

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

THE UNITED STATES OF AMERICA	:	
	:	
Plaintiff,	:	CRIM. NO. 03-198
vs.	:	
	:	
ROBERT BUCHANAN	:	CIV. NO. 04-4578
	:	
Defendant.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 16th day of February, 2005, upon consideration of Petitioner's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Document No. 36, filed September 29, 2004); Petitioner's Motion for Leave to Proceed *In Forma Pauperis* (Document No. 37, filed September 29, 2004); and Government's Response to Defendant's 2255 Motion (Document No. 38, filed October 18, 2004), for the reasons set forth in the attached Memorandum, **IT IS HEREBY ORDERED** that:

1. Petitioner's Motion for Leave to Proceed *In Forma Pauperis* is **DENIED AS MOOT** on the ground that a filing fee is not required of a movant filing a motion governed by 28 U.S.C. § 2255;
2. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody is **DENIED**; and,
3. A certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

MEMORANDUM

Petitioner, Robert Buchanan, filed a *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (“§ 2255 Motion”) in which he asks the Court to vacate a sentence imposed on him following a guilty plea on the ground that his counsel was ineffective for failing to timely appeal his sentence. Petitioner also filed a Motion for Leave to Proceed *In Forma Pauperis*. As a filing fee is not required of movants filing motions governed by 28 U.S.C. § 2255, petitioner’s Motion for Leave to Proceed *In Forma Pauperis* is denied as moot. For the following reasons, petitioner’s § 2255 Motion is also denied.

I. BACKGROUND

On March 24, 2003, the Government filed a seven-count Information against petitioner, charging him with six counts of distributing more than five grams of cocaine base (“crack”) in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B) and one count of possessing more than fifty grams of crack with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A). Petitioner faced a mandatory sentence of life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A).

On April 24, 2003, petitioner appeared before the Court and, pursuant to a Guilty Plea Agreement, pled guilty to all counts in the Information. Under the Guilty Plea Agreement, petitioner agreed to, *inter alia*, the following with respect to the right to appeal or collaterally attack his sentence:

“11. In exchange for the undertakings made by the government in entering this plea

agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth in paragraph 11 above, the defendant may file a direct appeal but may raise only claims that:
 - i. the defendant's sentence exceeds the statutory maximum; or
 - ii. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range."

(Guilty Plea Agreement at ¶ 11).

At the plea hearing, the Court engaged in a colloquy with petitioner pursuant to Federal Rule of Criminal Procedure 11. During the colloquy, the Guilty Plea Agreement was explained to petitioner and he stated that he understood the limitations imposed under the terms of the Agreement on his right to appeal or collaterally attack his sentence. (Change of Plea Hearing Transcript at 17-18.)

Prior to the sentencing hearing, the Government filed a motion for downward departure from the applicable United States Sentencing Guidelines ("U.S.S.G.") range and the statutory mandatory minimum sentence of life imprisonment pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) based on petitioner's substantial assistance in the investigation or prosecution of other

persons. At the sentencing hearing on October 8, 2003, the Court granted the Government's motion and sentenced petitioner to, *inter alia*, 150 months imprisonment. (October 8, 2003 Judgment and Conviction Order).

Petitioner's counsel did not timely file a notice of appeal. After the time for doing so expired, on February 6, 2004, petitioner filed a *pro se* Notice of Appeal. On August 30, 2004, the Third Circuit dismissed petitioner's appeal for lack of appellate jurisdiction on the ground that petitioner's Notice of Appeal was not timely filed. (Third Circuit Order of August 30, 2004). The dismissal was without prejudice to petitioner's right to file a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 within thirty days.

On September 29, 2004, petitioner filed the pending motions. Petitioner argues that the Court should grant his motion to vacate his sentence on the ground that counsel's failure to timely appeal his sentence constitutes ineffective assistance of counsel. (Petitioner's Memorandum of Law in Support of his Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 at 3).

II. DISCUSSION

A. Motion for Leave to Proceed *In Forma Pauperis*

Because a motion filed under 28 U.S.C. § 2255 is treated as having been filed in the underlying criminal case, no filing fee is required for such a motion. *E.g., United States v. Montana*, 149 F. Supp. 2d 368, 369 (N.D. Ill. 2001). Accordingly, petitioner's Motion for Leave to Proceed *In Forma Pauperis* is denied as moot.

B. Defendant's Waiver of Right to Appeal or File a § 2255 Motion

In this Circuit, "waivers of appeals are generally permissible if entered into knowingly

and voluntarily, unless they work a miscarriage of justice.” *United States v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001). Waivers of appeals should be strictly construed. *Id.* at 562. In determining whether a defendant’s waiver of appellate rights was knowing and voluntary, the role of the sentencing judge in conducting a colloquy under Federal Rule of Criminal Procedure 11 is critical. *Id.* at 563. Under Federal Rule of Criminal Procedure 11, before accepting a plea of guilty, the court must address the defendant personally and determine that the defendant understands the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence. Fed.R.Crim.Proc. 11.

Petitioner does not make any argument in his § 2255 Motion that his waiver of appellate rights and the right to file a § 2255 motion was not made knowingly and voluntarily. The Court colloquied petitioner on this issue and petitioner clearly stated that he understood the limitations placed on the right to appeal or collaterally attack his sentence by the Guilty Plea Agreement. (Change of Plea Hearing Transcript at 17-18). Accordingly, the Court concludes petitioner’s waiver of his right to appeal or collaterally attack his sentence was knowing and voluntary. *See United States v. Fagan*, Cr. No. 02-75, Civ. No. 04-2176, 2004 U.S. Dist. LEXIS 22456 at *11-12 (E.D. Pa. Oct. 5, 2004).

None of the circumstances that would allow petitioner to file an appeal or a collateral attack on his sentence under the terms of the Guilty Plea Agreement have occurred. The Government has not appealed, petitioner’s sentence does not exceed the statutory maximum for the charged offenses, and the Court did not erroneously grant an upward departure. (See Guilty Plea Agreement at ¶ 11).

Furthermore, petitioner has not made any showing that enforcing his waiver would work

a miscarriage of justice. The Third Circuit has declined to identify specific situations in which enforcement of a waiver provision would work a miscarriage of justice and has instead endorsed the case-by-case approach established in *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001). *Khattak*, 273 F.3d at 563. Under the *Teeter* approach, the court must weigh several factors when deciding whether to relieve a defendant of his waiver; these factors include “the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.” *Id.*

Petitioner does not argue that enforcement of his waiver would work a miscarriage of justice. Specifically, he does not claim that his sentence was unlawful or that his plea of guilty was in any way invalid. Moreover, there is no evidence of any of the factors identified in *Teeter* as grounds for relieving a defendant of a waiver of the right to appeal or collaterally attack his sentence. *See Fagan*, 2004 U.S. Dist. LEXIS 22456 at *13-14 (finding no miscarriage of justice where defendant who had waived right to appeal or collaterally attack his sentence did not identify any basis for denial of fair sentencing). Accordingly, the Court concludes that enforcing the waiver of the right to appeal or collaterally attack the sentence in this case would not work a miscarriage of justice.

C. Ineffective Assistance of Counsel

Petitioner argues that his counsel’s failure to timely appeal his sentence constitutes ineffective assistance of counsel. It is petitioner’s position that his counsel’s representation was objectively unreasonable and that he was prejudiced by his counsel’s deficient performance. (Petitioner’s Memorandum of Law in Support of his Motion to Vacate, Set Aside, or Correct his

Sentence Pursuant to 28 U.S.C. § 2255 at 4-6).

To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The measure for counsel's performance under the first prong of *Strickland* is "reasonableness under prevailing professional norms." *Id.* at 688. As to the second prong of *Strickland*, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In this case, petitioner failed to establish the first prong of the *Strickland* test. Because petitioner knowingly and voluntarily waived his right to appeal under the circumstances presented, there was no basis on which his counsel could appeal. *E.g.*, *United States v. Shedrick*, Cr. No. 02-523, 2004 U.S. Dist. LEXIS 9021, at *12 (E.D. Pa. Apr. 30, 2004) (denying petitioner's claim of ineffective assistance of counsel and finding that counsel's failure to file appeal was reasonable under prevailing professional norms where petitioner had waived appeal rights). Thus, counsel's conduct was reasonable under prevailing professional norms and petitioner's ineffective assistance of counsel claim must be rejected.

III. CONCLUSION

First, the Court denies petitioner's Motion for Leave to Proceed *In Forma Pauperis* as moot. Second, the Court concludes that petitioner knowingly and voluntarily waived the right to appeal or to collaterally attack his sentence in his Guilty Plea Agreement and that enforcing this waiver would not work a miscarriage of justice.

The sole ground on which petitioner seeks habeas relief is ineffectiveness of counsel for

failing to timely file a notice of appeal. Because petitioner waived the right to appeal, counsel was not ineffective. Accordingly, petitioner's § 2255 Motion is denied.

BY THE COURT:

JAN E. DUBOIS, J.