing, counsel[]stated to Movant 'Don't worry about the sentence, we'll appeal it, all right. Movant stated O.K. and as to date Movant has not heard anything from counsel.[']" Mem. L. in Supp. Mot. to Vacate, at 4. Counsel did not file a notice of appeal.

This allegation warrants an evidentiary hearing. If Williams directed counsel to file an appeal but counsel did not file an appeal, counsel performed deficiently. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000); Solis v. United States, 252 F.3d 289, 293 (3d Cir. 2001). Prejudice will be presumed. Solis, 252 F.3d at 293-94. Prejudice under Strickland is met by the fact that counsel's deficiency prevented defendant from pursuing an appeal he otherwise would have taken. Id.; Flores-Ortega, 528 U.S. at 484 (holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal).

Here, Williams asserts that at his sentencing hearing his counsel told him he would appeal and Williams approved. Allegedly, his counsel had no further consultation with him and never filed an appeal. This allegation, if proved, may establish ineffective assistance of counsel. Counsel may have been ineffective for disobeying the instruction of his client to appeal. Id. at 477; Solis, 252 F.3d at 294. Counsel

alternatively may have been ineffective for failing to consult with his client, within the standards of Flores-Ortega, 528 U.S. at 477-87; see also Solis, 252 F.3d at 293-94. In either event, Williams would be entitled to the relief of an appeal, Flores-Ortega, 528 U.S. at 484; Solis, 252 F.3d at 294, which may be effected by resentencing him, United States v. Lowery, No. 99-CR-267, 2002 U.S. Dist. LEXIS 12271, at *12 (E.D. Pa. June 19, 2002); United States v. Soto, 159 F. Supp. 2d 39, 50 (E.D. Pa. 2001).

At all events, we need an evidentiary hearing to afford Williams the opportunity to prove and particularize his claim, and the Government the opportunity to rebut it.

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ORDER

AND NOW, this 7th day of August, 2002, upon
consideration of Arthur Williams's motion to vacate, set aside or
correct his sentence pursuant to 28 U.S.C. § 2255, and the

Government's response thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. Grounds two and three of the motion (subject matter jurisdiction and Double Jeopardy) are DENIED WITH PREJUDICE, and, defendant not having made a substantial showing of the denial of a constitutional right, we decline to issue a certificate of appealability on these grounds, pursuant to 28 U.S.C. § 2253;

2. An evidentiary hearing shall COMMENCE at 2:00 p.m. on September 27, 2002, in Courtroom 10B, limited to the claims of ineffective assistance of counsel for (1) failure adequately to consult with Williams about plea bargaining and sentencing and (2) failure to file a notice of appeal; and

3. The Defender Association, Federal Division, is APPOINTED to represent Arthur Williams in the evidentiary hearing pursuant to Rule 8(c) of the Rules Governing Habeas Corpus Proceedings and 18 U.S.C. § 3006A.

BY THE COURT:

Stewart Dalzell, J.