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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 04-103
	:	
KENNARD GREGG	:	
a/k/a Raymond Edward Washington	:	

MEMORANDUM

Padova, J. **October 3, 2006**

Defendant pled guilty to Indictment No. 04-103 and was sentenced on June 23, 2004. Before the Court is the Government's "Motion to Vacate the Defendant's Sentence and Resentence the Defendant," in which the Government contends that Defendant's sentence should be vacated because he fraudulently used the identity of another person in connection with his conviction and sentencing in this case. For the reasons that follow, we find, as a threshold matter, that we have jurisdiction to vacate a sentence procured by fraud and to impose a new sentence based upon accurate information.

I. BACKGROUND

On March 22, 2004, Defendant, using the identity of Kennard Gregg, entered an open plea of guilty to Counts I and II of Information No. 04-103, which charged him with two counts of dealing in counterfeit obligations in violation of 18 U.S. § 473. Defendant's real name is Raymond Edward Washington. Defendant was sentenced on June 23, 2004, under the identity of Kennard Gregg. The Total Offense Level for this offense is 9. Kennard Gregg had 13 prior criminal convictions, all but two of which were so old that they did not result in criminal history points. The two more recent convictions resulted in three criminal history points and a Criminal History Category of II. The Guidelines sentencing range for a Total Offense Level of 9 and a Criminal History Category of II is 6 - 12 months. U.S. Sentencing Guidelines Manual, ch.5 pt. A (2003).

Defendant was sentenced as Kennard Gregg to six months imprisonment, three years of supervised release, restitution of $350.00 and a $200 special assessment.

Defendant served his period of imprisonment and admitted his real identity to his probation officer when he started supervised release. The Court has been advised that Raymond Washington has a more extensive criminal history than Kennard Gregg and, if Washington's true identity had been known, he would have had a Criminal History Category of IV. The Guidelines sentencing range for a Total Offense Level of 9 and a Criminal History Category of IV is 12 - 18 months imprisonment. U.S. Sentencing Guidelines Manual, ch.5 pt. A (2003).

The Government has asked the Court to vacate Defendant's sentence and to resentence him in accordance with the sentence that the Guidelines would suggest for an individual with his actual criminal history. Defendant opposes the Motion on the grounds that (1) this Court does not have jurisdiction to vacate Defendant's sentence and to resentence him and (2) his conduct was not fraudulent. It is clear that, as a threshold matter, we must determine whether we have jurisdiction to vacate a sentence based on fraudulent information submitted by the defendant and to impose a new sentence based upon accurate information.

II. DISCUSSION

The Government maintains that the district courts have the inherent power to correct criminal sentences procured through fraud. See United States v. Bishop, 774 F.2d 771 (7th Cir. 1985). In Bishop, the defendant moved for modification of his sentence because he was also serving a 34 year state sentence. Id. at 772. The district court granted the motion and resentenced Bishop to a term of imprisonment concurrent with his state sentence. Id. at 772-73. The district court subsequently discovered that Bishop's state sentence had been vacated and that he had been released on parole.

Id. at 773. The district court notified the government, which moved to vacate the modification order. Id. The district court held a hearing, found that Bishop had intentionally mislead the court, vacated the modified sentence and reimposed Bishop's original sentence (a term of three years imprisonment for conspiracy to distribute heroin). Id. Bishop appealed, arguing that the district court did not have jurisdiction to modify his sentence because the time for modifying a sentence pursuant to Federal Rule of Criminal Procedure 35 was only 120 days, which had past before the district court acted.[1] Id. The United States Court of Appeals for the Seventh Circuit determined that Bishop's jurisdiction argument was meritless because it ignored "the district court's inherent power to correct a judgment procured through fraud." Id. The Seventh Circuit noted that: "[A] court must be able to sentence a defendant upon accurate information and when the sentence imposed is based upon fraudulent information provided by the defendant, the court has the inherent power to correct that sentence." Id. at 775.

Similarly, in United States v. Kendis, 883 F.2d 209 (1989), the United States Court of Appeals for the Third Circuit affirmed a district court order vacating a sentence of six months imprisonment followed by five years of probation and resentencing Kendis to a term of four years incarceration, based on fraud on the court prior to sentencing. Kendis's fraudulent activity, like that of the Defendant in the instant case, was not discovered until after he had served his term of six months imprisonment. On February 9, 1987, Kendis pled guilty to bank fraud and, as part of his plea agreement, was required to pay restitution to his victims. Id. at 210. On April 10, 1987, he was sentenced to five years imprisonment, all but six months of which was suspended, followed by five

[1]Rule 35 has been amended since Bishop and now provides that the Court may correct a sentence which resulted from "arithmetical, technical, or other clear error" within seven days of sentencing. Fed. R. Crim. P. 35(a).

years of probation. Id. He was released from custody on September 21, 1987 and began to serve his probation. Id. In October, 1987, the Government moved to revoke his probation on the ground that the money he used to make restitution to his victims between his guilty plea and sentencing had been obtained through additional acts of bank fraud. Id. In November 1987, he was indicted on five additional counts of bank fraud ("Kendis II"). Kendis pled guilty to two counts of the Kendis II indictment on September 30, 1988, and, on October 13, 1988, was sentenced to three years of incarceration on each of those counts, to be served consecutively, fines, restitution, and a special assessment. Id. On October 13, 1988, the district court also vacated Kendis' April 10, 1987 sentence and sentenced him to four years of incarceration, to be served consecutively to the two three year terms of imprisonment he received on the Kendis II conviction. In affirming the district court, the Third Circuit adopted "the principle that revocation of probation is permissible when defendant's acts prior to sentencing constitute a fraud on the court." Id.

Defendant contends that our power to correct sentences is limited by Federal Rule of Criminal Procedure 35, which states that a court may correct a sentence "that resulted from arithmetical, technical, or other clear error" within seven days after sentencing. Fed. R. Crim. P. 35(a). Defendant maintains that the courts have no inherent power to allow them to circumvent this procedural rule, which would, therefore, prevent us from altering his sentence, since he was sentenced more than two years ago. Defendant relies on Carlisle v. United States, 517 U.S. 416 (1996). In Carlisle, the district court initially denied an untimely motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), which was filed after the seven day time limit for filing such a motion pursuant to Rule 29 had elapsed. Id. at 418. At Carlisle's sentencing, almost three months after the jury verdict was returned, the district court reversed its ruling, withdrew its

opinion and order denying the Rule 29 motion, and entered an order granting the Rule 29 motion. Id. The United States Court of Appeals for the Sixth Circuit reversed, holding that "under Rule 29 a district court has no jurisdiction to grant an untimely motion for judgment of acquittal, and that a district court has no jurisdiction to enter a judgment of acquittal sua sponte after the case has been submitted to the jury." Id. at 419 (citation omitted). Before the Supreme Court, Carlisle asserted, amongst other grounds, that the district court had the "inherent supervisory power" to rule in his favor. Id. at 425. The Supreme Court disagreed, stating that the court's "inherent power . . . does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." Id. at 426.

The Supreme Court in Carlisle was, however, careful not to disturb its determination in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), that a federal court has the inherent power "**to vacate its own judgment upon proof that a fraud has been perpetrated upon the court**." Id. at 44 (emphasis supplied) (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) and Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946)). The Court stated that:

> This "historic power of equity to set aside fraudulently begotten judgments," Hazel-Atlas, 322 U.S., at 245, 64 S. Ct., at 1001, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Id., at 246, 64 S. Ct., at 1001. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. Universal Oil, supra, 328 U.S., at 580, 66 S. Ct., at 1179.

Id. The Supreme Court also recognized, in Chambers, that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of

Congress.'" Id. at 47 (quoting Ex Parte Robinson, 19 Wall. 505, 511 (1874)). However, the Court stated that "'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." Id. (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) and citing Link v. Wabash R. Co., 370 U.S. 626, 631-32 (1962)). In Carlisle, the Supreme Court distinguished Chambers, stating that this "cautionary principle does not apply in the present case, not only because of the clarity of the text, but also because we are unaware of any 'long unquestioned' power of federal district courts to acquit for insufficient evidence sua sponte, after return of a guilty verdict." Carlisle, 517 U.S. at 426 (quoting Link, 370 U.S. at 631).

Applying the teachings of Carlisle and Chambers to the instant proceeding, we find that the courts have a historically recognized inherent power to vacate judgments procured by fraud. See Chambers, 501 U.S. at 44. We also see no evidence in the text of Rule 35 that Congress sought to limit this inherent power, since Rule 35 speaks to the court's power to "correct arithmetical, technical, or other clear error" and fraud on the court is not "error." See Fed. R. Crim. P. 35. We find, therefore, that Rule 35 does not limit the federal court's inherent power to vacate judgments procured through fraud.[2] See United States v. Gray, 708 F. Supp. 458, 460-61 (D. Mass. 1989)

[2]We asked the parties to address the impact of 18 U.S.C. § 3582(c) upon the instant Motion. That section restricts the power of the courts to modify sentences once they have been imposed to three instances: (1) upon motion of the Director of the Bureau of Prisons; (2) if otherwise permitted by statute or by Rule 35; or (3) if the Guidelines sentencing range upon which the sentence was based is subsequently lowered by the Sentencing Commission. See 18 U.S.C. § 3582(c). We see no evidence in the text or legislative history of this statute that Congress intended this section to abrogate or otherwise limit the historic power of the federal courts to vacate a judgment and sentence upon proof that it was procured through fraud. Indeed, the legislative history makes it clear that, in passing Section 3582(c) as part of the Comprehensive Crime Control Act of 1983, Congress was concerned foremost with providing "safety valves" for the reduction of a term of imprisonment "for 'extraordinary and compelling reasons' and to respond to changes in the guidelines." S. Rep. No.

("The authority of the Court to correct judgments obtained by fraud applies to criminal, as well as to civil cases, and is not limited by Rule 35(b) of the Federal Rules of Criminal Procedure." (citing Bishop, 774 F.2d at 774 n.5; United States v. Ecton, 454 F.2d 464, 466 (9th Cir.1972); and United States v. Rundle, 435 F.2d 721 (3d Cir.1971))).

Defendant also argues that the Due Process and Double Jeopardy Clauses of the Constitution prohibit us from resentencing him because he has already served his prison term. Defendant relies on United States v. Davis, 112 F.3d 118 (3d Cir. 1997). Davis moved, pursuant to 28 U.S.C. § 2255, to vacate his conviction for use of a firearm in a drug trafficking crime. Id. at 199. The district court granted his motion, but resentenced him on the related drug trafficking crime, including an enhancement for the use of a firearm which increased his sentence over his original sentence for that count. Id. Davis appealed the resentencing, arguing, in part, that the resentencing violated his due process rights." The Third Circuit stated that:

> A defendant's due process rights may be violated "when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them." United States v. Lundien, 769 F.2d 981, 987 (4th Cir.1985), cert. denied, 474 U.S. 1064, 106 S. Ct. 815, 88 L. Ed. 2d 789 (1986). A defendant, however, does not automatically acquire a vested interest in a shorter, but incorrect sentence. DeWitt v. Ventetoulo, 6 F.3d 32, 35 (1st Cir.1993), cert. denied, 511 U.S. 1032, 114 S. Ct. 1542, 128 L. Ed. 2d 193 (1994). It is only in an extreme case that a later upward revision of a sentence is so unfair that it is inconsistent with the fundamental notions of fairness found in the due process clause. Id.

Id. at 123. The Third Circuit found that Davis' case was not extreme. Id.

98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304. We find, accordingly, that 18 U.S.C. § 3582(c) does not limit the federal court's inherent power to vacate judgments procured through fraud.

The Due Process Clause and the Double Jeopardy Clause protect a defendant's legitimate interests in the finality of his sentence. See Id.; Bishop, 774 F.2d at 776 (noting that the Supreme Court has recognized that the Double Jeopardy Clause protects "the 'legitimate expectations' of the defendant as to the length of his sentence" (citing United States v. DiFrancesco, 449 U.S. 117 (1980))). However, a defendant has no legitimate interest in the finality of a sentence which was procured by his own fraud. See Bishop, 774 F.2d at 776 (referring to Bishop's double jeopardy argument as "specious, absurd and ridiculous as it was he who created the problem when he submitted to the court his motion containing the fraudulent and intentional misrepresentations concerning his sentence in the Indiana State Penitentiary" and determining that, since Bishop was the creator of the fraud, he "should not have properly held any legitimate expectation of finality in his sentence").

For the reasons stated above, we find that we have jurisdiction to vacate a sentence based on fraudulent information submitted by a defendant and to impose a new sentence based upon accurate information. A hearing will, therefore, be held to determine whether Defendant Raymond Washington did, in fact, defraud the Court in connection with his sentencing.

An appropriate order follows.

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UNITED STATES OF AMERICA	:	
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a/k/a Raymond Edward Washington	:	

O R D E R

AND NOW, this 3rd day of October, 2006, upon consideration of the Government's "Motion to Vacate the Defendant's Sentence and Resentence the Defendant" (Docket No. 28), Defendant's response thereto, and the argument held on September 18, 2006, **IT IS HEREBY ORDERED** that an evidentiary hearing will be held on October 10, 2006 at 11:00 a.m. in Courtroom 17B on the issue of whether Defendant perpetrated a fraud on the Court in connection with his sentencing.

BY THE COURT:

/s/ John R. Padova

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John R. Padova, J.