

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

UNITED STATES OF AMERICA	:	
	:	CIVIL ACTION
v.	:	97-4086
	:	
LUZ CONCEPCION	:	CRIMINAL NO.
(a.k.a. LUCY CONCEPCION)	:	95-624-02

M E M O R A N D U M

Broderick, J.

August 26, 1998

On February 26, 1997, defendant Luz Concepcion was sentenced by this Court to 60 months imprisonment followed by four years supervised release. Ms. Concepcion has now moved for a reduction of sentence, under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The Court has held two hearings on the instant motion; at both hearings, Ms. Concepcion was represented by counsel. For the reasons which follow, the Court will deny Ms. Concepcion's § 2255 motion.

Background

Luz Concepcion and her husband Ruben Concepcion were charged by Indictment with one count of conspiracy to distribute crack cocaine and possess crack cocaine with intent to distribute, in violation of 21 U.S.C. § 846, one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1), and one count of criminal forfeiture under 21 U.S.C. § 853(a)(1)(2) and (p).

Ruben and Luz Concepcion initially entered a plea of not guilty to the Indictment and planned to proceed to trial. On May 7, 1996, however, after a jury was selected and sworn, Ms. Concepcion and her husband pleaded guilty to all three counts in the Indictment. At the plea hearing, Ms. Concepcion admitted that she, along with her husband Ruben Concepcion, distributed cocaine and crack cocaine from a delicatessen located at 4765 North 8th Street which Ms. Concepcion owned and operated along with her husband.

Ms. Concepcion was sentenced by this Court on February 26, 1997. At Ms. Concepcion's sentencing hearing, the Court adopted the factual findings and guideline application set forth in the presentence report. The Sentencing Guidelines, U.S.S.G. § 2D1.1(c)(7), called for a base offense level of 26, as Ms. Concepcion was held accountable for possessing 1.3 kilograms of cocaine with intent to distribute. The Court applied a two level reduction for Ms. Concepcion's acceptance of responsibility under U.S.S.G. § 3E1.1, and arrived at a total offense level of 24.

Under the Sentencing Guidelines, the range of imprisonment for an offender with an offense level of twenty-four (24) and a criminal history category of I is fifty-one (51) to sixty-three (63) months. However, 21 U.S.C. § 841(b)(1)(B) provides for a mandatory minimum five year term of imprisonment. Accordingly, the Court sentenced Ms. Concepcion to a term of sixty (60) months

imprisonment-- a term of imprisonment within the Sentencing Guideline range, and the minimum term allowed under the statute, 21 U.S.C. § 841.

Ms. Concepcion subsequently filed the instant motion for a reduction of sentence, under 28 U.S.C. § 2255. In her motion, Ms. Concepcion claimed that her counsel provided ineffective assistance. Specifically, Ms. Concepcion alleged that her former attorney, Harry Rubin, Esquire (who represented Ms. Concepcion from the time of her arraignment until her sentencing), was ineffective because he failed to file an appeal upon Ms. Concepcion's request, failed to argue for a reduction under U.S.S.G. § 3B1.2 to account for Ms. Concepcion's mitigating role in the offense, failed to argue for a three level reduction under U.S.S.G. § 3E1.1(b) to account for Ms. Concepcion's acceptance of responsibility, and failed to ask the Court to apply the "safety valve" provision of U.S.S.G. § 5C1.2 so as to sentence Ms. Concepcion without regard to the statutory minimum term of imprisonment required by 21 U.S.C. § 841.

The Court held two hearings on Ms. Concepcion's motion-- one on July 20, 1998 and one on August 12, 1998. At both hearings, Ms. Concepcion was represented by counsel. Prior to the July 20, 1998 hearing, Ms. Concepcion's counsel filed a supplemental memorandum in support of the § 2255 motion. At the close of the August 12, 1998 hearing, the Court gave Ms. Concepcion's counsel

one week to file additional memoranda in connection with this § 2255 motion. As of today's date, the Court has received no such memoranda.

Ineffective Assistance of Counsel

As explained by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1983), a defendant claiming ineffective assistance of counsel must prove two elements in order to prevail. First, the defendant must identify specific acts or omissions committed by counsel and must prove that, in light of those actions, "counsel's performance was deficient." Id. at 687. Second, the defendant must demonstrate that counsel's "deficient performance prejudiced the defense." Id. at 690.

In determining whether counsel's performance was deficient, the court must determine whether counsel's challenged conduct was reasonable, in light of "the facts of the particular case, viewed as of the time of counsel's conduct." Id. An attorney's conduct will be deemed deficient only if "the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

In determining whether counsel's deficient performance prejudiced the defendant, the court must determine whether there is a reasonable probability that, absent counsel's deficient performance, the proceeding would have had a different result.

Id. at 691. It is not enough for a defendant to demonstrate that counsel committed unreasonable error, "if the error had no effect on the judgment." Id. The defendant can not simply show that counsel's error would have "had some conceivable effect on the outcome of the proceeding." Id. at 691-93. In order to show that his defense was prejudiced, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Mindful of the analysis set forth by the Supreme Court in Strickland, this Court will consider in turn each of the grounds on which Ms. Concepcion bases her claim of ineffective assistance of counsel.

Failure to File an Appeal

As noted above, Ms. Concepcion initially alleged in her § 2255 motion that her counsel had failed to file an appeal at her request. Although the Third Circuit has not directly addressed the issue, courts in other Circuits have held that an attorney's failure to file an appeal upon the defendant's request constitutes ineffective assistance of counsel without regard to the probability of success on appeal. See, e.g., Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Bonneau v. United States, 961 F.2d 17 (1st Cir. 1992).

At the July 20, 1998 hearing on her § 2255 motion, however,

Ms. Concepcion informed the Court that she wished to withdraw her claim that her attorney failed to file an appeal upon her request, and the Court allowed Ms. Concepcion to withdraw this claim. Accordingly, the Court will not consider Ms. Concepcion's claim that her attorney failed to file an appeal, as it is no longer before the Court.

Mitigating Role in the Offense

As noted above, Ms. Concepcion claims that her counsel was ineffective for failing to seek a reduction in her offense level under U.S.S.G. § 3B1.2 because of her mitigating role in the offenses.

Section 3B1.2 provides:

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

It is true that Ms. Concepcion's attorney did not seek a reduction in Ms. Concepcion's offense level under § 3B1.2.

However, this omission can not be deemed ineffective, as there is no evidence that Ms. Concepcion merited such a reduction.

According to the government, Ms. Concepcion owned the premises at 4765 North 8th Street, where she and her husband ran a delicatessen and sold drugs from behind the counter. At the time of Ms. Concepcion's guilty plea, Ms. Concepcion admitted that she

had refused to sell an undercover police officer drugs because she did not know him, and admitted that drugs were recovered from the premises at 4765 North 8th Street. There is no evidence which would tend to show that Ms. Concepcion played a minor or minimal role in the offenses to which she pleaded guilty. Accordingly, Ms. Concepcion's counsel was not ineffective for failing to seek a reduction under U.S.S.G. § 3B1.2.

Acceptance of Responsibility

Ms. Concepcion further claims that her attorney was ineffective because he did not fully pursue the argument that Ms. Concepcion should receive a three level reduction for acceptance of responsibility under Section 3E1.1(b).

Section 3E1.1(a) provides that a defendant is entitled to a two level reduction in his offense level if he "clearly demonstrates acceptance of responsibility for his offense."

Section 3E1.1(b) provides that a defendant is entitled to an additional one level reduction if:

the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

- (1) timely providing complete information to the government concerning his own involvement in the offense; or
- (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

In light of the fact that Ms. Concepcion pleaded guilty to the charges against her, and accepted responsibility for her offenses, she received a two level reduction under 3E1.1(a). According to the presentence investigation report prepared in connection with this case, Ms. Concepcion's counsel argued for an additional one level reduction under U.S.S.G. § 3E1.1(b). However, the probation officer who prepared the presentence report in the instant case determined that a reduction under § 3E1.1(b) was not merited because Ms. Concepcion did not enter a timely plea and did not provide full and truthful information regarding her role in the offense. The issue was not raised again at Ms. Concepcion's sentencing hearing.

Although Ms. Concepcion concedes that her counsel argued for a three level reduction under § 3E1.1(b) in connection with the presentence report, she claims that her counsel was ineffective because he failed to file an appeal upon her request and thus denied her the opportunity to appeal this issue.

As noted above, Ms. Concepcion has withdrawn her claim that her attorney failed to file an appeal upon her request. It would appear, therefore, that Ms. Concepcion's claim regarding counsel's failure to appeal the issue of a three level reduction under § 3E1.1(b) is also withdrawn.

The Court notes, however, that Ms. Concepcion was not entitled to a reduction under § 3E1.1(b), and her counsel was not

ineffective in failing to pursue this issue (although he did actually raise the claim in connection with Ms. Concepcion's presentence report). Ms. Concepcion pleaded guilty after her criminal trial had commenced and a jury had been selected. She did not timely notify authorities of her intention to enter a plea of guilty, and did not permit the government to avoid preparing for trial. Moreover, as discussed below in connection with Ms. Concepcion's "safety valve" claim, Ms. Concepcion did not timely provide complete and truthful information regarding her own involvement in the offenses with which she was charged. Accordingly, Ms. Concepcion was not entitled to an additional one level reduction under U.S.S.G. § 3E1.1(b).

Application of the "Safety Valve" Provision

Ms. Concepcion claims that her counsel was ineffective because he did not ask the Court to apply U.S.S.G. § 5C1.2-- the so-called "safety valve" provision-- which allows the Court to sentence a defendant without regard to any statutory minimum sentence. The Court sentenced Ms. Concepcion to sixty months imprisonment in order to satisfy the statutory minimum of five years imprisonment set forth in 21 U.S.C. §§ 841, 846.

The "safety valve" provision, U.S.S.G. § 5C1.2, provides that in the case of offenses under 21 U.S.C. §§ 841, 844, 846, 960 or 963, the court may impose a sentence in accordance with the sentencing guidelines, without regard to any statutory

minimum sentence, if the court determines that the defendant meets the following five criteria:

- (1) the defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

It is undisputed that Ms. Concepcion met the first four criteria enumerated under Section 5C1.2. There is, however, significant dispute as to whether Ms. Concepcion satisfied the fifth criterion under Section 5C1.2 in that, before the time of her sentencing hearing, Ms. Concepcion truthfully provided the Government with all information and evidence which she had concerning the offenses in which she was involved.

Ms. Concepcion claims that she had provided all such evidence and information, and claims that her attorney was ineffective for failing to ask for application of the "safety valve" provision. In an affidavit submitted in connection with her § 2255 motion, Ms. Concepcion states that, following her sentencing hearing, she asked her attorney why he did not argue for application of the "safety valve" provision and her attorney stated that he had never heard of the provision.

The Government maintains that, at the time of her sentencing, Ms. Concepcion had not given the Government truthful evidence and information concerning the offenses to which she had pleaded guilty. The Government further maintains that Ms. Concepcion's counsel was aware of the "safety valve" provision and properly decided not to raise the issue because he knew that Ms. Concepcion did not qualify for application of the provision.

Considering the evidence before it, the Court must agree with the Government that, at the time she was sentenced, Ms. Concepcion had not provided the Government with truthful and complete evidence and information concerning the offenses to which she had pleaded guilty. Indeed, as the evidence before the Court makes clear, Ms. Concepcion has yet to provide truthful and complete information regarding these offenses. Accordingly, Ms. Concepcion's counsel can not be deemed ineffective for not raising the issue of the "safety valve" provision.

At the two hearings held in connection with Ms. Concepcion's § 2255 motion, the Court heard testimony from Ms. Concepcion's former attorney, Harry Rubin, Esquire. The Court additionally heard testimony from William Housemann, a program manager in the Asset Forfeiture Unit in the United States Attorney's Office who had met with Ms. Concepcion after she had pleaded guilty and before she was sentenced. The Court also heard testimony from Cheri Wells, a Philadelphia Police Officer assigned to the Drug Enforcement Administration Task Force who had attempted to work with Ms. Concepcion after she had pleaded guilty and before she was sentenced. Moreover, the Court heard testimony from Ms. Concepcion herself.

Ms. Concepcion's former attorney, Harry Rubin, Esquire, testified that he was aware of the "safety valve" provision and decided not to raise the issue because he knew that Ms. Concepcion did not qualify for application of the provision. Both Mr. Rubin and William Housemann testified that they had been present in a series of meetings which took place between Ms. Concepcion and Government officials, after Ms. Concepcion pleaded guilty but before she had been sentenced. According to both Mr. Rubin and Mr. Housemann, Ms. Concepcion gave conflicting accounts regarding her own involvement and other persons' involvement in the drug offenses to which she had pleaded guilty.

Initially, Ms. Concepcion denied any involvement in any drug

possession or sale, despite the fact that she had pleaded guilty to drug offenses. Ms. Concepcion told Government officials that the drugs recovered on her premises belonged to Jose Pagan, a man who rented an apartment on the premises. Although Ms. Concepcion later admitted her involvement in the sale and possession of drugs, her information regarding the extent of her involvement and the involvement of others, including her former accountant, appeared inconsistent. Mr. Housemann testified that he did not believe much of the information which Ms. Concepcion provided because the information was inconsistent with the facts he had learned during his investigation, and inconsistent with the fact that she pleaded guilty to the drug offenses set forth in the Indictment issued against her.

Additionally, Police Officer Cheri Wells testified that, on three separate occasions, Ms. Concepcion told law enforcement officers that she could arrange a meeting with a woman named "Belky" or the woman's brother "Bernardo" who, according to Ms. Concepcion, were engaged in drug sales. Police officers conducted lengthy surveillance in order to observe Ms. Concepcion meeting with "Belky" and/or "Bernardo." However, neither "Belky" or "Bernardo" ever materialized. According to Officer Wells, law enforcement officers were never able to confirm any of the information which Ms. Concepcion had provided. Officer Wells testified to her opinion that Ms. Concepcion had not provided

truthful information to the Government prior to her sentencing.

Even Ms. Concepcion's own testimony demonstrated that she had not been forthright with Government officials in her meetings with them following her guilty plea. Although Ms. Concepcion testified that she had provided the Government with truthful information, she was unable to recall what information she had actually provided to the Government. Ms. Concepcion admitted that in her initial meeting with the Government following her guilty plea, she had untruthfully told Government officials that she had not been involved in any drug sales or possession. Moreover, Ms. Concepcion's testimony at the hearing on the instant motion contradicted statements which she had made to Government officials. For example, Ms. Concepcion's testimony at the hearing was inconsistent with prior statements made to Government officials regarding the source of cash which was recovered by law enforcement officers from the premises located at 4765 North 8th Street. While Ms. Concepcion had previously told Government officials that the cash had been a loan from her accountant, she testified at the hearing on the instant motion that she did not personally know the source of the cash.

The evidence clearly demonstrates that Ms. Concepcion had not, at the time of her sentencing, provided all information and evidence which she had regarding the offenses to which she pleaded guilty. Accordingly, Ms. Concepcion could not have

qualified for the "safety valve" provision, U.S.S.G. § 5C1.2, and was properly sentenced pursuant to the statutory minimums set forth in 21 U.S.C. §§ 841, 846.

In light of the fact that Ms. Concepcion did not qualify for the application of the "safety valve" provision, her attorney was not ineffective for choosing not to raise the issue. Even if the Court were to assume that Ms. Concepcion's counsel failed to raise the issue because he did not know about the "safety valve" provision, Ms. Concepcion's defense was not prejudiced by this failure because the "safety valve" provision was clearly inapplicable.

Defendant's Health Issues

Although Ms. Concepcion did not raise the issue of her health in her § 2255 motion, Ms. Concepcion's counsel raised the issue during the hearings which this Court held on the motion, as well as in the supporting memorandum which counsel submitted before the hearings. Ms. Concepcion's attorney argued that the Court should either resentence Ms. Concepcion to a period of imprisonment below the guideline range due to Ms. Concepcion's poor health, or should place Ms. Concepcion in a facility closer to her family in Philadelphia. Ms. Concepcion is currently confined to the Women's Federal Corrections Institute in Danbury, Connecticut.

Although Ms. Concepcion has high blood pressure, there is no evidence that she suffers from any severe health problems which would take her case out of the heartland of cases, and justify a departure below the Sentencing Guidelines.

With respect to Ms. Concepcion's placement in FCI Danbury, the Court recommended at the time Ms. Concepcion was sentenced in February 1997 that she be placed in a federal facility that was located close to her family in Philadelphia. FCI Danbury appears to be the closest Federal Women's Correctional Institute for women who committed offenses such as those committed by Ms. Concepcion. See, Alan Ellis, Federal Prison Guidebook, 1998 Ed.

Conclusion

For the above stated reasons, the Court will deny Ms. Concepcion's motion to reduce her sentence under 28 U.S.C. § 2255. Ms. Concepcion has failed to prove her claims of ineffective assistance of counsel. Moreover, Ms. Concepcion has failed to demonstrate that her health problems are so exceptional as to merit a reduction in sentence. Accordingly, the Court sees no reason to amend its Judgment and Order of February 26, 1997, and will deny Ms. Concepcion's § 2255 motion.

An appropriate Order follows.

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

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 LUZ CONCEPCION : CRIMINAL NO.
 (a.k.a. LUCY CONCEPCION) : 95-624-02

O R D E R

AND NOW, this 26th day of August, 1998; upon consideration of defendant's motion under 28 U.S.C. § 2255 to vacate, set aside or correct her sentence; and for the reasons stated in the Court's accompanying memorandum;

IT IS ORDERED: Defendant Luz Concepcion's motion under 28 U.S.C. § 2255 to vacate, set aside or correct her sentence is hereby **DENIED**; and

IT IS FURTHER ORDERED: There is no probable cause to issue a certificate of appealability.

RAYMOND J. BRODERICK, J.