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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 01-290
v.	:	
	:	CIVIL ACTION NO. 04-0660
DEVON A. FELLOWS	:	

MEMORANDUM

Padova, J. **June 9, 2004**

Before the Court is Defendant Devon A. Fellows' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons which follow, the Court denies the Motion in all respects.

I. BACKGROUND

Devon Anthony Fellows is a native and citizen of Jamaica who entered the United States as an immigrant in 1974. On February 5, 1997, the INS commenced removal proceedings against Fellows based on his 1993 conviction in a New York state court for criminal sale of a controlled substance. On June 30, 1997, the Immigration Judge ordered Fellows to be deported. Fellows thereafter filed an appeal with the Board of Immigration Appeal ("BIA"), which was dismissed on February 27, 1998. On May 8, 1998, Fellows was deported.

On May 24, 2001, a federal grand jury sitting in the Eastern District of Pennsylvania returned a two count indictment charging Fellows with one count of reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2), and one count of fraud in connection with identification documents, in violation of 18 U.S.C.

§ 1028(a)(4). After a bench trial on September 10, 2001, this Court convicted Fellows of both counts of the Indictment. On October 29, 2002, the United States Court of Appeals for the Third Circuit ("Third Circuit") affirmed the conviction on appeal. On May 19, 2003, the United States Supreme Court denied Fellows' petition for writ of *certiorari*. The instant Motion was filed on April 5, 2004.

II. LEGAL STANDARD

Defendant Fellows has moved for relief pursuant to 18 U.S.C. § 2255, which statute provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground 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 that the sentence was in excess of the maximum authorized by law, 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.A. § 2255 (West Supp. 2001).

"Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors." United States v. Rishell, Civ.A.Nos. Nos. 97-294-1 and 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001) (citation omitted). In order to prevail on Section 2255 motion, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an

omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). Even an error that may justify a reversal on direct appeal will not necessarily sustain a collateral attack. See United States v. Addonizio, 442 U.S. 178, 184-85 (1979). A Section 2255 motion simply is not a substitute for a direct appeal. See United States v. Frady, 456 U.S. 152, 165 (1982). A district court has the discretion to summarily dismiss a motion brought under Section 2255 in cases where the motion, files, and records "show conclusively that the movant is not entitled to relief." United States v. Nahodil, 36 F.3d 323, 325 (3d Cir. 1994) (citing United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)).

III. DISCUSSION

Fellows has asserted three grounds for relief pursuant to 28 U.S.C. § 2255:

1. He was provided ineffective assistance of counsel in that his trial attorney failed to file a motion to dismiss Count One of the Indictment based on the fundamental unfairness of his deportation proceedings.
2. He was provided ineffective assistance of counsel in that his trial attorney did not object to the sufficiency of the waiver of jury trial colloquy conducted by this Court before trial.
3. He was provided ineffective assistance of counsel in that

his trial attorney did not object to the prosecution's introduction of his criminal history at trial, and his appellate counsel failed to raise the issue on appeal.

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are governed by the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain a reversal of a conviction on the ground that counsel was ineffective, the movant must establish: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687. Counsel is presumed effective, and the movant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 686-89. Strickland imposes a "highly demanding" standard upon a movant to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) ("Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, we have cautioned that it is 'only the rare claim of ineffectiveness that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'"). Prejudice requires proof "that there is a reasonable probability

that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

1. Fundamental fairness of deportation proceedings

Fellows contends that his trial attorney provided ineffective assistance of counsel by failing to file a motion to dismiss Count One of the Indictment (reentry after deportation) based on the fundamental unfairness of his deportation proceedings. Specifically, Fellows contends that both the Immigration Judge at his deportation hearing and the BIA violated his due process rights by refusing to consider his request for a Section 212(c) waiver of deportation pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Fellows previously raised this due process challenge on direct appeal of his conviction. In an unpublished decision, the Third Circuit rejected Fellows' due process claim on the merits. "There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999); see also United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981)("Once a legal argument has been litigated and decided adversely to a criminal defendant . . . [on] direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral

proceedings under 28 U.S.C. § 2255.”). Accordingly, the Court denies the instant Motion with respect to Fellows’ claim that trial counsel was ineffective for failing to file a motion to dismiss Count One of the Indictment based on the fundamental unfairness of his deportation proceedings.

2. Waiver of jury trial

Fellows argues that his trial attorney provided ineffective assistance of counsel by failing to challenge the sufficiency of the oral colloquy conducted by this Court in connection with Fellows’ waiver of his right to jury trial. Prior to accepting Fellows’ written waiver of jury trial form, this Court conducted the following colloquy:

> THE COURT: I see that we have a waiver of jury trial and why don’t we enter into a colloquy with Mr. Fellows with respect to this waiver. Mr. Ortiz [Fellow’s trial counsel], you may proceed. We have a waiver of jury trial here?
>
> MR. ORTIZ: Yes, your Honor. We are ready to proceed by waiver of jury trial. I’ve signed - my client and I have gone over the waiver, we’ve reviewed it. I’ve explained obviously the difference between a waiver of trial and a jury trial and he’s fully aware of those differences and is ready to proceed today by way of waiver of trial – bench trial.
>
> THE COURT: Mr. Fellows, you are entitled to a trial by jury on these charges, you do understand that, don’t you?
>
> THE DEFENDANT: Yes, I do, your Honor.
>
> THE COURT: And of course you may waive your right to a jury trial, and unless you waive your right to a jury trial, one would be held.

> Have you discussed fully with your counsel your entitlement to a jury trial and your privilege of waiving that jury trial?
>
> THE DEFENDANT: Yes, I have, your Honor.
>
> THE COURT: Do you have any questions with respect to your entitlement to a jury trial?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: Is this your signature on the written waiver of jury trial?
>
> THE DEFENDANT: Yes, it is.
>
> THE COURT: And it is your desire freely and voluntarily to waive the jury trial in this case; is that right?
>
> THE DEFENDANT: Yes, it is.
>
> THE COURT: Is the government ready to waive the jury trial in this case?
>
> MR. WRIGHT: Yes, sir.
>
> THE COURT: Okay. We'll hand down to the Government, for the Government's signature, and we'll accept the waiver.

(9/10/01 N.T. at 2-3.)

Federal Rule of Criminal Procedure 23(a)("Rule 23(a)") provides as follows:

> **(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> **(1)** the defendant waives a jury trial in writing;
>
> **(2)** the government consents; and
>
> **(3)** the court approves.

Fed. R. Crim. P. 23(a). Although Rule 23(a) does not require an oral colloquy, the Third Circuit has stated that "a colloquy

between the district judge and the defendant is preferable to the mere acceptance by the court of the written waiver and the filing of it in the record of the case." United States v. Anderson, 704 F.2d 117, 119 (3d Cir. 1983). Oral colloquies are not, however, required procedure in this Circuit. Id. Instead, district courts remain free "to employ the means most appropriate to a particular case in order to insure that a defendant's waiver of the right to a trial by jury is knowingly and intelligently made." Id.

It is undisputed that the three prerequisites to waiver of the right to jury trial, as set forth in Rule 23(a), were satisfied in this case. Moreover, although an oral colloquy was not required, the Court inquired into Fellows' knowledge of his right to jury trial and the voluntariness of his waiver of that right. Fellows' affirmative responses to the Court's inquiries confirmed his express and intelligent consent to waiver of a jury trial. Nevertheless, Fellows maintains that the Court's colloquy was deficient because it failed to specifically advise him that twelve members of the community compose a jury, that he may take part in jury selection, that a jury verdict must be unanimous, and that the court alone decides guilt or innocence in a non-jury trial. In United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997), a case cited by Fellows, the United States Court of Appeals for the Ninth Circuit held that a district court "should" provide this information in a waiver of jury trial colloquy. Id. at 1002.

However, the Duarte-Higareda court further noted that district courts are not required to question the defendant about his understanding of the jury waiver where, as here, the defendant had signed a written waiver in accordance with Rule 23(a). Id. at 1003 (citing United States v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985)). In any event, the Third Circuit has elected to vest the district courts with full discretion to determine the means most appropriate to insure that a particular defendant has knowingly and intelligently waived the right to jury trial. Anderson, 704 F.2d at 119. As Fellows' knowingly and intelligently waived his right to jury trial in this case, his trial counsel cannot be found ineffective for failing to make a meritless argument. Sanders, 165 F.3d at 253. Accordingly, the Court denies the instant Motion with respect to Fellows' claim that trial counsel was ineffective for failing to object to the sufficiency of the Court's waiver of jury trial colloquy.

3. Introduction of criminal history record

Fellows contends that his trial counsel was ineffective for failing to object to the prosecution's introduction of his criminal history at trial, and that his appellate counsel was ineffective for failing to raise the issue on appeal. At trial, the Government introduced a stipulation of facts that had been signed by the prosecutor, defense counsel, and Fellows. Among other things, the parties stipulated that "[p]rior to his May 8, 1998 deportation

from the United States, Fellows was convicted in New York [s]tate court of aggravated felonies including several robberies, assault and at least one drug trafficking crime." (Trial Stip. at 4.) During his opening statement, the prosecutor also advised the Court that "[b]etween April 7, 1974 and May 8, 1998, Mr. Fellows was convicted in New York [s]tate [c]ourt of numerous crimes, including at least one aggravated felony. He was convicted . . . of drug trafficking crimes; he was convicted of robberies; he was convicted of assault; he was convicted of larceny." (9/10/01 N.T. at 4-5.)

Fellows correctly notes that the Government need not prove that a defendant was previously convicted of an aggravated felony to establish a violation of 8 U.S.C. § 1326 for reentry after deportation. United States v. DeLeon-Rodriguez, 70 F.3d 764, 766-67 (3d Cir. 1995). As the Government points out, however, there were no disputed factual issues in this case and Fellows' sole legal defense was that the Indictment was defective for failing to charge attempted reentry after deportation. This Court's determination that the Indictment sufficiently charged attempted reentry after deportation was affirmed by the Third Circuit on direct appeal. As Fellows was not prejudiced by the Court's knowledge of his criminal history, his ineffectiveness claim must fail. Accordingly, the Court denies the instant Motion with respect to Fellows' claim that trial counsel was ineffective for failing to object to the prosecution's introduction of his criminal

history at trial and that appellate counsel was ineffective for failing to raise the issue on appeal.

An appropriate order follows.

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ORDER

AND NOW, this 9th day of June, 2004, upon consideration of Defendant Devon A. Fellows' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 27), and all attendant and responsive briefing thereto, and the record of this case, **IT IS HEREBY ORDERED** that said Motion is **DENIED** in all respects. As Defendant has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
John R. Padova, J.