

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

UNITED STATES OF AMERICA : CIVIL ACTION
: (Crim. A. No. 92-086-05)
:
v. :
:
KENNETH CORNELIUS LAMPKIN : NO. 98-CV-5270

MEMORANDUM & ORDER

J. M. KELLY, J.

MAY , 1999

Presently before the Court is Kenneth Cornelius Lampkin's ("Lampkin") Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence. In consideration of this motion, and the government's response thereto, the Court concludes Petitioner has failed to state any meritorious claim. The Court therefore denies Petitioner all of the relief he demands.

BACKGROUND

Lampkin was convicted on several counts of conspiracy to distribute cocaine and distribution of cocaine on January 15, 1993. His trial attorney filed post trial motions, including an argument that lies and contradictions in the government's evidence made the verdict unreliable, necessitating a new trial. These motions were denied. Lampkin hired new counsel for sentencing who filed additional post trial motions. Prior to sentencing, on November 13, 1994, Lampkin wrote to the Court, asserting that his trial counsel was ineffective and that the government withheld Brady material. Lampkin then hired new sentencing counsel who filed a motion seeking in camera review of

potential Brady material. The Court conducted an in camera review, as requested, and found no exculpatory or impeachment material. On November 28, 1995, Lampkin was sentenced to prison for 188 months. Represented by a new attorney, Lampkin filed a direct appeal. The direct appeal raised the issues of: 1) admission of limited evidence concerning Lampkin's financial condition; 2) use of guilt assuming hypotheticals to some of Lampkin's character witnesses; 3) the Court's instructions to the jury on conspiracy, coconspirator liability and reasonable doubt; 4) the Court's response to a question from the jury; and 5) sufficiency of the evidence. As a result of his direct appeal, certain counts of Lampkin's conviction were vacated on January 16, 1997. Lampkin's petition to the United States Supreme Court for a writ of certiorari was denied on October 6, 1997.

EVIDENTIARY HEARING

If a prisoner's § 2255 allegations raise an issue of material fact, the Court is required to hold an evidentiary hearing in order to make findings of fact and conclusions of law, unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. See Walker v. Johnson, 312 U.S. 275, 285 1941; United States v. Costanzo, 625 F.2d 465, 468 (3rd Cir. 1980). In exercising the discretion of whether to grant such a hearing, the court must accept the truth of the factual allegations, unless they are clearly frivolous on the face of the existing record. Virgin Islands v. Forte, 865 F.2d 59, 62 (3rd Cir. 1980). The court

must decide whether the allegations are material using a two step inquiry. United States v. Essig, 10 F.3d 968, 976-77 (3rd Cir. 1993). First, was a petitioner's failure to object a procedural waiver? Id. If there was not a procedural waiver, the court must determine if an error is alleged that is serious enough to permit collateral review under § 2255. Id. Since petitioner must meet both elements, if either element is not met, the Court may dismiss the petition. Review of Lampkin's petition demonstrates that there is no issue of material fact raised, therefore there is no need to hold a hearing on this motion.

RELITIGATION PROHIBITED

A prisoner may not use a § 2255 motion as a vehicle to relitigate an issue that has been raised on direct appeal. United States v. DeRewal, 10 F.3d 100, 105 n. 4 (3rd Cir. 1993). To the extent that issues raised in Lampkin's § 2255 Motion were raised and rejected in post trial motions and his direct appeal of his conviction, they are inappropriately raised here.

PROCEDURAL DEFAULT

An issue that could have been raised on direct appeal, but was not, is subject to procedural default. United States v. Frady, 456 U.S. 152, 162-67 (1982). Such claims are waived unless the prisoner can show either actual innocence or cause excusing the procedural default, and actual prejudice resulting from the error. Id. at 168.

DISCUSSION

A. Singleton

Lampkin argues for relief because of the government's use of cooperating witnesses. In support of this claim, Petitioner relies upon the reasoning underlying United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), which the Tenth Circuit vacated pending rehearing en banc just nine days after it issued its opinion. The en banc Tenth Circuit has now rejected the panel decision. United States v. Singleton, No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999). In fact, no circuit has come even vaguely close to adopting its reasoning and the panel decision has been roundly criticized. See United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) ("the chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are . . . about the same as discovering that entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns"). Petitioner's claim, therefore, lacks any precedential support. The Court therefore concludes this basis for relief is without merit.

B. Suborned Perjury

Lampkin claims that the government knowingly presented perjured testimony to convict him. Lampkin has pointed out many inconsistencies contained within the testimony to support his position. Lampkin and his attorneys were aware of the

inconsistencies in testimony in this case, as demonstrated by Lampkin's post trial motions. This issue was not, however, raised on appeal. Accordingly, Lampkin has procedurally defaulted on this issue and has not demonstrated his actual innocence or cause for not having previously appealed this issue.

C. Brady & Jenks Act Violations

Counsel for Lampkin presented this issue to the Court in post trial motions and the Court performed an in camera review of purported Jenks Act violations. Lampkin's attempt to relitigate this issue is barred. Because Lampkin failed to appeal the Court's determination that there was no material that should have been produced under the Jenks Act, he has also procedurally defaulted on this issue.

D. Ineffective Assistance of Counsel

Petitioner next argues his counsel was ineffective at trial, alleging a multitude of deficiencies. He claims his counsel failed to adequately investigate the facts of his case and possible defenses, failed to object to improper cross-examination, failed to request proper jury instructions, failed to interview prosecution witnesses and did not discuss whether Lampkin should testify and his potential testimony. Lampkin clearly believed that he had an ineffective assistance of counsel claim at the sentencing stage of his case, as set forth in his November 13, 1994, letter to the Court.

An ineffective assistance of counsel claim is generally reserved for a § 2255 motion because of the difficulty associated with forcing an attorney to argue on appeal his or her own ineffectiveness at trial. Here, Lampkin has retained separate counsel for trial, sentencing and appeal. Further, he raised the belief that his trial counsel was ineffective prior to his sentencing hearing. Lampkin has not proved his actual innocence or shown cause for his failure to raise this issue on appeal. Accordingly, it has been procedurally defaulted.

CONCLUSION

Lampkin's Motion to Vacate, Set Aside, Or Correct Sentence shall be denied. Lampkin has made no substantial showing of the denial of a constitutional right, therefore a Certificate of Appealability shall not be issued.

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O R D E R

AND NOW, this day of May, 1999, in consideration of
Petitioner's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside,
Or Correct Sentence By A Person In Federal Custody, and the
government's response thereto, it is ORDERED:

1. The Motion To Vacate, Set Aside, Or Correct Sentence By
A Person In Federal Custody is DENIED; and
2. No probable cause exists for a certificate of
appealability.

BY THE COURT:

JAMES MCGIRR KELLY