

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

UNITED STATES OF AMERICA : CIVIL ACTION NO. 12-5833
 :
 v. :
 :
 KWAME THOMAS : CRIMINAL ACTION NO. 10-783

MEMORANDUM

Padova, J.

April 4, 2013

Before the Court is Kwame Thomas's *pro se* Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the following reasons, the Motion is denied.

I. BACKGROUND

On April 27, 2011, Thomas was convicted by a jury of Counts I and II of Indictment No. 10-783. Counts I charged him with interference with commerce by robbery in violation of 18 U.S.C. § 1951(a), and Count II charged him with using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). Both charges arose from the June 17, 2009 armed robbery of Smitty's Mill Creek Bar, located at 601 North 52nd Street, Philadelphia, Pennsylvania.¹

Thomas was sentenced on August 4, 2011 to consecutive terms of imprisonment of 51 months as to Count I and 84 months as to Count II. Thomas was also sentenced to five years of supervised release, a special assessment of \$200 and restitution in the amount of \$600. Thomas

¹In the same trial, Thomas was also acquitted of one count of conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. § 1951(a) (Count III), two counts of interference with commerce by robbery in violation of 18 U.S.C. § 1951(a) (Counts IV and VI), and two counts of using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Counts V and VII). Counts IV and V arose from the August 8, 2009 robbery of Nikel's Lounge, located at 400 N. 59th Street in Philadelphia, Pennsylvania and Counts VI and VII arose from the August 25, 2009 robbery of the Wine & Spirits store located at 5101 Lancaster Avenue in Philadelphia, Pennsylvania.

appealed his judgment of conviction and sentence to the United States Court of Appeals for the Third Circuit on August 15, 2011.

Thomas raised four issues on appeal, that: 1) his indictment was invalid as to Count I because it did not include the words “in furtherance of” even though that phrase is used in the underlying statute, 18 U.S.C. § 1951(a); 2) his conviction violated his rights under the Confrontation Clause of the Sixth Amendment because the prosecution failed to call as a trial witness the informant who caused the Government to seek him as a suspect; 3) there was insufficient evidence to show that his conduct interfered with commerce in violation of 18 U.S.C. § 1951(a); and 4) the Court erred by imposing a sentence of 84 months of imprisonment rather than 60 months of imprisonment as to Count II. United States v. Thomas, 486 F. App’x 250, 252-53 (3d Cir. 2012). The Third Circuit rejected all of Thomas’s arguments and affirmed his judgment of conviction and sentence on June 29, 2012. Id.

Thomas filed his Motion pursuant to 28 U.S.C. § 2255 on February 28, 2012. We dismissed the Motion without prejudice because Thomas’s appeal was still pending before the Third Circuit. (See 3/5/12 Order.). After the Third Circuit affirmed Thomas’s judgment of conviction and sentence, he filed a Motion asking that we refile his § 2255 Motion. We granted Thomas’s Motion on October 4, 2012. Thomas’s Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 was thus entered on the docket of this action on October 12, 2012. Thomas’s § 2255 Motion raises two grounds for relief: 1) that his trial counsel was ineffective for failing to move the Court to dismiss Indictment No. 10-783 because the Government’s delay in indicting him violated his Fifth Amendment right to substantive due process; and 2) that his trial counsel was ineffective for failing to object to the Court’s imposition of an 84-month sentence rather than a 60-month sentence as to Count II.

II. LEGAL STANDARD

Defendant has moved for relief pursuant to 18 U.S.C. § 2255, which 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. § 2255(a). “Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.” United States v. Perkins, Crim. A. No. 03-303, Civ. A. No. 07-3371, 2008 WL 399336, at *1 (E.D. Pa. Feb. 14, 2008) (quoting United States v. Rishell, Crim. A. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001)). In order to prevail on a 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).

III. DISCUSSION

Thomas claims that his conviction should be vacated because his trial counsel was ineffective in failing to seek dismissal of the indictment. He also argues that his sentence for violation of 18 U.S.C. § 924(c) (Count II) should be vacated and he should be resentenced because his counsel was ineffective for failing to object to his sentence with respect to that Count. In order to prevail on a claim for ineffective assistance of counsel, a criminal defendant must demonstrate both that (1) his attorney’s performance was deficient, *i.e.*, that the performance was unreasonable under prevailing professional standards, and (2) that he was prejudiced by the attorney’s performance. Strickland v. Washington, 466 U.S. 668, 687–88

(1984). Prejudice is proven if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. Consequently, counsel cannot be found to be ineffective for failing to pursue a meritless claim. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) (“There can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.” (citations omitted)); see also Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998)).

A. Failure to Seek Dismissal of the Indictment

Thomas claims that his attorney was ineffective for failing to move for dismissal of Indictment 10-783 because the federal government’s delay in seeking that indictment violated his Fifth Amendment right to substantive due process. Thomas was originally arrested for the June 17, 2009 robbery of Smitty’s Mill Creek Bar by Philadelphia Police Officers on March 31, 2010, and he was subsequently charged by the Commonwealth of Pennsylvania with nine counts arising from that robbery. See Commonwealth v. Thomas, No. MC-51-0013662-2010 (Phila. Cnty. Municipal Ct.) (docket). The Commonwealth withdrew its charges against Thomas on October 7, 2010. (Id.) The United States filed Indictment No. 10-783 against Thomas two months later, on December 7, 2010. (See Indictment No. 10-783).

The Supreme Court explained in United States v. Lovasco, 431 U.S. 783, 789 (1977), and United States v. Marion, 404 U.S. 307, 325 (1971), that a petitioner can make out a claim that his Fifth Amendment due process rights were violated by the federal government’s delay in seeking his indictment ““only if he can show both (1) that the delay between the crime and the federal indictment actually prejudiced his defense; and (2) that the government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass him.””

Snyder v. Klem, 438 F. App'x 139, 141 (3d Cir. 2011) (quoting United States v. Beckett, 208 F.3d 140, 150–51 (3d Cir. 2000)). Thomas claims that he told his trial counsel that the state charges against him had been dismissed because a witness failed to identify him in a lineup. Thomas contends that he was prejudiced by the federal prosecution because he would not have been prosecuted if the federal government had not indicted him after the Commonwealth of Pennsylvania withdrew its charges against him.

Thomas “has not shown either actual prejudice or improper delay. He does not, for instance, claim that items of evidence or documents were lost, witnesses became unavailable, or that memories faded as the result” of the eighteen month delay between the date of the robbery of Smitty’s Mill Creek Bar and his federal indictment. Beckett, 208 F.3d at 151 (citing Marion, 404 U.S. at 325-26). The fact that Thomas was federally prosecuted is simply not prejudice that was caused by the delay between the date of the crime and the date of the federal indictment. Thomas further suggests that the federal government indicted him in order to take advantage of a manner of identification that was less onerous to the prosecution than the lineup conducted by Philadelphia police. The fact that the federal government was able to secure Thomas’s indictment without a witness identifying him in a lineup is not proof that the federal government deliberately delayed his indictment in order to gain an improper tactical advantage. See Snyder, 438 F. App'x at 141 (quoting Beckett, 208 F.3d at 151). We conclude that Thomas has entirely failed to establish that the federal government violated his Fifth Amendment substantive due process rights by intentionally delaying his indictment and that this claim is, accordingly, meritless. Since counsel cannot be ineffective for failing to raise meritless claims, Sanders, 165 F.3d at 253, Thomas’s Motion to Vacate, Set Aside or Correct Sentence is denied insofar as he argues that his trial counsel was ineffective for failing to file a motion to dismiss the indictment

on the ground that the federal government's delay in seeking his indictment for the robbery of Smitty's Mill Creek Bar violated his Fifth Amendment right to substantive due process.

B. Failure to Object to Thomas's Sentence as to Count II

Thomas argues that his trial counsel was ineffective for failing to object to his 84-month sentence of imprisonment for violation of 18 U.S.C. § 924(c), even though the Court did not explain why he was being sentenced to 84 months for that crime rather than 60 months. Section 924(c) provides that:

any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, . . . shall, in addition to the punishment provided for such crime of violence . . . (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

18 U.S.C. § 924(c)(1)(A). The Third Circuit determined on appeal that we did not err in sentencing Thomas to 84 months of imprisonment:

Thomas argues that his sentence is invalid because the District Court imposed a sentence of 84 months on Count Two -- using a firearm in violation of 18 U.S.C. § 924(c)(1) -- although the punishment is "typically . . . 5 years." Pro Se Br. at 5. However, § 924(c)(1)(A)(ii) provides that "if the firearm is brandished, [the defendant shall] be sentenced to a term of imprisonment of not less than 7 years." Because witness testimony established that Thomas brandished a firearm during the robbery, see App. at 42-43, the District Court did not err by sentencing Thomas to 84 months on Count Two.

Thomas, 486 F. App'x at 253 (alterations in original). The Third Circuit referred to the testimony of an employee of Smitty's Mill Creek Bar, who testified that Thomas pointed a gun at her when he said "[t]his is a stickup. Give me your money." (4/25/11 N.T. at 26.) The term "brandish," as it is used in § 924(c), means "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. § 924(c)(4). Since there was clear evidence in the record that Thomas brandished the gun he used to commit the

robbery of Smitty's Mill Creek Bar, we conclude that any objection to the imposition of an 84-month term of imprisonment pursuant to § 924(c)(1)(A)(ii) would have been overruled as meritless. Since counsel cannot be ineffective for failing to raise meritless claims, Sanders, 165 F.3d at 253, Thomas's Motion to Vacate, Set Aside or Correct Sentence is denied insofar as he argues that his trial counsel was ineffective for failing to object to his 84-month sentence of imprisonment with respect to Count II.

IV. CONCLUSION

For the foregoing reasons, Thomas's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is denied in its entirety. We conclude that Thomas has failed to make a substantial showing of the denial of a constitutional right, and, consequently, that there is no basis for the issuance of a certificate of appealability. An appropriate order follows.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

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ORDER

AND NOW, this 4th day of April 2013, upon consideration of Kwame Thomas’s *pro se* Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Crim. Docket No. 66) and all documents filed in connection therewith, **IT IS HEREBY ORDERED** that the Motion is **DENIED**. As Thomas 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. The Clerk is directed to **CLOSE** Civil Action No. 12-5833.

BY THE COURT:

John R. Padova

John R. Padova, J.