

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 DAVID E. NAPIER : NO.: 97-214

MEMORANDUM AND ORDER

J. M. KELLY, J.

NOVEMBER 3, 1998

Presently before the Court are Defendant David E. Napier's many motions, in which he seeks to have his sentencing postponed (Document No. 45), withdraw his guilty plea (Document No. 46), be released on bail (Document Nos. 42 and 47), have the indictment pending against him dismissed or have the grand jury proceedings released (Document No. 48), have information relating to his earlier prosecution in New Jersey released (Document Nos. 44, 50, and 53), have his presentence investigation report modified (Document No. 43), have a hearing regarding his claim that his counsel was ineffective (Document No. 51), and have documents produced pursuant to Rule 17(c) (Document Nos. 52 and 55). For the reasons that follow, Defendant's motions to withdraw his guilty plea, be released on bail, and have his sentencing postponed are denied. Further, as the other motions generally relate to these three, the remaining motions also are denied.

I. FACTS

In May 1997, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Defendant with four counts of bank fraud. The indictment alleged that Defendant used a false Social Security number and false credit history documents to secure bank loans that he never repaid. More specifically, the indictment alleged that Defendant induced The Great

Western Bank to loan Defendant money to purchase a home by falsely representing to the bank that he was a senior vice-president of a laboratory. Defendant supported this claim, the indictment alleged, by producing a false tax return and two letters purporting to show additional sources of income. The indictment also alleged that Defendant convinced Provident National Bank to loan him money to buy a car, again by claiming to be a vice-president of the laboratory and using a false Social Security number. The third count of the indictment alleged that Defendant defrauded Meridian Bank into loaning him money to buy a car through his claim of employment at the laboratory, his use of the false Social Security number, and by misrepresenting the outstanding mortgage on the property purchased through the Great Western Bank loan. The fourth and final count alleged Defendant defrauded Meridian Bank into a car loan a second time through the same means. Defendant pled not guilty and was released on bail until trial, which was scheduled for September 15, 1997.

Several delays then followed. The Court first continued trial at a hearing about Defendant's representation on September 4, 1997. Next, six days before the continued trial date, Defendant moved for another continuance, which the Court granted. The Court set the trial date for October 27, 1997.

The trial did not occur on October 27, either. At that time, Defendant was represented by Michael J. Kelly, Esquire, a federal public defender. Mr. Kelly and Defendant, however, disagreed about how Mr. Kelly should proceed on certain matters,¹ and Defendant therefore

¹In his Motion for Withdrawal of Guilty Plea, Defendant states that he disagreed with Mr. Kelly about the availability of jurisdictional defenses as well as the existence of deficiencies in the government's case. (Def.'s Mem. Supp. Mot. Withdrawal Guilty Plea Pursuant to R. 34(d), at 17.) The disagreement between Defendant and his counsel shows Defendant knew of these defenses prior to his plea, and informs the Court's decision regarding Defendant's waiver of

wished to replace Mr. Kelly with another attorney, William C. Cagney, Esquire. Defendant requested this change despite Mr. Kelly's declaration that he was fully prepared to try the case and Mr. Cagney's claim that although he basically was prepared, he could use more time to ready himself for trial. To ensure Defendant could not later claim he had been denied the representation of his choice, the Court granted Defendant's request that Mr. Cagney be the lead trial attorney.² The Court, however, denied Mr. Kelly's request to withdraw from the case because of its concern that Mr. Cagney was not as prepared as Mr. Kelly. Instead, the Court ordered Mr. Kelly to act as co-counsel with Mr. Cagney.

That afternoon, counsel for Defendant informed the Court that Defendant wished to enter an open guilty plea to all charges. During the colloquy that followed, the Court advised Defendant that by entering this plea, Defendant waived certain rights, including challenging the indictment and raising various defenses. The Court further informed Defendant that by entering this plea he would waive his right to force the government to prove the elements of the charges pending against him, including his intentional and deliberate inducement of federally insured banks to make these loans. See 18 U.S.C. § 1344 (West Supp. 1998). Further, Defendant later stated his belief that the government could make at least a prima facie case of bank fraud on each

these defenses during the plea colloquy.

²Defendant repeatedly requested that the Court substitute Mr. Kelly with Mr. Cagney as his lead attorney, even after the Court instructed Defendant that, by virtue of his knowledge of the state of Mr. Cagney's preparation, Defendant might affect his ability to claim ineffective assistance of counsel later. Defendant acknowledged this risk. As it has turned out, however, while the Court's ruling may have prevented a subsequent claim that it denied Defendant the counsel of his choice, Defendant has not hesitated to claim Mr. Cagney was ineffective; Defendant, perhaps unwittingly, created a situation when demanding leave to install Mr. Cagney that, regardless of the outcome of the Court's decision, created an issue for appeal. He now seeks to take advantage of the representation he insisted upon.

count. Defendant expressly recognized these waivers, and, in response to a question from the Court, said he entered the plea freely and voluntarily. Defendant admitted guilt to all four counts alleged in the indictment. Moreover, he said he was satisfied with his attorneys' representation. The Court accepted Defendant's plea, and scheduled sentencing for February 10, 1998.

Defendant since has requested numerous postponements of his sentencing. Defendant first requested a postponement from the February sentencing date, and the Court continued sentencing to March 27, 1998. On March 20, Defendant's counsel requested a second continuance because Defendant had not obtained a psychological report and counsel had not received all medical and bank records it sought. The Court postponed sentencing to June 8, 1998. On the morning of sentencing, however, the Court received a fax from Defendant in which he itemized his various disputes with Mr. Cagney. The Court again postponed sentencing, this time so that Defendant could retain another attorney. After Defendant retained new counsel, Robert E. Welsh, Jr., Esquire, the Court held a hearing on July 16, 1998, at which it granted Defendant's fourth motion for a continuance of the sentencing but revoked Defendant's bail. A fifth request to postpone sentencing presently is before the Court, as well as his motion to withdraw his guilty plea and his second request to reconsider the Court's revocation of bail. The Court recently held another hearing to hear argument about this last motion.

II. DISCUSSION

A. Defendant's Motion To Withdraw His Guilty Plea

The Court will discuss Defendant's motion to withdraw his guilty plea first. In his memorandum, Defendant laboriously details a jurisdictional defense, that Defendant, at worst, defrauded only car dealerships and mortgage companies, and not banks directly, and that for

jurisdiction under 18 U.S.C. § 1344 to exist Defendant must have known the funds sought by the loans were federally insured. In reliance principally upon United States v. McDow, 27 F.3d 132 (5th Cir. 1994), Defendant argues that the documents Defendant signed nowhere explicitly state an FDIC insured bank was involved, and therefore, Defendant argues, he “factually and legally is innocent of the charged crime[s]”³ (Def.’s Mem. Supp. Mot. Withdrawal Guilty Plea

³This conclusion is an extraordinarily hopeful one, even when considered in light of the persuasive authority of McDow. Far from requiring direct, absolute knowledge of the victim bank’s identity, (Def.’s Mot. Withdrawal Guilty Plea Pursuant to Rule 32(d), at 4-6), or that the bank be involved in the transaction as a primary participant, see id. at 5, the court in McDow merely required proof that the defendant knew a bank ultimately would be influenced.

[I]t is not required that the defendant actually make the false statement directly to the insured institution to be found guilty under the statute, nor is it required that the government show that the defendant knew which particular institution was involved. The defendant does not even have to know that the institution he is trying to influence is federally insured, as long as the proof shows the insured status. But we made it clear in Bowman that “the government must still prove that the defendant *knew* that it was a bank he intended to influence.”

McDow, 27 F.3d at 135-36 (internal citations omitted) (emphasis in original). The issue under McDow, accordingly, is not whether he knew exactly which bank was involved with each loan or whether the bank was federally insured, but whether he knew a bank ultimately would be influenced by his frauds. Cf. United States v. Graham, 146 F.3d 6, 10 (1st Cir. 1998); United States v. Key, 76 F.3d 350, 353 (11th Cir. 1996); United States v. Grissom, 44 F.3d 1507, 1510-11 (10th Cir.), cert. denied, 514 U.S. 1076 (1995); United States v. Bellucci, 995 F.2d 157, 159 (9th Cir. 1993), cert. denied, 512 U.S. 1225 (1994); United States v. White, 882 F.2d 250, 250 (7th Cir. 1989). Given that he applied for the mortgage held by Great Western Bank through Great Western Mortgage Company, he personally authorized one of the car dealerships to apply to PNC Bank on his behalf for a car loan, (Def.’s Mem. Supp. Mot. for Withdrawal of Guilty Plea Pursuant to Rule 32(d), at 7-8), and he previously was convicted of filing false applications for loans, (Hr’g of 10/27/97, at 18 (“obviously there is a one hundred percent similarity of the prior offense and what we have here”); Def.’s Mem. Supp. Mot. for Disclosure, at 1), the Court finds the Defendant knew banks would be influenced by his frauds. Cf. In re Sealed Case, 131 F.3d 208, 210 (D.C. Cir. 1997) (“[T]he law requires a court to examine its own subject-matter jurisdiction in criminal cases as well as civil cases.”). Accordingly, Defendant’s jurisdiction argument, assuming the rationale of McDow is applicable in this Circuit, is unavailing. Further, consistent with this finding and the lack of binding or persuasive precedent requiring a contrary conclusion, the Court denies Defendant’s Motion to Dismiss the Indictment

Pursuant to Rule 32(d), at 6.) Defendant also details other alleged defects in the case against him. The focus of his argument, to make all of the preceding relate in some way to withdrawing his guilty plea, is that the Court should allow Defendant to withdraw his plea because he was denied effective assistance of counsel. “In sum, Mr. Napier was rendered ineffective assistance of counsel.” Id. at 16.

The standard to evaluate Defendant’s motion was provided by the Supreme Court in Hill v. Lockhart, 474 U.S. 52 (1985), in which it reaffirmed that the test to determine the validity of a plea is whether the plea was an intelligent and voluntary choice of those options available to the defendant. Id. at 56. In Hill, the defendant challenged the voluntariness of his plea based on his claim that he was denied effective assistance of counsel, and that argument seems to be the one

or Disclosure Under Rule 6(e)(3)(C)(ii).

Moreover, Defendant has moved for each entity involved in Defendant’s false loan applications to produce documents pertaining to those applications pursuant to Rule 17(c), including internal files and financing licenses. These requests seem relevant only to the jurisdictional defense, and because the Court finds that defense is inapplicable here, Defendant previously could have procured the requested documents through its own subpoena power, and Defendant already has copies of the loan applications in his possession (as evidenced by the appendices to his motion to withdraw his guilty plea), the Court finds no compelling reason to order the production of these documents, and will decline to exercise its discretion under Rule 17(c).

Similarly, Defendant has requested production of documents relating to his earlier prosecutions in New Jersey, arguing that this production is necessary because those documents possibly may show some overlap between the offenses presently before the Court and those he previously was sentenced for in New Jersey. The Court finds nothing, however, in the record to indicate that this is even a vague possibility. To the contrary, the Presentence Investigation Report makes clear that no overlap occurred. The previous bank fraud charges arose out of Defendant’s fraudulent obtaining of six loans during the period between November 18, 1987, and June 18, 1988. The conduct to which Defendant more recently pled guilty took place between June 1990 and February 1991. Because of this two year gap, Defendant’s request is nothing more than a fishing expedition, and an untimely one at that. Defendant has had more than ample time to request a transcript of his previous sentencing or otherwise investigate this far-fetched avenue. Accordingly, the Court denies Defendant’s request to compel the government to turn over this information.

Defendant is making here. “Because of the ineffective assistance of Mr. Cagney and the Federal Defenders Office in failing to investigate and to file the above motions, and to prepare them at a trial, I pled guilty when I did not wish to.” (Def.’s Mot. Evidentiary Hr’g On Ineffective Assistance of Counsel, at 1.) Whether Defendant’s claim goes to the voluntariness or intelligent nature of his plea is not of great consequence, however, as the analysis is the same. See Tollett v. Henderson, 411 U.S. 258, 267 (1973).

The standard the Court announced in Tollett has matured into the one stated in Strickland, Hill, 474 U.S. at 57, and the Court therefore must evaluate Defendant’s claims to determine whether Mr. Kelly’s and Mr. Cagney’s representations fell below an objective standard of reasonableness and whether, but for his attorneys’ unprofessional errors, if any, the result of the proceeding would have been different. See id. Defendant cannot prevail under the first prong of this standard, however, and therefore an analysis of the second prong is unnecessary. See Dooley v. Petsock, 816 F.2d 885, 889 (3d Cir.), cert. denied, 484 U.S. 863 (1987). First, regardless of whether Messrs. Kelly and Cagney failed to recognize the McDow jurisdictional defense or failed to present it, given the lack of supporting precedent in this Circuit and the dubious applicability of a correct reading of McDow to this case, their representation of Defendant was not objectively unreasonable.⁴ Second, the reasons Defendant claims counsel told him to enter a guilty plea, “relating to jury pool demographics and [the] advice that a good case could be made for downward departure in this case,” (Letter from Defendant to the Ct. of 6/8/98, at 4), are

⁴With respect to any other defenses Defendant believes are applicable, the Court conducted an extensive colloquy, and Defendant said he understood the consequences of his plea. Accordingly, he expressly waived all of those defenses when he entered his open guilty plea. Cf. Libretti v. United States, 516 U.S. 29, 49-51 (1995); United States v. Huff, 873 F.2d 709, 712 (3d Cir. 1989).

objectively reasonable. Third, Defendant was represented by counsel reasonably prepared on the day of trial; Mr. Kelly several times said he was prepared to try the case, and Mr. Cagney, introduced into the case only upon Defendant's emphatic, repeated requests, would have been supported ably by Mr. Kelly. The representation Defendant received, therefore, was not objectively unreasonable, and Defendant's counsel was not ineffective.⁵ The Court therefore finds that Defendant's plea was voluntary and intelligent, and denies his request to withdraw the plea. "This, then, is simply a case in which the defendant changed his mind about the plea." Huff, 873 F.2d at 712.

B. Defendant's Renewed Motion For Bail

Defendant has renewed his previous motion for bail following the Court's July 16, 1998, denial of that motion. Defendant argues that circumstances now are different than when the Court twice previously visited this issue, and that the serious illness of Defendant's longtime companion, Ms. Deborah Jones, guarantees he no longer is a danger to the community. Rather, Defendant claims, his efforts will be focused on helping Ms. Jones recover⁶ and running errands.

The government can think of a few other things Defendant might do while on bail. At the

⁵Accordingly, Defendant's Motion for an Evidentiary Hearing Regarding Ineffective Assistance of Counsel is denied. Further, Defendant's previous counsel, apparently in view of what they believed were the applicable defenses and facts of the case, declined to file objections to the presentence report. In light of the Court's finding that Messrs. Kelly and Cagney provided reasonable, effective representation, and the fact that the time period for filing objections to the report long since has elapsed, the Court finds Defendant has failed to meet the "good cause" requirement of Federal Rule of Criminal Procedure 32(b)(6)(D). Therefore, despite the government's lack of an objection to this motion, Defendant's Motion to Require Modification of Presentence Investigation Report in Consideration of Objections is denied.

⁶Defendant admitted at the hearing, which took place on September 24, 1998, that he has no special skills, like nursing skills, that would enable him to care for Ms. Jones. His assistance to Ms. Jones, therefore, apparently is limited to comforting her and helping to run the household.

September 24, 1998, bail hearing, the government requested leave, granted by the Court, to investigate various representations Defendant made. In response to Defendant's assertion that he presents no danger to the community by virtue of his employment with a company called Voyager General Personal Computer Corporation ("Voyager"), the government claims to have discovered the following: Defendant and Ms. Jones requested Coleman Capital Advisors, Inc., to prepare a prospectus about Voyager, but has failed to pay Coleman for its work; Defendant and Ms. Jones, on behalf of Voyager, entered into a lease that has been in default since July 1998 in the amount of \$21,406.00; and, of the three hundred computers Voyager agreed to provide Creative Educational Concepts Charter School ("CEC") at the price of \$6,000.00 per computer, Voyager has furnished only five, and three of those no longer are operational.⁷

The government also investigated Defendant's claim that he is "a skilled businessman whose character is beyond reproach." (Letter from Bilal to the Ct. of 9/6/98 in Supp. of Def.'s Mot., at 1.) Mr. Bilal made this statement in connection with Defendant's relationship with Learning Methods International ("LMI"), a company that promised recruiters that if they found teachers to instruct others about an on-line tutorial system LMI supposedly created, the recruiters would receive a ten dollar reimbursement for each twenty dollar fee they collected from prospective teachers. According to the government's memorandum, Robert Prentiss recruited between seventy and eighty teachers; Scott Wright recruited sixty-three teachers; and Cheryl Della Valle recruited about twenty teachers. While LMI did accept each twenty dollar fee, it

⁷When a representative of CEC called Voyager to find out when the remaining 295 computers would be delivered, the government alleges, Ms. Jones informed her that Defendant was on an extended business trip to South Africa. Defendant actually was somewhat closer than that, spending his time at the federal correctional institute in Minerville, Pennsylvania.

never provided any service to any teacher, and never reimbursed the recruiters. Joseph Maiorana, an employee of LMI, reported to the government that he lost \$16,000.00 to LMI, and Stephen Kohler, another LMI employee, lost \$10,000.00; Toni Reilly, Daniel Reilly, Dr. Eugene Alexander, and Roseann Murphy all were employed or retained by LMI and never have received their salaries. Several of this latter group received checks, but those checks all were returned for insufficient funds. Based on its investigation, the government believes Defendant continues to present a danger to the community.

The Court agrees with the government that Defendant continues to present a threat to the community, and Defendant's renewed motion therefore is denied. First, even before considering the government's investigation, Defendant has failed to present a sufficiently compelling reason to reverse the Court's prior conclusions. He admitted he cannot provide any nursing services to Ms. Jones, but contemplated his presence would be useful for running late-night errands and making sure the couple's two children, ages fifteen and sixteen, find their way home after school. The Court can find no reason why Defendant is uniquely equipped to perform these services. Any non-nursing duties readily can be performed by a hired attendant; Defendant has represented to the Court that Ms. Jones's salary from the State of New Jersey is approximately eighty-five thousand dollars and that his salary from Voyager is \$9,500.00 per month. As for their children, they must continue to draw upon whatever resources have carried them through their father's incarceration. Second, the government's allegations, if true, paint a picture of Defendant either as an astonishingly inept businessman or a career confidence man, habitually scheming to prey on the gullible. Based upon his record to date, the Court believes the latter is more likely. The Court's conviction that Defendant is a danger to the community has been reinforced, not

weakened, and therefore Defendant's motion is denied.

C. Defendant's Motion to Postpone Sentencing

Defendant also has moved to postpone his sentencing. In light of the preceding rulings, however, it no longer is necessary to postpone Defendant's sentencing; Defendant had urged the Court to delay sentencing until the motions pending before the Court were resolved and the materials Defendant sought through some of those motions digested. Accordingly, Defendant's motion is denied, and sentencing, already postponed four times, will take place on November 30, 1998, at 9:45 A.M.

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ORDER

AND NOW, this 3rd day of November, 1998, in consideration of Defendant's motions and the Government's responses thereto, it is hereby **ORDERED**:

1. Defendant's Motion to Withdraw Guilty Plea Pursuant to Rule 32(d) (Doc. No. 46) is **DENIED**;

2. Defendant's Renewed Motion for Bail (Doc. Nos. 42 and 47) is **DENIED**;

3. Defendant's Motion to Postpone Sentencing (Doc. No. 45) is **DENIED**;

4. Defendant's Motion for Disclosure of Materials and Information Arising Out of New Jersey Prosecution (Doc. Nos. 44, 50, and 53) is **DENIED**;

5. Defendant's Motion to Require Modification of PSI in Consideration of Objections (Doc. No. 43) is **DENIED**;

6. Defendant's Motion for Evidentiary Hearing Regarding Ineffective Assistance of Counsel (Doc. No. 51) is **DENIED**;

7. Defendant's Motion to Dismiss the Indictment or for Disclosure under Rule 6(e)(3)(C)(ii) (Doc. No. 48) is **DENIED**;

8. Defendant's request for a production of records pursuant to Rule 17(c) (Document Nos. 52 and 55) is **DENIED**;

9. Sentencing of Defendant is scheduled to take place on November 30, 1998, at 9:45

A.M.

BY THE COURT:

JAMES McGIRR KELLY