

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

UNITED STATES : CRIMINAL ACTION
 :
 v. :
 : No. 97-279-02
 JOSEPH SCAVETTI, SR. : (98-6233)

ORDER-MEMORANDUM

AND NOW this ___ day of February, 1999, petitioner Joseph Scavetti, Sr.'s motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is denied.

On November 17, 1997, petitioner pleaded guilty to three counts of unlawful distribution of methamphetamine and one count of conspiracy to distribute methamphetamine, 21 U.S.C. §§ 841(a)(1), 846. On March 6, 1998, he was sentenced to the mandatory minimum of sixty months imprisonment on each count to run concurrently. Petitioner did not directly appeal his sentence. This habeas petition under 28 U.S.C. § 2255 alleges ineffective assistance of counsel.¹

Specifically, petitioner claims that his attorney should have moved (1) to suppress recordings taped by a cooperating witness who had been promised leniency in violation of 18 U.S.C. § 201(c)(2), and (2) to dismiss certain counts of unlawful distribution because the government engaged in sentencing manipulation or sentencing entrapment; and that (3) his plea of guilty was involuntary because his attorney did not advise him of the availability of such

¹ Because petitioner is asserting ineffective assistance of counsel, he need not satisfy the "cause and prejudice" standard normally applicable to claims waived for failure to raise on direct appeal. See United States v. DeRewal, 10 F.3d 100, 105 (3d Cir. 1993).

motions.

To succeed in an ineffective assistance of counsel claim in the context of a guilty plea, petitioner must show that:

- (i) his or her counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases; and
- (ii) there is a reasonable probability that, but for counsel's errors, he or she would have proceeded to trial instead of pleading guilty.

United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (citing Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985)). Here, the first step is to determine whether petitioner's counsel was unreasonable either in not moving to suppress evidence or to dismiss certain counts of unlawful distribution.

It has consistently been held that the government's offer of leniency to a witness in exchange for cooperation or testimony is not a violation of the so-called "anti-gratuity statute," 18 U.S.C. § 201(c)(2).² See, e.g., United States v. Hease, 162 F.3d 359, 366 (5th Cir. 1998); United States v. Ware, 161 F.3d 414, 420 (6th Cir. 1998); United States v. Hammer, 25 F. Supp. 2d 518, 535-36 (E.D. Pa. 1998); Nero v. United States, 1998 WL 744031, *1 (E.D. Pa. Oct.

² This statute reads in relevant part:

(c) Whoever-

* * *

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2).

23, 1998).³ Accordingly, the claim that the prosecutor violated the anti-gratuity statute by promising a witness leniency for his cooperation against petitioner is without merit.

Petitioner also claims that the government engaged in sentencing manipulation or sentencing entrapment because it waited until after petitioner's third drug sale to arrest him so as to increase the sentence.

Sentencing entrapment has been described as "outrageous official conduct [that] overcomes the will of an individual predisposed only to dealing in small quantities' for the purpose of increasing . . . the resulting sentence of the entrapped defendant." United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993) (citations omitted). Our Court of Appeals has not ruled on the validity of this theory. See United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994). However, even if it were applicable in this Circuit, petitioner would not benefit. There is no evidence on the record, nor is any asserted in his § 2255 motion, that suggests petitioner was predisposed to committing a lesser offense or was otherwise unwilling to engage in subsequent drug transactions violative of 21 U.S.C. § 841(a)(1).

Nor can petitioner establish a successful sentencing manipulation claim. Closely-related to sentencing entrapment, manipulation "occurs when the government engages in improper

³ A Tenth Circuit panel recently found to the contrary, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998); however, that decision was vacated, id. at 1361, and upon rehearing, en banc, rejected. United States v. Singleton, ___ F.3d ___ (10th Cir. 1999).

conduct that has the effect of increasing a defendant's sentence." See United States v. Kaczmariski, 939 F. Supp. 1176, 1180 (E.D. Pa. 1996) (quoting United States v. Okey, 47 F.3d 238, 240 (7th Cir. 1995)). Here, however, petitioner qualified for the five-year mandatory minimum after his first drug transaction. 21 U.S.C. § 841(b)(1)(B)(viii). Whatever the government's motivation for waiting until a third drug sale before arresting petitioner,⁴ the effect was not to increase his sentence.⁵

Petitioner has not established the first part of his ineffective assistance of counsel claim - lack of objective reasonableness. No evidentiary hearing is required in that petitioner's claims "clearly fail[]" to demonstrate either deficiency of counsel's performance or prejudice to the defendant." United States v. Dawson, 857 F.2d 923, 928 (3d Cir. 1988).

Edmund V. Ludwig, J.

⁴ The allegation that the government improperly intended to enhance petitioner's sentence is undermined by the fact that petitioner was given several opportunities after his arrest to obtain a downward departure under § 5C1.2 - the "safety valve" provision. Because petitioner failed several polygraph tests, however, the government determined that petitioner had not provided truthful information and did not qualify for downward departure.

⁵ The standard for evaluating the government's conduct has been stated in different ways. It has been held that a claim of sentencing manipulation requires "outrageous government conduct that offends due process." United States v. Jones, 18 F.3d 1145, 1153 (4th Cir. 1994). The First Circuit has required a showing that the government has "improperly enlarged the scope or scale of the crime." United States v. Egemonye, 62 F.3d 425, 427 (1st Cir. 1995). Here, no facts support a finding under either standard.