

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
v.) Crim. No. 96-0070-B
)
JAMES WAYNE THERIAULT,)
)
 Defendant)

RECOMMENDED DECISION

Defendant has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. section 2255. The Court has reviewed the Motion, the Government's Response and Supplemental Response to the Motion, and Defendant's Reply brief, and concludes that the Motion may properly be dismissed without a hearing. 28 U.S.C. § 2255 (no hearing necessary if "the files and records of the case conclusively show that the prisoner is entitled to no relief"); Rule 4(b), Rules Governing Motions Under Section 2255; *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990).

Background.

Defendant was convicted on his plea of guilty to a two-count indictment charging him in count I with illegal entry into the U.S. after deportation (18 U.S.C. § 1326) and in count II with illegal entry having eluded inspection (18 U.S.C. §

1325). Because Defendant had been convicted of an "aggravated felony" within the meaning of section 1326(b)(2), he was subject to an enhanced sentence as set forth in that subsection and the relevant Sentencing Guideline. Defendant was sentenced to a term of 46 months on count I and a concurrent term of 24 months on count II.

1. *Ex Post Facto Clause.*

Defendant argues that he was subject to the enhanced sentence set forth in 8 U.S.C. section 1326(b) in violation of the ex post facto clause of the constitution, because his conviction for the aggravated felony that served as the basis for the enhancement occurred prior to the effective date of the amendments adding subsection (b). This argument has been directly rejected by the First Circuit Court of Appeals, which held:

[Defendant] is being punished for the crime of unlawful reentry, in violation of § 1326. The enhancement provision increases the punishment for this crime. It does not affect the punishment that [Defendant] received for the crimes he committed prior to the effective date of the Act. As the [U.S. Supreme] Court observed, the fact that prior convictions that factored into a defendant's increased sentence preceded the enactment of an enhancement provision does not render the Act invalidly retroactive. [*Gryger v. Burke*, 334 U.S. 728, 732 (1948)]. Rather, an enhanced penalty "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.*

United States v. Forbes, 16 F.3d 1294, 1302 (1st Cir. 1994). Plaintiff's argument regarding the ex post facto clause fails as a matter of law.

2. *Double Jeopardy Clause.*

Defendant next argues that his convictions under both sections 1325 and 1326 violate the double jeopardy clause. The test for determining whether the double jeopardy clause is implicated when the same conduct violates more than one statutory provision is whether each provision requires proof of an element the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The Court can find only one reported case in which the test was applied to sections 1325 and 1326, and that court concluded that prosecution for both sections did not violate the double jeopardy clause. *United States v. Flores-Peraza*, 58 F.3d 164 (5th Cir. 1995). This Court agrees. Section 1326 requires the government prove the defendant entered the country after having been previously deported. 8 U.S.C. § 1326(a)(1). The prior deportation is not a necessary element of section 1325, which requires proof that the entry was effected in an improper manner. 8 U.S.C. § 1325(a). Section 1326 requires no proof with respect to the manner of entry. Each statute, then, requires proof of an element the other does not. Defendant's prosecution for violating both statutes does not therefore implicate the double jeopardy clause.

3. *The predicate felony.*

Defendant's final argument is somewhat confusing. The Government has interpreted Defendant's complaint to be that there is insufficient evidence of his prior conviction in the record of this case to permit the Court to impose the enhanced penalties provided in sections 1325 and 1326. This nonconstitutional, nonjurisdictional argument could have been presented on appeal. Defendant did not pursue an appeal of his conviction or sentence. Accordingly, he has waived his right to present the argument in the context of this Motion to Vacate Sentence. *Knight v. United States*, 37 F.3d 769, 772-773 (1st Cir. 1994).

The Court reads the Motion to Vacate, however, to challenge as well the validity of the prior conviction, or the resultant deportation. However, the law is clear that Defendant may not challenge that conviction for the first time in this Court. *United States v. Field*, 39 F.3d 15 (1st Cir. 1994). Rather, Defendant must first have the conviction declared invalid by the appropriate state court, or through a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254. *Id.* at 18 (quoting *Custis v. United States*, 511 U.S. 485, ___, 114 S. Ct. 1732, 1739 (1994)). Only then may he seek review under section 2255 of the federal sentence that was enhanced by the invalid conviction. *Id.*

4. *Ineffective Assistance of Counsel.*

The Court does not read Defendant's Motion to Vacate Sentence as alleging ineffective assistance of counsel for counsel's failure to file a notice of appeal on his behalf. Defendant clearly indicates in the Motion that he lacked faith in his trial counsel, and that "[a]n appeal with the assistance of this attorney would have been legal suicide and a waste of judicial resources." Motion at 4. If Defendant did not want this attorney's assistance on appeal, the fact that the attorney did not want to file an appeal on his behalf would be irrelevant. Further, the Court is satisfied that counsel did not state on the record, as Defendant alleges, his unwillingness to file an appeal on Defendant's behalf. Rather, counsel indicated that he would be willing to do so, but suggested other counsel might be appointed for the purpose of prosecuting the appeal. Sent. Tnsct. at 29. The record does not reveal the reason no motion to that effect was filed, as the Court suggested.

Further, the Court will not address allegations of ineffective assistance raised for the first time in reply to the Government's Response to the Motion to Vacate Sentence. This Court's local rules provide that reply memoranda "shall be strictly confined to replying to new matter raised in the objection of opposing memorandum." D. Me. R. 7(c). Further, to the extent Defendant's claims of ineffective assistance involve counsel's failure to raise before the sentencing court the issues Defendant has

now raised in this Motion to Vacate Sentence, the Court has already concluded the claims are without merit. Defendant cannot therefore show prejudice as a result of counsel's representation, even were the Court to find, and we don't, that the representation was inadequate. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant must show deficient performance *and* resulting prejudice).

Conclusion

For the foregoing reasons, I hereby recommend the Motion to Vacate Sentence be DENIED in its entirety.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.