

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

GUSS ORTIZ	:	CIVIL ACTION
	:	
v.	:	No. 97-1250
	:	
UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	No. 91-578-02

ORDER

AND NOW, this day of April, 1999, upon careful consideration of defendant's motion under Rule 35(a)(2)¹ to Correct an Illegally Imposed Sentence, and the Government's

¹ Federal Rule of Criminal Procedure 35 (a)(2) directs the district court to correct a sentence on remand when the court of appeals has determined that the sentence was unreasonable, was imposed in violation of law, or resulted from an incorrect application of the sentencing guidelines. See Fed. R. Crim. P. 35 (a)(2) (Supp. 1998). Ortiz is not awaiting resentencing as a result of a remand -- he has already been resentenced. Furthermore, his resentencing did not occur on remand but as a result of the court's granting, in part, Ortiz's § 2255 motion. Consequently, Rule 35(a)(2) is completely inapplicable to the instant case.

Even looking past Ortiz's unwarranted reliance on Rule 35 (a)(2) to the substance of the claims does not save this motion -- Ortiz makes five arguments all of which lack any merit. He first asserts that his sentence imposed on September 25, 1997, violated 18 U.S.C. § 3282 because, at the time of the resentencing, the five-year statute of limitations for his offenses had run. Section 3282 provides that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (emphasis added). The statute does not require that a person be sentenced within five years of having committed an offense, but only that the person be indicted within that period. Ortiz does not challenge the timing of his indictment and thus, cannot obtain relief pursuant to this law.

Second, Ortiz claims that the court subjected him to double jeopardy by applying a two-level enhancement for possession of a firearm during the course of the offense when he had already served his time on the charge of being an alien in possession of a firearm (Count Four of the indictment). The Double Jeopardy Clause prohibits punishing an individual twice for the same crime. Witte v. United States, 515 U.S. 389, 396 (1995). Ortiz initially received a 97-month sentence (just over eight years) on Counts One, Two, and Four to run concurrently. He has been incarcerated since September 9, 1991. When the court resentenced Ortiz in September 1997, after vacating his conviction on Count Three pursuant to the subsequent decision in Bailey

response thereto, IT IS HEREBY ORDERED that the motion is DENIED.

William H. Yohn, Jr., Judge

v. United States, 516 U.S. 137 (1995), Ortiz had not yet completed his sentence on Count Four. See United States v. Ortiz, No. 97-1250, 1997 WL 214934, at *7 n.9 (E.D. Pa. April 28, 1997). The Third Circuit has held that a defendant's sentence can be enhanced for possession of a firearm under U.S.S.G. § 2D1.1(b)(1) following a vacation of a § 924(c) conviction for "use" of a firearm on a § 2255 motion. See United States v. Davis, 112 F.3d 118 (3d Cir.), cert. denied, 118 S. Ct. 224 (1997). A number of courts have also held that, under similar circumstances, such an enhancement did not constitute separate and duplicative punishment for double jeopardy purposes. See Witte, 515 U.S. at 397-404 (holding that defendant may be separately prosecuted for conduct that supported enhancement of sentence for previous conviction); United States v. Segler, 37 F.3d 1131, 1134-35 (5th Cir. 1994) (holding that two-point enhancement for possessing firearm while manufacturing methamphetamine in conjunction with conviction for being felon in possession of firearm does not constitute double jeopardy); United States v. Patterson, 947 F.2d 635, 637-38 (2d Cir. 1991) (holding that two-level enhancement for possession of gun during commission of drug offense where conviction for being felon in possession of firearm had already increased defendant's level under drug guideline did not constitute unlawful double-counting). Accordingly, I find that Ortiz has not raised a valid double jeopardy claim in this case.

Ortiz's third claim is that he has been subjected to cruel and unusual punishment in violation of the Eighth Amendment because he received two punishments for possession of a single firearm. The Eighth Amendment "prohibits punishments which . . . are grossly disproportionate to the severity of the crime." Sample v. Diecks, 885 F.3d 1099, 1108 (3d Cir. 1989) (citations omitted). As noted above, Ortiz is not being punished twice for a single crime. Consequently, Ortiz has failed to present any genuine basis for this claim.

Fourth, Ortiz asserts that certain testimony from a witness who received leniency in exchange for his testimony should have been suppressed because prosecutors bribed and intimidated the witness into testifying against Ortiz in violation of federal bribery and witness tampering statutes. See 18 U.S.C. § 201 (c)(2); 18 U.S.C. § 1512 (b)(1). Ortiz offers no evidence beyond the fact that the witness received a more lenient sentence and the witness's father characterized him as a liar. Courts consistently have held that § 201 (c)(2) does not apply to federal prosecutors who negotiate lesser sentences for defendants who testify against co-defendants. See, e.g., United States v. Scavetti, No. 97-279-02, 1999 WL 80368 (E.D. Pa. Feb. 2, 1999); Nero v. United States, No. 97-321-02, 1998 WL 744031 (E.D. Pa. Oct. 23, 1998). As defendant has failed to assert any evidence that would support a finding that the government acted in an unlawful manner, defendant's claim must be dismissed.

Finally, Ortiz claims that his counsel was ineffective for failing to raise the Title 18 U.S.C. § 3282 statute of limitations issue at his resentencing. As noted above, § 3282 in no way affects the legality of Ortiz's sentence. Because counsel cannot be ineffective for failing to raise a frivolous issue, this argument also has no merit.