

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

KARL JOSEPH BALDACCI : CIVIL ACTION
 :
 v. : NO. 97-2720
 :
 UNITED STATES OF AMERICA : (Criminal No. 91-198-1)

M E M O R A N D U M

WALDMAN, J.

June 5, 1998

Presently before the court is petitioner's 28 U.S.C. § 2255 petition to vacate, set aside or correct his sentence. Petitioner contends that he should have received credit towards his current prison sentence for time served on two prior criminal convictions and that he was entitled to a downward departure for mitigating circumstances not considered by the Sentencing Commission. Because his lawyer failed to press these issues, petitioner also claims he received ineffective assistance of counsel.

Petitioner was the principal in a methamphetamine manufacturing and distribution enterprise. He pled guilty to conspiracy to manufacture methamphetamine, manufacturing methamphetamine and engaging in a continuing criminal enterprise.

Petitioner was sentenced on October 29, 1991. Because of three prior felony drug convictions, petitioner was a career

offender.¹ Given the amount of methamphetamine involved and petitioner's criminal record, the total offense level was 36 and the criminal history category was VI. The sentencing guideline range was 324 to 405 months imprisonment. Petitioner also faced a statutory mandatory minimum sentence of 240 months.

The court granted the government's motion for a downward departure in consideration for petitioner's substantial assistance in the investigation of others involved in the manufacture and distribution of methamphetamine. The court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. The sentence was twelve years less than the otherwise applicable minimum guideline term of imprisonment and five years below the statutory minimum prison term.

Petitioner cites the current version of U.S.S.G. § 5G1.3 to assert that he should have received credit for time he had served for prior federal and state convictions. Defendant points specifically to § 5G1.3(b) and Application Note 2. The language petitioner cites, however, is from a recent amendment to § 5G1.3 which was not retroactive. See U.S.S.G. § 1B1.10(c).

¹ Petitioner had state methamphetamine trafficking convictions in 1982 and 1985, apart from the state conviction on which he was sentenced in 1990 which is implicated in this action. He also had a prior federal conviction for selling methamphetamine which resulted in what the court has termed his "first federal sentence" for purposes of this petition.

The applicable version of § 5G1.3 provides that when a sentence was imposed for an offense arising from the same transactions or occurrences as an "unexpired" sentence, the new sentence should run currently with the unexpired one.

Petitioner suggests that because the state sentence was for conduct at least partially related to that underlying the previous and subsequent federal sentences, all of the sentences should be deemed related. Petitioner, however, provides no support for the suggestion that the state sentence and first federal sentence were for related conduct.² Moreover, the first and second federal sentences clearly were not for related conduct. The three year federal sentence petitioner was serving on October 29, 1991 was for sales of methamphetamine in August and September 1987 which were distinct from the offenses charged in the subsequent federal case.³

Petitioner's state sentence of two to four years imposed in 1990 was for conduct partially related to that charged in the second federal case.⁴ The state sentence, however, was

² The first federal case involved conduct in August and September 1987. The state case involved conduct in May 1988.

³ The various laboratories involved in the second federal case were not set up and operated until after September 1987.

⁴ Activity at one of the several laboratories involved in the second federal case was charged in the state case.

concurrent with petitioner's first federal sentence. Petitioner had been discharged on the concurrent state sentence by November 25, 1991 when the first federal sentence expired.

Pursuant to the applicable version of § 5G1.3, petitioner should have begun serving the sentence at issue immediately upon the expiration of his prior unrelated federal sentence. Any unexpired portion of his prior related state sentence would thus be served concurrently with the sentence at issue. Prison records confirm that petitioner properly began serving the subsequent federal sentence immediately upon completion of his first federal sentence. Contrary to petitioner's belief, the applicable version of § 5G1.3 does not entitle him to credit for the time he had previously served on the state sentence.⁵ There was in effect no "unexpired" related state sentence with which to run concurrently the subsequent federal sentence.

Petitioner also asserts that he was entitled to a downward departure under U.S.S.G. § 5K2.0 because he endured hardships during his youth which are not taken into account by the Sentencing Commission. He adds that he has "participated in

⁵ Indeed, in the particular circumstances presented, the current version of § 5G1.3 would not help petitioner. It would not require credit for a prior related sentence which is effectively subsumed by a prior concurrent unrelated sentence. Otherwise, a defendant would in effect receive credit for an unrelated sentence imposed for distinct offenses.

many programs to rehabilitate [sic] himself since he has been imprisoned and has already served a large part of his sentence." He contends that his is thus an "atypical case."

Petitioner's contention that he is entitled to a further downward departure is meritless. Petitioner states that he was abused as a child by an alcoholic stepfather and that neither of two stepfathers he had as a child gave him any encouragement or guidance. It appears that the Commission first specifically considered lack of guidance and disadvantageous circumstances as a child in 1992. At that time the Commission concluded such factors "are not relevant grounds" for a departure. See U.S.S.G. § 5H1.12. While not prohibited as a basis for departure at the time of petitioner's sentencing, a departure for this reason would be inappropriate. The circumstances described by petitioner are unfortunate, however, many others have regrettably faced similar circumstances without becoming career offenders.

Any effort by petitioner to rehabilitate himself is laudable, but he has pointed to nothing extraordinary. That petitioner has completed a "large part of his sentence" is clearly not extraordinary or a basis for a further departure.

In any event, petitioner received a substantial downward departure which resulted in a sentence significantly below the otherwise mandatory statutory minimum sentence of 20

years imprisonment. The court is without authority to depart below the statutory mandatory minimum sentence under § 5K2.0 or for any reason other than substantial assistance. See United States v. Polanco, 53 F.3d 893, 897 (8th Cir. 1995) (§ 5K2.0 does not permit departure from statutory minimum sentence), cert. denied, 116 S. Ct. 2555 (1996); United States v. Brigham, 977 F.2d 317, 320 (7th Cir. 1992) (same). See also United States v. Campbell, 995 F.2d 173, 175 (10th Cir. 1993); United States v. Rudolph, 970 F.2d 467, 470 (8th Cir. 1992), cert. denied, 506 U.S. 1069 (1993); United States v. Valente, 961 F.2d 133, 135 (9th Cir. 1992).

Finally, petitioner contends that his attorney was ineffective for failing to make the § 5G1.3 and § 5K2.0 arguments petitioner now presents to the court.

Effectiveness of counsel means adequate representation by an attorney of reasonable competence. See Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. See Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of

the pertinent proceedings cannot be accepted as reliable, fair and just. See Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

Because these arguments lack merit, it follows that petitioner's attorney was not professionally deficient for not making them and that petitioner suffered no prejudice.

Petitioner's attorney was effective in helping him to secure a substantially reduced sentence and did nothing which was professionally deficient.

It clearly appears from the petition and the pertinent records in this case that petitioner is not entitled to a reduction of his sentence. Accordingly, the petition will be denied. An appropriate order will be entered.

