

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

UNITED STATES OF AMERICA : CIVIL ACTION
 : NO. 97-4783
 v. :
 : CRIMINAL ACTION
 LOUIS BENSON : NO. 95-124-2

MEMORANDUM AND ORDER

YOHN, J. January , 1998

Louis Benson pleaded guilty to drug charges, and was sentenced on October 17, 1995. He filed a motion under 28 U.S.C. § 2255 on July 24, 1997. For the reasons set forth below, defendant's motion will be denied.

BACKGROUND

This action arises from defendant's participation in the Idris Enlow Crack Cocaine Organization, which operated in the Germantown neighborhood of Philadelphia, Pennsylvania, from 1990 to 1994. Defendant pleaded guilty to one count of conspiracy to distribute crack cocaine, in violation of 21 U.S.C. § 846, and two counts of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841. The possession counts are based upon conduct leading to defendant's arrests in January and April 1993, which resulted in convictions in state court. In defendant's federal sentencing, his total offense level was forty-two, with seventeen criminal history category points. (Tr. Sentencing Hr'g, Gov't Answering Mem. Ex. D at 3, 5.) This combination suggested a sentencing guideline range of 360 months to life imprisonment; however, the court granted a substantial departure in light of defendant's grand

jury testimony and his cooperation with the government in the prosecution of other members of the Enlow Organization. *See* United States Sentencing Guidelines Manual (“U.S.S.G.”) § 5K1.1. On October 17, 1995, defendant was sentenced to 180 months in prison. He did not file a direct appeal.

DISCUSSION

1. Untimeliness

Prior to April 24, 1996, federal prisoners were given practically unlimited time to file a federal habeas petition. As of that date, however, 28 U.S.C. § 2255 was amended to provide for a new limitations period, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub.L. No. 104-132, § 105, 110 Stat. 1214, 1220 (1996). The current version of the statute provides, in relevant part:

A 1-year period of limitations shall apply to a motion under this section. The limitations period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (1997). Benson did not file an appeal of his sentence; therefore, the date on which his judgment of sentence became final was at the close of the appeal period after his sentencing on October 17, 1995. His § 2255 motion was filed more than one year thereafter, on July 24, 1997, in violation of the new provisions of § 2255.

The new provisions apply because the instant motion was filed more than one year after the new act became effective. Where a prisoner's conviction became final prior to April 24, 1996, this district has allowed a "reasonable time" after passage of the Act to file a § 2255 motion. See *United States v. Ramos*, 971 F.Supp. 199, 203 n.2 (E.D. Pa. 1997). In a recent unpublished opinion, the Third Circuit joined other circuits in limiting defendants to "a reasonable period of time, not to exceed one year, from the effective date of the AEDPA for filing a habeas petition." *United States v. Urrutia*, Civ. No. 97-7051 (3d Cir. Sept. 18, 1997); accord *Calderon v. United States District Court for the Central District of California*, 128 F.3d 1283, 1287 (9th Cir. 1997); *United States v. Simmonds*, 111 F.3d 737, 744-46 (10th Cir. 1997); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2059 (1997). This district has cited *Urrutia* as persuasive, noting that it "is in accord with the decisions of all other courts of appeals which have addressed the issue." *Collinson v. United States*, Civ. No. 97-3026, 1997 WL 602777, at *2 (E.D. Pa. Sept. 22, 1997); *United States v. Valentin*, Crim. No. 92-540-1, 1997 WL 602771, at *1 (E.D. Pa. Sept. 19, 1997).

Because the instant motion was filed more than one year after the date on which the judgment of sentence became final, and more than one year after the new act became effective, and does not meet any of the exceptions of the act, the motion will be denied because of its untimeliness. In addition, even if the motion were not denied because of its lack of timeliness it would be denied on the merits, as follows:

2. Merged Charges

Defendant complains of "merged" charges; however, the charges were properly grouped

for sentencing purposes in accordance with the Sentencing Guidelines. There was no error in doing so.

Count One, conspiracy to distribute cocaine base, was grouped with the two substantive counts of possession with intent to distribute, as required by U.S.S.G. § 3D1.2(b). Section 3D1.2(b) applies because these counts involved harm to identical societal interests, and involved two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Defendant's total offense level was determined, in accordance with the guidelines, for a single Group of Closely Related Counts. *See* § 3D1.1. Defendant was sentenced to 180 months on each of the three counts, with all three of those terms to be served concurrently. (Tr. Sentencing Hr'g, Gov't Answering Mem. Ex. D at 25.)

Section 5G1.3 of the Sentencing Guidelines is "designed to guide the district courts in determining whether a sentence on a defendant subject to an undischarged term of imprisonment is to run consecutively or concurrently." *United States v. Oser*, 107 F.3d 1080, 1083 (3d Cir. 1997). § 5G1.3(b) provides that if "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." Therefore, defendant was given the benefit of a federal sentence running concurrently with the sentence that he received in state court for the incidents of January and April 1993.

3. Ineffectiveness of Counsel

Defendant claims ineffectiveness of counsel because his attorney did not file an appeal

after his request to do so on the issue of whether his guilty plea was made under duress.¹

Because such an appeal would have been frivolous, defendant's claim must be denied.

A two-part test is applied to a claim of ineffective assistance of counsel. The defendant must first show that "his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms." *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) (citing *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 2064-66 (1984)). Second, unless prejudice is presumed, the defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant bears the burden of proving a claim of ineffective assistance of counsel. *See Government of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1081 (3d Cir. 1985).

I will assume for this purpose the truth of Benson's allegation that the prosecutor "intimidated him with a[] longer prison sentence if he didn't plea[d] guilty to alle[ged] charges against him." (Pet.'s Mot. § 2255 at 4.) During the colloquy, Benson was specifically asked whether his plea was a result of any force or threats, or any promises apart from the plea agreement. (Tr. Change of Plea Hr'g, Gov't Mem. Ex. C at 13-14.) Benson stated, and I found, that it was not. (*Id.* at 14, 20.) A prosecutor's suggestion of a longer sentence if a case goes to trial does not by itself constitute duress. Such a statement is merely part of the ordinary context of plea bargaining, which involves the threat of more severe treatment should the defendant put

1. At the conclusion of the sentencing hearing on October 17, 1995, the defendant was advised of his right to appeal and of the fact that the clerk would file an appeal for him. (Tr. Sentencing Hr'g, Gov't Answering Mem. Ex. D at 27.)

the government to the burden of trial. *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64, 98 S.Ct. 663, 668 (1978). In *Bordenkircher*, the Court held that “no prosecutorial vindictiveness existed and no due process violation occurred in the context of a plea bargain where the defendant is informed of the terms of the deal and is free to accept or reject the offer.” *United States v. Oliver*, 787 F.2d 124, 125-26 (3d Cir. 1986) (citing *Bordenkircher*, 434 U.S. at 363, 98 S.Ct. at 667). I conclude that an appeal on the issue of whether defendant’s guilty plea was made under duress would be “utterly without merit,” and therefore frivolous. See *Hilmon Co. (V.I.) Inc. v. Hyatt Int’l*, 899 F.2d 250, 251 (3d Cir. 1990).

Defendant also claims that counsel was ineffective because he failed to challenge unspecified erroneous information in the presentence report, and failed to inform defendant of the contents of the report. This allegation fails because there is no specification of what the erroneous information was, and the objection is therefore frivolous. In addition, the record reflects that Benson did review the presentence report, and that his attorney raised objections on the basis of Benson’s comments in connection with the presentence report. (Tr. Sentencing Hr’g, Gov’t Answering Mem. Ex. D at 2-4.)

For the foregoing reasons, defendant can show neither unprofessional conduct on the part of his attorney, nor that he has been prejudiced by the outcome of his attorney’s conduct in this matter.

4. Double Jeopardy

Defendant raises double jeopardy arguments because of the state prosecution of the incidents of January 18, 1993 and April 14, 1993. However, this argument also has no merit,

because of the dual sovereignty doctrine. A prior prosecution by the Commonwealth of Pennsylvania cannot bar a subsequent federal prosecution arising out of the same facts. As the Third Circuit notes, “The ‘dual sovereignty’ doctrine rests on the premise that, where both sovereigns legitimately claim a strong interest in penalizing the same behavior, they have concurrent jurisdiction to vindicate those interests and neither need yield to the other.” *United States v. Pungitore*, 910 F.2d 1084, 1105 (3d Cir. 1990). Therefore, “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” *Heath v. Alabama*, 474 U.S. 82, 89, 106 S.Ct. 433, 437 (1985) (quoting *United States v. Lanza* 260 U.S. 377, 382, 43 S.Ct. 141, 142 (1922)).

In addition, the government raised the objection in this instance that Benson needed to allege cause and prejudice since he had not raised this issue on appeal. A habeas petitioner who fails to directly appeal his conviction must show “cause” excusing the procedural default, and “actual prejudice” resulting from it. *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 1594 (1982); see *United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1994) (“*Frady*’s cause and prejudice standard applies to § 2255 proceedings in which a petitioner seeks relief from alleged errors in connection with his sentence that he has not directly appealed”). Neither cause nor prejudice has been shown. There was no actual prejudice to the defendant in this case, because I specifically made the sentence concurrent to his state sentence, so that the Bureau of Prisons would give him credit on the federal sentence from the date of his state incarceration in April 1993. (See Tr. Sentencing Hr’g, Gov’t Answering Mem. Ex. D at 11, 21-22, 24-25.) Therefore, defendant is serving no additional time in jail as a result of there being two prosecutions.

Finally, there is no merit to the issue of double jeopardy because the state charges were

for two particular incidents, whereas the federal charges were based upon defendant's participation in the overall conspiracy from December 17, 1992, until his arrest in April 1993. The guidelines in this case were determined by the amount of cocaine base for which defendant was responsible on the conspiracy count. (*See* Tr. Change of Plea Hr'g, Gov't Answering Mem. Ex. B at 15.)

5. Hearsay Evidence

Benson alleges that the government's evidence was all hearsay. This is patently frivolous, since defendant entered a guilty plea, and during the guilty plea colloquy of June 15, 1995, he waived the right to have witnesses testify in his presence. (Tr. Change of Plea Hr'g, Gov't Answering Mem. Ex. B at 6-8.) Moreover, in the continuation of the guilty plea on June 16, 1995, the government outlined the evidence against the defendant. (Tr. Change of Plea Hr'g, Gov't Answering Mem. Ex. C at 15-16.) This evidence consisted of testimony which would not be hearsay under the Federal Rules of Evidence: testimony of an ATF special agent concerning admissions by the defendant, *see* Fed. R. Evid. 801(d)(2)(A), and the testimony of a Philadelphia police officer and defendant's co-conspirators, who observed the defendant's criminal activity directly and therefore were not relying on hearsay. (*Id.*)

CONCLUSION

For the foregoing reasons, defendant's motion will be denied. An appropriate order follows.

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ORDER

AND NOW, this day of January, 1998, upon consideration of Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, and the government's response thereto, IT IS HEREBY ORDERED that defendant's motion is DENIED WITH PREJUDICE.

The court having concluded that defendant has not made a substantial showing that he was denied a constitutional right, IT IS FURTHER ORDERED that he shall not be issued a certificate of appealability.

William H. Yohn, Jr., Judge