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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-2536
v.	:	
	:	CRIMINAL ACTION
MARCUS BROWN	:	NO. 92-64-01

MEMORANDUM AND ORDER

Yohn, J. June , 1997

On August 14, 1992, Marcus Brown was convicted, after a jury trial in this court, of one count of conspiracy in violation of 18 U.S.C. § 371, two counts of bank robbery in violation of 18 U.S.C. § 2113(a), two counts of armed bank robbery in violation of 18 U.S.C. § 2113(d), and one count of using of a gun in the course of a crime of violence in violation of 18 U.S.C. § 924(c), all in connection with the armed robberies of the Fidelity Savings and Loan in Bristol, Pennsylvania on December 6, 1991, and the Provident Bank in Bensalem, Pennsylvania on January 15, 1992. Defendant was sentenced to 108 months imprisonment on the armed robbery counts, 60 months on the conspiracy counts to run concurrently, and 60 months on the Section 924(c) count to run consecutively. The court of appeals affirmed the judgment of sentence by order dated November 3, 1993. Brown has filed the instant pro se motion pursuant to 28 U.S.C. § 2255 challenging various aspects of his sentence. For the reasons set forth below, the court will deny the requested relief.

DISCUSSION

28 U.S.C. § 2255[1] provides a federal prisoner with a statutory remedy for challenging the lawfulness of his conviction. See United States v. Addonizio, 422 U.S. 178, 184 (1979). But "[s]ection 2255 does not afford a remedy for all errors that may be made at trial or sentencing. . . . The alleged error must raise 'a fundamental defect which inherently results in a complete miscarriage of justice.'" United States v. Essig, 10 F.3d 968, 977 n.25 (3d Cir. 1993) (quoting Addonizio, 422 U.S. at 185). Rule 4(b) of the rules governing § 2255 proceedings requires the court to consider the motion together with all the files, records, transcripts and correspondence relating to the judgment under attack. See 28 U.S.C.A. § 2255 Rule 4(b). While the final disposition of a § 2255 motion lies within the discretion of the trial judge, Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1075 (3d Cir. 1985), "the discretion of the district court summarily to dismiss a motion

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[1] Section 2255 states in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

brought under § 2255 is limited to cases where the motion, files, and records '"show conclusively that the movant is not entitled to relief."'" United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992) and Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)).

Our court of appeals has emphasized that a § 2255 proceeding should not be a substitute for direct appeal. See Essig, 10 F.3d at 979 ("[Section] 2255 is no longer a necessary stand-in for the direct appeal of a sentencing error because full review of sentencing errors is now available on direct appeal."). Thus, a defendant who fails to raise an issue on direct appeal and subsequently attempts to raise the issue in a § 2255 proceeding must generally demonstrate cause and prejudice for his failure to raise the claim in his direct appeal. See id. A defendant need not, however, demonstrate cause and prejudice when he raises a claim of ineffective assistance of counsel. See United States v. DeRewal, 10 F.3d 100, 104 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). Indeed, a § 2255 motion is the proper and preferred vehicle for challenging ineffective assistance of counsel. See Nahodil, 36 F.3d at 326.

Although Brown's § 2255 motion does not, for the most part, rest on constitutional grounds, but instead attempts to directly challenge the lawfulness of his sentence, the government has, in its brief, treated the motion as challenging his sentence on the basis of ineffective assistance of counsel. Even if the court

were to treat Brown's motion as alleging ineffective assistance of counsel, however, he cannot prevail.

The cause of action for ineffective assistance of counsel is based on the Sixth Amendment right to counsel, which exists "in order to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). The right to effective assistance of counsel extends to plea negotiations, see Hill v. Lockhart, 474 U.S. 52 (1985), and certain sentencing proceedings, see Strickland v. Washington, 466 U.S. 668, 686 (1984) (extending right to counsel to capital sentencing proceedings). In order to make a showing of ineffective assistance of counsel, a habeas petitioner must make a two part showing. First he must show that his attorney's performance was objectively deficient and second he must prove that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687.

Regarding "deficient performance," the court must defer to counsel's tactical decisions, not employ hindsight and give counsel the benefit of a strong presumption of reasonableness. See id. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential . . . ."); Government of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1431 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). While an attorney has a duty to investigate reasonable claims and defenses, see Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary."); Weatherwax, 77 F.3d at 1432, an attorney's performance cannot be deemed ineffective or deficient if she fails to raise a defense which is "doomed to failure." Sistrunk v. Vaughn, 96 F.3d 666, 671 (3d Cir. 1996).

A habeas petitioner alleging "prejudice" must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 113 S. Ct. at 842 (citing Strickland, 466 U.S. at 687). That the outcome may have been different but for counsel's error is not dispositive of the "prejudice" inquiry, rather, the court must determine whether the result of the proceeding was fundamentally unfair or unreliable. See id. Obviously, a defendant cannot show that a proceeding was fundamentally unfair if the underlying claims the attorney failed to raise are meritless, because the outcome of the proceeding would not be different. Because each of Brown's substantive claims is wholly without merit, he cannot show that he was prejudiced by his counsel's performance.

A. Defendant was Properly Convicted of Violating 18 U.S.C. § 924(c)

Brown was convicted of violating 18 U.S.C. § 924(c) in connection with the armed robbery of the Provident Bank in January 1992. Defendant argues that his actions do not meet the statutory definition of 18 U.S.C. § 924(c) and that his conviction under that provision cannot stand. 18 U.S.C. § 924(c) provides in relevant part:

> Whoever, during and in relation to any crime of violence[2] or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c)(1).

Brown argues that he cannot be convicted of violating § 924(c) because it was his accomplice, Bernal Long, and not he who carried the gun during the Provident robbery. But the defendant need not be the party who actually carries or uses the gun in order to be found guilty under § 924(c). Indeed, a defendant may be convicted of violating § 924(c) under an aiding and abetting theory, see United States v. Price, 76 F.3d 526, 529 (3d Cir. 1996) (aiding and abetting liability applies to violations of § 924(c)), under a theory of constructive possession, see United States v. Harrison, 931 F.2d 65, 71 (D.C. Cir.) ("In order to establish that a defendant 'use[d] or carrie[d] a firearm,' the government must prove that the defendant actually or constructively possessed it."), cert.

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[2] Bank Robbery is a crime of violence. See 18 U.S.C. § 924(c)(3); United States v. Price, 76 F.3d 526, 527-28 (3d Cir. 1996).

denied, 502 U.S. 953 (1991), or under the theory that a co-conspirator "may be held responsible for the substantive crimes committed by a co-conspirator in furtherance of the conspiracy . . . ." United States v. Gonzalez, 918 F.2d 1129, 1135 (3d Cir. 1990), cert. denied, 499 U.S. 982 (1991); United States v. Casiano, No. 96-1380, slip op. at 11-12 (3d Cir. May 7, 1997). The court correctly instructed the jury that it may find the defendant guilty of violating § 924(c) under any one of these three theories, see N.T. Aug. 14, 1992 at 55-56, and there was ample evidence in the record for the jury to find the defendant guilty under any one of these theories.[3] Therefore, counsel could not have been ineffective for failing to pursue this theory.

B. The Court Properly Sentenced the Defendant to a 5 Year Consecutive Sentence Under § 924(c)

Defendant also argues that the court improperly sentenced him to a five year sentence to run consecutively with his sentences for conspiracy and bank robbery. Citing Simpson v. United States, 435 U.S. 6 (1978) and Busic v. United States, 446 U.S. 398 (1980), Brown argues that he cannot be sentenced for both the underlying sentence of armed bank robbery and the enhancement provision in § 924(c) for carrying a weapon. Brown

[3] Defendant does not appear to contest the sufficiency of the evidence, but rather argues that he could not fall within the statutory definition of § 924(c) because he did not personally carry the gun.

claims that, because his bank robbery sentence has already been enhanced for the use of a firearm under 18 U.S.C. § 2113(d) (armed robbery), tacking a sentence under § 924(c) onto his bank robbery conviction would amount to an impermissible double enhancement of his sentence.

In 1984, Congress specifically amended § 924(c) to statutorily overrule Simpson and Busic. See United States v. Bishop, 66 F.3d 569, 574 (3d Cir.), cert. denied, 116 S. Ct. 681 (1995). Under the 1984 amendments, "the legislative intent to impose a consecutive sentence for the violation of section 924(c) is plain from the language of that provision . . . ." Id. at 573-74 (quoting United States v. Mohammed, 27 F.3d 815, 819 (2d Cir.), cert. denied, 513 U.S. 975 (1994)). Indeed, by its terms the statute applies even if the underlying crime already "provides for an enhanced punishment if committed by the use of a deadly weapon or device." 18 U.S.C. § 924(c). Thus, under § 924(c) as it now stands, there is no doubt that Brown can be sentenced for both armed bank robbery and violation of § 924(c), and his counsel could not have been ineffective for failing to pursue the issue.

C. The Court Did Not Violate Application Note 2 to U.S.S.G. § 2K2.4

Defendant next argues that the court should not have imposed a five-point enhancement under U.S.S.G. § 2B3.1(b)(2)(C) for brandishing a firearm during the commission of the bank robbery

while also sentencing the plaintiff to a five year consecutive sentence under 18 U.S.C. § 924(c).[4] Application note 2 to U.S.S.G. § 2K2.4 provides:

> Where a sentence under this section [for violation of 18 U.S.C. § 924(c)] is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, or discharge of a firearm (e.g. § 2B3.1(b)(2)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense.

U.S.S.G. § 2K2.4, application note 2 (1992).

This provision was not violated, however, because Brown was sentenced for two separate bank robberies, neither one of which provided an enhancement under both § 2B3.1(b)(2)(C) and § 924(c). See U.S.S.G. § 3D1.2 (1992) (bank robberies are treated separately and are not "grouped" together under sentencing guidelines). Rather, plaintiff was given an enhancement under § 2B3.1(b)(2)(C) for the Fidelity Savings robbery only. See P.S.R. at ¶ 19. Plaintiff was not given a § 2B3.1(b)(2)(C) enhancement for the Provident Bank robbery because he was sentenced under § 924(c) for that robbery. See id. at ¶ 26.

There was, therefore, nothing unlawful in applying a § 2B3.1(b)(2)(C) enhancement for the first robbery because Brown was not charged with violating § 924(c) in connection with that robbery. Indeed, at least two courts of appeal have squarely held that, when a defendant is charged with multiple counts of

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[4] Brown is subject to the brandishing enhancement although his co-conspirator was the one who actually brandished the weapon. See U.S.S.G. § 1B1.3(a)(1).

armed robbery, he may be subject to an enhancement under § 2B3.1(b)(2) for one robbery while being subject to an enhancement under § 924(c) for another robbery. See United States v. McCarthy, 77 F.3d 522, 536-37 (1st Cir. 1996), cert. denied, 117 S. Ct. 771 (1997); United States v. Mrazek, 998 F.2d 453 (7th Cir. 1993). As the Mrazek court stated:

> Nothing has been counted twice. There were three robberies, all armed. The gun was taken into account once per robbery--via § 2B3.1(b)(2)(C) for the first two robberies, and via § 924(c) for the third robbery. . . . [Defendant] contends that he should be treated just as if the first two robberies were unarmed. Yet why should three armed robberies be treated identically to one armed and two unarmed robberies? Both the Guidelines and § 924(c) recognize that armed crimes are more serious.

Id. at 455.

Because the court did not "double count" in assessing Brown two separate enhancements for two separate crimes, this argument was doomed to failure, and counsel could not have been ineffective for failing to pursue it.

D. The Court Applied the Correct Version of the Sentencing Guidelines.

Brown claims that the court erred by calculating his sentence under the 1992 version of the sentencing guidelines. According to Brown, the court should have applied the 1991 version of the sentencing guidelines manual which provides for a three point enhancement under § 2B3.1(b)(2)(C). See U.S.S.G. § 2B3.1(b)(2)(C) (1991). The 1992 version of the sentencing guidelines manual provides for a five point enhancement under

§ 2B3.1(b)(2)(C). See U.S.S.G. § 2B3.1(b)(2)(C) (1992).

As our court of appeals has stated:

> As a general rule, a defendant's sentence should be based on the guidelines 'that are in effect on the date that the defendant is sentenced.' . . . When, however, the retroactive application of the version of the guidelines in effect at sentencing results in more severe penalties than those in effect at the time of the offense, the earlier version controls . . . since . . . to apply a change in the guidelines that enhances the penalty would offend the ex post facto clause of the United States Constitution.

United States v. Corrado, 53 F.3d 620, 622-23 (3d Cir. 1995) (citations omitted).

Thus, the defendant was entitled to be sentenced under the more lenient of the guidelines in effect when the offenses were committed (on December 6, 1991 and January 15, 1992) or the date the sentence was imposed (January 5, 1993). While it is true that the 1991 edition of the sentencing guideline manual provided for only a three point enhancement under § 2B3.1(b)(2)(C), the amendments incorporated in the 1992 version of the guidelines, which provide for a five point enhancement, became effective November 1, 1991--over a month before the defendant committed the first crime. Because the guidelines in effect on the date the crimes were committed and the guidelines in effect on the date sentence was imposed both provide for a five level enhancement under § 2B3.1(b)(2)(C), compare U.S.S.G. § 2B3.1(b)(2)(C) (1992) (incorporating amendments through November 1, 1991) with U.S.S.G. § 2B3.1(b)(2)(C) (1993) (incorporating amendments through November 1, 1992), the defendant would have been subject to the

five point enhancement under either version of the guidelines. Plaintiff's ex post facto argument is, therefore, meritless.

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Because the motion, files, and records "show conclusively that [Brown] is not entitled to relief," Nahodil, 36 F.3d at 326, the court will deny his motion without a hearing. An appropriate order follows.

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ORDER

AND NOW, this day of June, 1997, after consideration of the defendant's petition and brief in support of his motion pursuant to 28 U.S.C. § 2255 and the government's response thereto, IT IS HEREBY ORDERED that the defendant's motion is DENIED.

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William H. Yohn, Jr., Judge