

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

UNITED STATES OF AMERICA	:	
	:	Crim. No. 99-35-02
v.	:	Civ. No. 03-4090
	:	
WILLIE SAWYER	:	

MEMORANDUM AND ORDER

JOYNER, J.

August 25, 2005

Via the motion now pending before this Court, Defendant Willie Sawyer moves to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons outlined below, the motion shall be DENIED.

Factual Background

On June 22, 2000, Defendant Willie Sawyer was sentenced to 454 months imprisonment for (1) conspiracy; (2) armed bank robbery; (3) brandishing a firearm during a violent crime; (4) attempted armed bank robbery; and (5) using a firearm during a violent crime. On July 15, 2002, Defendant's convictions were unanimously upheld by the Third Circuit Court of Appeals. U.S. v. Sawyer, 39 Fed.Appx. 785, 2002 U.S. App. LEXIS 14289 (3rd. Cir. July 15, 2002). Defendant then sought to file a petition for writ of certiorari through his appellate counsel, but the petition was never filed.

On July 11, 2003, Defendant filed a pro se Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. This

collateral attack was based on the following claims: (1) ineffective assistance of appellate counsel, Mitchell Scott Strutin; (2) ineffective assistance of trial counsel, Gregory J. Pagano; (3) court error regarding restitution; and (4) availability of new evidence. After the § 2255 hearing held by this Court, Defendant's counsel, Robert E. Welsh, Jr., filed an additional memorandum, which reiterated Defendant's ineffective assistance of appellate counsel claim and introduced a new claim for ineffective assistance of trial counsel based on a failure to object to this Court's Pinkerton jury instruction.

I. Ineffective Assistance of Appellate Counsel

A. Failure to file petition for writ of certiorari.

Defendant's primary argument is that appellate counsel deprived him of effective assistance by failing to file a petition for writ of certiorari to the Supreme Court. Defendant maintains that he asked counsel to file a petition for writ of certiorari and he presents evidence of a handwritten note he received from counsel, which states, "I will file a pet. for writ of cert. in US Supreme Court within 90 days." (Def.'s § 2255 mot., exh. A). However, after the ninety-day period for filing a petition for writ of certiorari had passed, Defendant received a letter from counsel explaining that the petition was not filed

because Defendant's arguments needed to be raised in a § 2255 motion. (Def.'s §2255 mot., exh. B).

To support a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 686 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

This Court has consistently denied ineffective assistance of counsel claims raised in connection with an attorney's failure to file a petition for writ of certiorari. See U.S. v. Swint, 2000 U.S. Dist. LEXIS 9959 at **34-35 (E.D. Pa. 2000)(failure to file a petition for writ of certiorari did not violate defendant's constitutional rights); U.S. v. Lin, 1996 U.S. Dist. LEXIS 11555, at **28-29 (E.D. Pa. 1996)(same); U.S. v. Ferrell, 730 F. Supp. 1338, 1340 (E.D. Pa. 1989) (failure to notify defendant of his right to appeal to the Supreme Court did not constitute ineffective assistance); U.S. v. Lena, 670 F. Supp. 605, 613-614 (E.D. Pa. 1987) (ineffective assistance claim for failure to seek a writ of certiorari was "totally devoid of merit"); See also U.S. v. Lauqa, 762 F.2d 1288, 1291 (5th Cir. 1985)(same).

The above cases would provide sufficient precedent to allow this court to reject Defendant's claim without further discussion

if not for one crucial difference: in this action, Defendant has presented evidence suggesting that he specifically asked counsel to file a petition for writ of certiorari. The significance of this fact was touched on in Lin, which indicates that under the Third Circuit's Plan pursuant to the Criminal Justice Act of 1964 (CJA Plan), appointed attorneys are required to "prepare a petition for certiorari and other necessary and appropriate documents in connection therewith" after communicating with a client who requests review of an adverse decision by the Court of Appeals. 1996 U.S. Dist. LEXIS 11555, at *28, n.11 (quoting Third Circuit CJA Plan, § III-6 (effective Sept. 1, 1971)). However, the Lin Court had no need to analyze the implications of an attorney's noncompliance with the Third Circuit's CJA Plan because the defendant in that case did not specifically ask counsel to file a petition for writ of certiorari. Here, while Defendant did ask for a petition for writ of certiorari to be filed, it is likewise unnecessary for this Court to now determine whether an attorney's failure to comply with the CJA Plan is unreasonable under the Strickland standard. This is because Defendant fails to demonstrate sufficient prejudice under Strickland's second prong.

In his motion, Defendant argues that counsel's failure to file a petition for writ of certiorari merits a per se finding of prejudice. (Def.'s mot., 11-12)(citing Lozada v. Deeds, 964 F.2d

956 (9th Cir. 1992); U.S. v. Tajeddini, 945 F.2d 458 (1st Cir. 1991)). However, the per se prejudice rule and the cases supporting it were recently abrogated by the Supreme Court. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). In Roe, the Court reasoned that the “per se prejudice rule ignores the critical requirement that counsel’s deficient performance must actually cause the forfeiture of the defendant’s appeal.” Id. at 484. Thus, the Court held that, in the context of an attorney’s failure to pursue direct appeal of a criminal conviction, a defendant can establish prejudice by showing that, but for counsel’s constitutionally deficient performance, he would have filed a timely appeal. Id.

The key difference between Roe and this case is that Roe dealt with the direct appeals process and this case deals with review by the Supreme Court. Unlike the direct appeals process, review by the Supreme Court is discretionary, and there is no constitutional right to counsel to pursue discretionary review. Swint, 2000 U.S. Dist. LEXIS 9959, at **34-36 (citing Ross v. Moffitt, 417 U.S. 600, 616-617 (1974); Wainwright v. Torna, 455 U.S. 586, 587 (1982)); Ferrell, 730 F. Supp. at 1340; Lin, 1996 U.S. Dist. LEXIS 11555, at *29. Defendant cannot claim that counsel’s error deprived him of a proceeding for which no right to counsel exists. Lin, 1996 U.S. Dist. LEXIS 11555, 28-29.

Therefore, Defendant cannot show sufficient prejudice to support an ineffective assistance claim under the Strickland standard.¹

B. Prematurely including ineffective assistance of trial counsel claim on direct appeal.

In its decision affirming Defendant's conviction, the Court of Appeals declined to consider an ineffective assistance of trial counsel claim because there had not been an evidentiary hearing in which to develop and assess the pertinent facts. Sawyer, 39 Fed. Appx. at 786. Defendant now claims that appellate counsel was ineffective for prematurely filing the ineffective assistance of trial counsel claim on direct appeal.

Defendant's claim fails both prongs of the Strickland test. First, counsel did not err by raising the ineffective assistance claims on direct appeal. At the time of Defendant's appeal, the Court of Appeals preferred ineffective assistance claims to be raised collaterally, but it was not completely unwilling to hear

¹ Because Defendant's ineffective assistance claim fails, the sentence cannot be vacated due to counsel's failure to file a petition for writ of certiorari. The United States, however, suggests that Defendant should be granted limited relief so that he may file in the United States Court of Appeals for the Third Circuit a motion to recall the mandate affirming Defendant's judgment of sentence. The United States contends that such a motion, if granted, would allow Defendant an additional period within which to file a petition for writ of certiorari in the Supreme Court. However, there is authority indicating that the period within which a petition for writ of certiorari must be filed does not begin to run anew unless the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered and not when a judgment previously entered has been reentered or revised in an immaterial way. Fed. Trade Commn. v. Minneapolis-Honeywell Reg. Co., 344 U.S. 206, 211 (1952); see also F.C.C. v. League of Women Voters, 468 U.S. 364 (1984); Keith v. Truck Stops Corp., 909 F.2d 743, 746 (3rd. Cir. 1990).

such claims on direct appeal. See U.S. v. Fraser, 42 Fed.Appx. 532, 534; 2002 U.S. App. LEXIS 12693 at **4, (3rd. Cir. June 26, 2002)(citing U.S. v. Headley, 923 F.2d 1079 (3rd. Cir. 1991)). Thus, if counsel believed that the record contained sufficient evidence to support an ineffective assistance claim, it would have been reasonable to raise the claim on direct appeal. Id.

Second, the Court of Appeals' decision not to review Defendant's ineffective assistance of trial counsel claim can hardly be seen as prejudicial. In order to establish prejudice on this claim, Defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. However, Defendant fails to explain how the Court's decision, which was based on the lack of an evidentiary hearing, would have been different had the ineffective assistance claim not been included on direct appeal. Defendant still retained the ability to bring this claim in his § 2255 motion.

II. Ineffective Assistance of Trial Counsel

A. Failure to file the sentencing memorandum before the day of sentencing.

Defendant claims that trial counsel Pagano was ineffective because he did not file a sentencing memorandum containing Defendant's objections until the day of sentencing. Defendant argues that the alleged delay precluded this Court from

conducting an adequate review of the arguments on his behalf. However, Defendant does not show a reasonable probability that the sentencing would have been different had the memorandum been filed any earlier. Moreover, as the United States notes, Defendant cannot establish prejudice because Counsel was able to obtain a hearing on all sentencing issues and this Court was able to consider and resolve the issues on their merits.

B. Failure to object to this Court's Pinkerton jury instructions regarding conspiracy.

In his post hearing memorandum, Defendant argues that both trial and appellate counsel were ineffective because they failed to object to this Court's Pinkerton jury instructions. Pinkerton requires that in order for a co-conspirator to be found guilty of a substantive offense committed by another co-conspirator, "a jury must find that a party to the conspiracy committed a crime both 'in furtherance of' and 'as a foreseeable consequence of' the conspiracy." U.S. v. Turks, 41 F.3d 893, 897 (3rd. Cir. 1994) (quoting Pinkerton v. U.S., 328 U.S. 640, 646 (1946)). This Court's jury instruction, modeled after 1 Sand, Modern Federal Jury Instructions, ¶ 19.03 (1998), required the substantive crime to be both "reasonably foreseeable" and "committed as part of the common plan." Thus, this Court's instruction more than adequately covered the Pinkerton requirements. If anything, this Court's jury instruction was

favorable to Defendant because "as part of" indicates a higher standard of involvement than "in furtherance of" does. Because this Court's jury instructions were not incorrect, counsel cannot be deemed ineffective for failing to object to them.

C. Ineffectiveness claims raised on direct appeal.

This court will address the following claims against trial counsel, which Defendant raised on direct appeal, even though they were not raised in Defendant's §2255 motion.

First, Defendant claims that trial counsel was ineffective for eliciting and failing to object to a detective's reference to Defendant's post-Miranda silence. (Def.'s App. Br. 16). On direct examination, the detective testified that Defendant initially waived his Miranda rights and denied involvement in the robbery of the Harleysville National Bank in Spring City, Pennsylvania. (Def.'s App. Br. 16-17; U.S. App. Br. 13). On cross-examination, the detective explained that while Defendant did not explicitly deny involvement in the robbery, he made conflicting remarks, invoked his Fifth Amendment privilege and stopped talking. (Def.'s App. Br. 17; U.S. App. Br. 13). Defendant claims that counsel should not have elicited this remark on cross examination and should have either objected or requested a cautionary instruction once the remark was made.

In reviewing counsel's performance for ineffectiveness, this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 694. Thus, this Court declines to "grade counsel's performance" when it is clear that Defendant's claim fails for lack of sufficient prejudice. See U.S. v. Clausen, 2005 U.S. Dist. LEXIS 6196, No. 00-291-02, 04-4625 at **54-56 (E.D. Pa. 2005)(citing Smith v. Robbins, 528 U.S. 259, 286 n.14 (2000)).

To show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, Defendant must show "a probability sufficient to undermine confidence in the outcome." Jacobs v. Horn, 395 F.3d 92, 105 (3rd. Cir. 2005)(citing Strickland, 466 U.S. at 693-94). This standard is not a stringent one. Id. However, it is not satisfied by Defendant's sole assertion that counsel's alleged error caused the jury to form a negative inference. (Def.'s App. Br. 20). This is because the effect of counsel's alleged error must be evaluated in light of the totality of the evidence at trial. Strickland, 466 U.S. at 696. Defendant has not shown how "the decision reached would reasonably likely been different absent the [alleged] errors." Id. at 695. Instead, it appears that the alleged errors would not have been pervasive enough to overcome the jury's decision based on the totality of evidence

against Defendant. See Id. at 695; Clausen 2005 U.S. Dist. LEXIS 6196, at *59.

Second, Defendant claims that trial counsel was ineffective for failing to object to a witness' testimony referring to Defendant and co-defendant Wilkerson as thieves. Defendant's claim concerns this portion of the witness' testimony:

Q. He knows the type of person you are. right?
A. What type of person am I?
Q. A person convicted of crimes.
A. I know a lot of people like that.
Q. A person who is a thief.
A. I know a lot of thieves.
Q. Right. I know you do.
A. There's two right there.

Def.'s App. Br., 21.

As in Defendant's above claim, it is not clear that counsel erred by not objecting to the witness' testimony. Defendant claims the witness' remark violated Rule 404(b) of the Federal Rules of Evidence, which bars the admission of evidence of other crimes, wrongs, or acts to prove a person's character. Fed. R. Evid. 404(b); U.S. v. Sriyuth, 98 F.3d 739, 745 (3rd. Cir. 1996). However, the United States contends that, by referring to Defendant as a thief, the witness was referring to the crimes for which the defendants were on trial. This Court agrees that the reference does not fit into the realm of inadmissible evidence under Rule 404(b) because it does not refer to any crimes other than the ones for which Defendant was tried.

Furthermore, Defendant again fails to establish prejudice as a result of counsel's alleged error. Defendant cannot cast doubt on the outcome of his trial because he fails to show a reasonable probability that, in light of the totality of evidence against him, a jury would have decided differently had counsel objected to the witness' testimony identifying him as a thief. Strickland, 466 U.S. 695.

III. Restitution

Defendant's next argument concerns the \$19,050 in restitution for which he and co-defendant Curtis Wilkerson are jointly and severally responsible. Defendant claims that, according to his monthly payments, both he and Wilkerson are being charged for the entire amount. The fact that Defendant and Wilkerson are jointly and severally responsible means that they are "responsible together and individually." Black's Law Dictionary 914 (6th ed. 1990). Joint and several responsibility seeks to protect victims from missing out on a portion of their restoration due to a particular defendant's inability to pay. While both defendants are responsible for the entire amount, together they will pay no more than \$19,050. Thus, Defendant's claim that he is paying too much is rejected.

IV. Newly Discovered Evidence

Defendant also argues that FBI tape-recordings of his conversations with a former accomplice will prove his innocence. Defendant claims he merits an evidentiary hearing because the tapes are newly discovered evidence. However, Defendant's claim is not cognizable on collateral review. Sokolow v. U.S., 1998 U.S. Dist. LEXIS 22605, at *15 (E.D. Pa. 1998)(citing Guinan v. U.S., 6 F.3d 468, 471 (7th Cir. 1993)). "The scope of a collateral challenge to a conviction is very limited; only jurisdictional errors and errors of constitutional significance may generally be considered by the court in deciding such a motion." Swint, 2000 U.S. Dist. LEXIS 9959, at **12-13.

Even if Defendant's new evidence claim were cognizable, the fact that the tapes were available at the time of trial precludes them from being admitted as new evidence. This is because "[e]vidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." Id. (internal quotations and citations omitted); see also Govt. of the Virgin Islands v. Lima, 447 F.2d 1245, 1250 (3rd. Cir. 1985) (defining new evidence as evidence discovered since trial).²

An appropriate Order follows.

² This qualification was originally established as part of a test for admitting new evidence in the context of a motion for a new trial under Fed. R. Civ. P. 33. However, "it has been applied to a §2255 motion when a claim of new evidence is raised." Granero v. U.S., 2000 U.S. Dist. LEXIS 2073, at *3 n.2 (E.D. Pa. 2000) (citing U.S. v. Blount, 982 F. Supp. 327, 330 (E.D. Pa. 1997)).

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

UNITED STATES OF AMERICA	:	
	:	C.A. No. 03-4090
v.	:	CRIM No. 99-35-02
	:	
WILLIE SAWYER	:	

ORDER

AND NOW, this 25th day of August, 2005, upon consideration of Defendant Willie Sawyer's Motion and Amended Motion to Vacate, Set Aside, or Correct his sentence, Post-Hearing Memorandum on the Ineffectiveness of Appellate Counsel (Document Nos. 113, 114 & 145) and the United States' responses thereto (Document Nos. 127 & 146) it is hereby ORDERED that Defendant's Motion is DENIED.

1. Defendant's claim for ineffective assistance of appellate counsel for failure to file a petition for writ of certiorari is DENIED.

2. The Court holds that Defendant has failed to make a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2) with respect to the following claims: (1) appellate counsel was ineffective for including ineffective assistance of trial counsel on direct appeal to the United States Court of Appeals; (2) trial counsel was ineffective for filing a sentencing memorandum on the date of sentencing; (3) appellate and trial counsel were ineffective for not objecting to the

United States District Court's Pinkerton jury instruction; (4) trial counsel was ineffective for eliciting and failing to object to a detective's reference to Defendant's post-Miranda silence; (5) trial counsel was ineffective for failing to object to a witness' reference to Defendant as a thief; (6) Defendant is paying more than the restitution for which he is jointly and severally responsible; and (7) Defendant's "newly discovered evidence" merits an evidentiary hearing.

3. A certificate of appealability is DENIED with respect to all claims.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS JOYNER, J.