

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 97-0625
v.	:	
	:	(CIVIL ACTION
DWAYNE STEVENS	:	NO. 02-0704)

MEMORANDUM AND ORDER

HUTTON, J.

September 19, 2002

Currently before the Court is Petitioner Dwayne Stevens's Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 85), the Government's Response to Stevens' Motion to Vacate, Set Aside, or Correct a Sentence (Docket No. 91), and Stevens's Response to the Government's Answer (Docket No. 92). For the following reasons, the Court denies Petitioner the relief sought.

I. BACKGROUND

Dwayne Stevens ("Petitioner") committed two separate carjacking offenses - one on February 6, 1997 and one on February 11, 1997. On November 20, 1997, Petitioner was indicted on two counts related to the February 11, 1997 offense. Petitioner was indicted for one count of carjacking, in violation of 18 U.S.C. § 2119, and one count of carrying a firearm while committing a violent crime, in violation of 18 U.S.C. § 924(c). Following an unsuccessful suppression hearing, Petitioner pleaded guilty to both counts on February 2, 1998. On March 26, 1999, Petitioner was

charged by information with one count of carjacking arising from the February 6, 1997 incident. Petitioner pleaded guilty to that charge on May 18, 1999. The cases were consolidated for sentencing.

Stevens was sentenced on August 24, 1999. For the February 11, 1997 offense, the Court sentenced Petitioner to a term of 120 months of imprisonment for the carjacking count and a mandatory consecutive term of 120 months of imprisonment for the firearm count, to be followed by a three-year term of supervised release. For the February 6, 1997 offense, the Court sentenced Petitioner to a term of 120 months of imprisonment and three years supervised release, both to be served concurrently with the other sentence.

Following his sentencing, Petitioner appealed of his sentences to the United States Court of Appeals for the Third Circuit. On August 14, 2000, the judgment of the Court was affirmed. United States v. Stevens, 223 F.3d 239, 241 (3d Cir. 2000). The Supreme Court of the United States subsequently denied Petitioner's Petition for a Writ of Certiorari. 531 U.S. 1179 (2001).

As a result, Petitioner filed the instant Motion pursuant to 28 U.S.C. § 2255 raising multiple grounds for relief. First, Petitioner raises two allegations of ineffective assistance of counsel: (1) counsel failed to effectively argue a lack of exigent circumstances at Petitioner's suppression hearing; and (2) counsel failed to effectively argue a motion to dismiss pursuant to the

Speedy Trial Act. Second, Petitioner argues that the indictment was insufficient to allow the Court to sentence him to a ten-year enhancement for using a short-barreled rifle under 18 U.S.C. § 924(c). Finally, Petitioner argues that Count Two of the indictment against him is defective for failure to allege that he used a firearm "in furtherance of" a violent crime under 18 U.S.C. § 924(c).

II. LEGAL STANDARD

A prisoner in custody pursuant to a sentence imposed by a federal court who believes "that the sentence 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 is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. The district court is given discretion in determining whether to hold an evidentiary hearing on a prisoner's motion under section 2255. Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the court must determine whether the petitioner's claims, if proven, would entitle him to relief and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. See Gov't of the Virgin Islands v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994).

Accordingly, a district court may summarily dismiss a motion

brought under section 2255 without a hearing where the "motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" U.S. v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting U.S. v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)); Forte, 865 F.2d at 62. For the reasons outlined below, the Court finds that there is no need in the instant case for an evidentiary hearing because the evidence of record conclusively demonstrates that Petitioner is not entitled to the relief sought.

III. DISCUSSION

A. Ineffective Assistance of Counsel

Petitioner raises two claims primarily based on ineffective assistance of counsel, as well as other ineffective assistance claims that appear to be raised strictly to avoid procedural default. This section discusses the two claims which are primarily based on an ineffective assistance of counsel argument. The other claims are discussed below.

1. The Strickland Test

The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to reasonably effective assistance of counsel. See U.S. Const. amend. VI. A petitioner's claim of ineffective assistance of counsel is governed by the standard promulgated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). In Strickland, the Supreme Court stated that an

ineffective assistance of counsel claim requires the petitioner to show: (1) that their counsel's performance was defective; and (2) that the deficient performance prejudiced the defense. Id.; see also Meyers v. Gillis, 142 F.3d 664, 666 (3d Cir. 1998) (stating that to be entitled to habeas relief, the defendant must establish ineffectiveness as well as resultant prejudice). Counsel's performance is to be measured against a standard of reasonableness. In analyzing that performance, the court must make "every effort . . . to eliminate the distorting effects of hindsight," and determine whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

Once it is determined that counsel's performance was deficient, the court must determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Only after both prongs of the analysis have been met will the petitioner have asserted a successful ineffective assistance of counsel claim. Moreover, "judicial scrutiny of an attorney's competence is highly deferential." Diggs v. Owens, 833 F.2d 439, 444-45 (3d Cir. 1987).

2. Failure to Effectively Argue at Suppression Hearing

First, Petitioner alleges that defense counsel was ineffective

in that she failed to effectively argue a lack of exigent circumstances at Petitioner's suppression hearing. See Pet'r § 2255 Mem. at 1-3. In the memorandum accompanying his motion, Petitioner essentially reargues the validity of the Court's decision to deny his suppression motion. Id. However, in assessing the first Strickland prong, the Court need not determine whether exigent circumstance actually existed such that the evidence in question should have been excluded. Instead, the Court's role is to evaluate the performance of defense counsel's attempts to exclude this evidence.

Defense counsel filed a motion to suppress on December 17, 1997. This motion argued that no exigent circumstances existed to support the warrantless search conducted in this case. A hearing on the motion was conducted on February 2, 1998. At that hearing, the government called as witnesses three Philadelphia police officers involved in Stevens's arrest. Although defense counsel called no witnesses of her own, she conducted what the Court described as "rigorous cross-examination" of the Government's witnesses. Gov't Resp. to Pet'r § 2255 Mot. at 3. After consideration of the evidence, the Court denied Petitioner's motion to suppress, finding the officers to be "eminently credible officers . . . who speak the truth." Id. Based on the record, it is clear that defense counsel acted reasonably in seeking to exclude the evidence in question. Counsel moved to suppress the

evidence and tried in vain to undermine the Government's case. Petitioner is not entitled to claim ineffective assistance of counsel merely because he lost the motion. As a result, Petitioner's first ineffective assistance of counsel claim fails.

3. Failure to Effectively Argue Speedy Trial Act Violation

Next, Petitioner claims that counsel was ineffective "in her failure to properly argue favorable case authority" that his indictment be dismissed under the Speedy Trial Act, 18 U.S.C. § 1361. Pet'r § 2255 Mem. at 9-12. Petitioner acknowledges that counsel filed a motion to dismiss his indictment on these grounds. Pet'r Reply Mem. at 3. In a manner quite similar to his suppression argument above, Petitioner essentially argues that the Court was wrong in denying his motion to dismiss the indictment.

18 U.S.C. § 1361(b) ("Speedy Trial Act") requires that, "[a]ny . . . indictment charging an individual with the commission of an offense shall be filed within thirty days form the date on which such individual was arrested or served with a summons in connection to such charges." In this case, Petitioner was arrested by Philadelphia police on February 11, 1997 and was held for a parole violation. On August 6, 1997, a federal complaint and warrant were issued against Petitioner. Two days later, on August 8, 1997, a federal detainer was lodged against Petitioner. However, Petitioner remained in state custody for his parole violation until he was turned over to federal custody on October 22, 1997.

Petitioner was subsequently indicted on the federal charges on November 20, 1997.

First, Petitioner has failed to demonstrate deficient performance by defense counsel under Strickland. As noted above, Petitioner acknowledges that defense counsel filed and argued a motion to dismiss on these grounds. Rather, Petitioner relies on Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), for the proposition that ignorance of the law can equate to deficient performance of counsel under Strickland. However, Petitioner has not offered any evidence that defense counsel's ignorance of the law resulted in the denial of the motion.

Moreover, Petitioner cannot demonstrate prejudice under Strickland because the case law appears to support the denial of his motion. Petitioner argues that the federal detainer lodged against him on August 8, 1997 triggered the running of the Speedy Trial Act's 30-day period. The statutory language and the case law, however, suggest otherwise. As noted above, the Speedy Trial Act's 30-day limit does not begin to run until the defendant is in federal arrest. 18 U.S.C. § 1361. See United States v. Jones, 129 F.3d 718, 721-23 (2d Cir. 1997); United States v. Thomas, 55 F.3d 144, 147-48 (4th Cir. 1995).

In Thomas, while the defendant was arrested and jailed on state charges, a federal complaint, warrant, and detainer were issued against him. Thomas, 55 F.3d at 147. Thomas, who was in

state custody, was not tried on the federal charges for a period of two years. Id. The Court found that the Speedy Trial Act was "not implicated until [the defendant] was either taken into federal custody or indicted" Id. at 148. Similarly, Stevens's Speedy Trial Act rights were not implicated until he came into federal custody. Stevens was transferred to federal custody on October 22, 1997. He was indicted by a federal grand jury on November 20, 1997. The fact that a federal detainer was issued against him while he was in state custody is not relevant. No violation of the Speedy Trial Act occurred. As such, Stevens cannot show that he was prejudiced by any purported ineffective assistance of counsel.

B. Sentencing Court's Jurisdiction to Impose Ten-Year Enhancement

On November 20, 1997, a federal grand jury indicted Petitioner and a co-defendant, Rick Vance, on two counts - one count of carjacking in violation of 18 U.S.C. § 2119 and one count of carrying a firearm during and in relation to a violent crime in violation of 18 U.S.C. 924(c) ("section 924(c)"). Count Two of the indictment alleges that Petitioner "did knowingly use and carry a firearm, that is, a loaded .22 caliber sawed-off short-barreled rifle, during and in relation to a crime of violence." Gov't Resp. to Pet'r § 2255 Mot., Ex. A at 2. 18 U.S.C. § 924(c)(1)(B) imposes a sentence of not less than 10 years if the firearm "possessed" by a person convicted under section 924(c) is, among other things, a

"short-barreled rifle." The term "short-barreled rifle" includes rifles with a barrel less than 16 inches long and any weapon made by altering a rifle to an overall length of less than 26 inches. 18 U.S.C. § 921(a)(8).

In the instant motion, Petitioner alleges that a defect in Count Two of this indictment deprived the Court of subject matter jurisdiction to sentence him to a ten-year enhancement under section 924(c) for carrying a short-barreled weapon during the carjacking. Specifically, Petitioner argues that "[t]here is nothing in the indictment that establishes that the firearm that the movant possessed had a barrel that was less than sixteen inches in length . . . or was less than twenty-six inches total." Pet'r § 2255 Mem. at 6. In short, Petitioner argues that the indictment, which described the weapon as a "sawed-off short-barreled rifle," was insufficiently specific to confer jurisdiction on the sentencing court to impose the ten-year enhancement for using a short-barreled weapon.

At the outset, the Court notes that an evaluation of Petitioner's claim is not required because this issue is procedurally barred. See Reed v. Farley, 512 U.S. 339, 354, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (prohibiting section 2255 petitioner from asserting claims he failed to raise at trial or on direct appeal unless he can show "cause" for the default and "prejudice" resulting from it). This issue was not raised in

Petitioner's appeal of his criminal conviction¹, and Petitioner has not met the standard of showing cause and prejudice such as would require this Court to hear these arguments. Because Petitioner had a full opportunity to assert the insufficiency of his indictment on direct appeal, and he has not shown cause as to why this issue was not raised then, the issue is barred from this section 2255 petition. Petitioner relies on United States v. Spinner, 180 F.3d 514 (3d Cir. 1999), for the proposition that a defect in the indictment is a fundamental, jurisdictional defect that can be raised at any time. Pet'r § 2255 Mem. at 5. This case, however, is distinguishable from Spinner on at least two grounds.

First, Spinner involved the direct appeal of a criminal conviction for access device fraud. In Spinner, the Court held that a defect in a criminal indictment is a fundamental defect which may be raised sua sponte by a court on direct appeal. Id. at 516. This case, unlike Spinner, involves a 18 U.S.C. § 2255 motion rather than a direct appeal of a criminal conviction. When a federal prisoner seeks to collaterally attack his conviction, he must clear a considerably higher hurdle than on direct appeal by showing cause for his procedural default and prejudice resulting

¹ Petitioner's appeal to the Third Circuit argued that the district court erred in: (1) failing to verify whether he had read and discussed the presentence investigation report with his attorney; (2) in denying Steven's request for downward departure in his sentence based on his criminal history, post-offense rehabilitation, and time served; and (3) applying an five-level "brandishing" enhancement to his sentence for the February 6, 1997 charges. United States v. Stevens, 223 F.3d 239 (3d Cir. 2000).

from such default. United States v. Frady, 456 U.S. 152, 166-68 (1982).

Second, in Spinner the Court found the indictment deficient because it omitted the interstate commerce element of the crime charged. Spinner, 180 F.3d at 516. In contrast, the indictment in the instant case tracked the statutory language with precision. In this case, Stevens was sentenced to a ten year enhancement under 18 U.S.C. § 924(c) for using a "short-barreled rifle" in the commission of a violent or drug-trafficking crime. Unlike Spinner, in this case both the statute and the indictment use the exact same terminology - "short-barreled rifle." The fact that the indictment did not go further and define this term is not relevant. This is particularly true because Stevens was made aware of the definition of "short-barreled rifle" in his plea colloquy. Furthermore, he stipulated that he used a short-barreled rifle in his plea agreement. See Gov't Resp. to Pet'r § 2255 Mot., Ex. D at 135. Because Stevens failed to raise these claims at his plea hearing or on direct appeal, these claims are procedurally defaulted.

Stevens offers no evidence showing any cause which could excuse his procedural default. Cause exists when the claim had "no reasonable basis in existing law" at the time of the procedural default. Reed v. Ross, 468 U.S. 1, 14-15 (1984). Steven does not and cannot offer any such evidence.

Without any showing of cause, Stevens must demonstrate his

actual innocence for his procedural default to be excused. Bousely v. United States, 523 U.S. 614, 623 (1998). Stevens can offer no such evidence. Stevens participated in a lengthy, probing plea hearing, resulting in his pleading guilty to all counts. He make no suggestion of his innocence in his motion or accompanying briefs.

Stevens attempts to avoid this procedural default by claiming that trial counsel was ineffective for failing to challenge the indictment. Pet'r § 2255 Mem. at 13-14. This claim fails even to satisfy the deficiency prong of Strickland described above. Counsel made a reasonable strategic choice not to challenge the indictment, because, even in the highly unlikely chance that challenge was successful, the government would simply seek a superceding indictment to correct whatever errors might exist. With her client facing a substantial jail sentence, counsel wisely chose to take a more cooperative approach with the government during the plea colloquy. Defendant's ineffective assistance of counsel argument fails.

Finally, in addition to being procedurally defaulted, Stevens's claim fails on the merits because Count Two of the indictment is sufficient on its face. An indictment is facially sufficient if: (1) it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and (2) it enables the defendant to plead

an acquittal or conviction in bar of future prosecutions for the same offense. United States v. Hodge, 211 F.3d 74, 76 (3d Cir. 2000) (quoting Government of the Virgin Islands v. Moolenaar, 133 F.3d 246, 248 (3d Cir. 1998)). When an indictment is challenged for the first time on appeal, the indictment is liberally construed in favor of validity. United States v. Cefaratti, 221 F.3d 502, 507 (3d Cir. 2000). In this case, the indictment contained the elements of the offense charged. It stated that Stevens was charged with using and carrying a short-barreled rifle during the commission of a crime of violence. Additionally, because the indictment virtually tracked the statute verbatim, it sufficiently enabled Stevens to avoid subsequent prosecution on double jeopardy grounds.

C. Defect in the Indictment

Petitioner also attacks Count Two of his indictment for failing to allege the "in furtherance of" element of 18 U.S.C. § 924(c). Pet'r § 2255 Mem. at 6-8. As with his earlier attack on this count, Petitioner's claims were not raised on direct appeal and are procedurally defaulted. Because Petitioner had a full opportunity to assert this claim in his appeal, and he has not shown cause as to why this issue was not raised then, the issue is barred from this section 2255 petition. Notwithstanding this procedural defect, the Court chooses to evaluate Petitioner's arguments.

18 U.S.C. § 924(c) provides that any person who, during and in relation to a violent or drug trafficking crime, either "uses or carries a firearm" or "who, in furtherance of such crime, possesses a firearm" shall be subject to additional punishments. Petitioner rightly states that the "in furtherance of" element was not alleged in his indictment. This is true because Petitioner's indictment charged him with using and carrying a firearm during and relation to a crime of violence, rather than possessing a weapons "in furtherance of" such a crime. As a result, Petitioner's claim is without merit.

IV. CONCLUSION

For the foregoing reasons, the Court declines to grant Petitioner the relief sought. No evidentiary hearing is necessary since the records before this Court establish that Petitioner is not entitled to relief under section 2255. Moreover, since Petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability will issue.

An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 97-0625
v.	:	
	:	(CIVIL ACTION
DWAYNE STEVENS	:	No. 02-0704)

O R D E R

AND NOW, this 19th day of September, 2002, upon consideration of Petitioner Dwayne Stevens's Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 85), the Government's Response to Stevens's Petition to Vacate, Set Aside or Correct his Sentence Pursuant to § 2255 (Docket No. 91), and Stevens's Response to the Government's Answer (Docket No. 92), IT IS HEREBY ORDERED THAT:

1) Petitioner's Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 85) is **DENIED**;

2) The Court finds that there are no grounds to issue a certificate of appealability; AND

3) The Clerk of the Court shall mark this case as **CLOSED**.

BY THE COURT:

HERBERT J. HUTTON, J.