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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-2371
v.	:	
	:	CRIMINAL ACTION
RANDY WASHINGTON	:	NO. 95-124-3

MEMORANDUM AND ORDER

Yohn, J. June , 1997

On May 24, 1995, defendant, Randy Washington ("Washington") pleaded guilty to one count of conspiracy to distribute crack cocaine, see 21 U.S.C. § 846, and one count of possession of crack cocaine with intent to distribute. See 21 U.S.C. § 841. These guilty pleas flowed from an indictment charging the defendant with participation in the Idris Enlow Crack Cocaine Organization. On August 27, 1996, after dismissing the possession with intent to distribute count, the court sentenced Washington to 100 months in prison on the conspiracy count. Although defendant's total offense level of 41, when combined with his eight criminal history points, suggested a sentencing guideline range of 360 months to life imprisonment, the court granted the defendant a substantial departure in light of his cooperation with the government in the prosecution of two other members of the Enlow Organization. See U.S.S.G. § 5K1.1. The defendant did not file a direct appeal.

Defendant has filed the instant motion pursuant to 28 U.S.C. § 2255 raising several claims of ineffective assistance of

counsel. Defendant first argues that he instructed his counsel to request a downward departure pursuant to U.S.S.G. § 5K2.0 based on the overcrowded conditions in the federal penal system. Counsel did not raise this issue at sentencing. Defendant next argues that his counsel was ineffective for failing to inform him of his right to file an appeal. Finally, defendant alleges that his counsel was ineffective for failing to file an appeal, despite defendant's specific request that counsel do so.

DISCUSSION

I. Standard of Review

28 U.S.C. § 2255 provides federal prisoners with a statutory remedy for challenging the lawfulness of their convictions. See United States v. Addonizio, 442 U.S. 178, 184 (1979). 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 with 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 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)). At this point in the proceedings, the court must assume the truth of the allegations in the defendant's petition. Day, 969 F.2d at 42.

In order to show ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must make a two part showing. First he must show that his attorney's performance was objectively deficient and second he must prove the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). 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 v. Fretwell, 506 U.S. 364, 369 (1993) (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. See, e.g., United States v. Marron, Civ. No. 95-2231, 1996 WL 677511 at *4 (E.D. Pa. Nov. 22, 1996) ("[C]ounsel cannot be ineffective for failing to pursue a meritless defense.").

II. Counsel Was Not Ineffective for Failing to Pursue the Overcrowded Prison Argument

Because the court did not have the authority to depart downward pursuant to U.S.S.G. § 5K2.0[1] based on the alleged overcrowded conditions of federal prisons, defendant's ineffectiveness claim must fail.

It is true that 28 U.S.C. § 994(g)[2] directs the Sentencing Commission to take into account the capacity of penal institutions. But that provision does not give courts the authority to depart downward based on prison overcrowding in individual cases. As our court of appeals has held, a district court may not depart downward pursuant to § 5K2.0 on the basis of "the overall impact of the guidelines" or a factor which is common to all federal prisoners facing sentencing. United States v. Alton, 60 F.3d 1065, 1070 (3d Cir.), cert. denied, 116 S. Ct. 576 (1995). As the commentary to § 5K2.0 makes clear, "[i]n the

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[1] U.S.S.G. § 5K2.0 allows the court to grant a downward departure if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." U.S.S.G. § 5K2.0.

[2]

> The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature of capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

28 U.S.C. § 994(g).

absence of a characteristic that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized." U.S.S.G. § 5K2.0, commentary (emphasis added). Assuming that the federal prison system is in fact overcrowded, that is a condition faced by any defendant facing sentencing in a federal court. The defendant's case is therefore not "sufficiently atypical" to warrant a departure. As the Court of Appeals for the Tenth Circuit has correctly stated:

> While the Commission is directed to take into account prison overcrowding in devising its overall guideline scheme, prison capacity is not an appropriate consideration for courts in determining the sentences of individual defendants. Because prison overcrowding applies equally to all defendants facing imprisonment, the capacity of penal facilities cannot constitute a "mitigating" or "unusual circumstance[]" to justify departure in a unique individual case.

United States v. Ziegler, 39 F.3d 1058, 1063 (10th Cir. 1994).

Because the court had no authority to grant the departure, counsel could not have been ineffective for failing to raise this claim. This claim must therefore be dismissed.

III. Defendant is Entitled to a Hearing on the Issue of His Attorney's Alleged Failure to Perfect an Appeal

Defendant claims that he requested his attorney to file an appeal, but that his attorney failed to do so. Apparently, Washington would have had his attorney appeal the court's refusal to grant a downward departure in the defendant's sentence

pursuant to U.S.S.G. § 4A1.3.[3] At sentencing, Washington had argued that his criminal history category substantially overstated the seriousness of his criminal history, which entitled him to a reduction under § 4A1.3. Although the court agreed that the defendant's criminal history represented mostly minor offenses, it also noted that the defendant's criminal history category did not include a multitude of offenses related to the offense for which he was being sentenced, and therefore concluded that that factor "pretty much defeats any possibility that his history, which is extensive for a man his age, over-represents the seriousness of his crimes." N.T. Aug. 27, 1996 at 9.

The court is confident in the correctness of its ruling and therefore doubts that the defendant has suffered any prejudice by his attorney's alleged failure to appeal this issue. Nevertheless, because prejudice is presumed in this situation, a hearing will be necessary to resolve the factual question of whether the defendant requested his attorney to file an appeal.

A criminal defendant has a constitutional right to effective assistance of direct appellate counsel. See Douglas v. California, 372 U.S. 353, 355 (1963). Accordingly, in Anders v. California, 386 U.S. 738 (1967), the Supreme Court held that

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[3] "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." U.S.S.G. § 4A1.3.

direct appellate counsel may not withdraw from a case unless he specifies the reasons he believes the appeal is frivolous and the court of appeals agrees with that assertion. See id. at 744. In Penson v. Ohio, 488 U.S. 75 (1988), defendant's trial counsel filed an Anders brief seeking to withdraw from representation in the case. After examining the defendant's case, the state appellate court determined that several claims had "arguable merit." See id. at 79. Nevertheless, the state appellate court "concluded that petitioner 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants" and determined that the appeal must fail on the merits. Id.

The Supreme Court reversed, holding that the state appellate court was required to appoint new counsel once it determined that the defendant's claim had arguable merit. See id. at 80. The court specifically rejected the lower court's determination that defendant had not suffered "prejudice" in the Strickland sense based on its independent review of the merits:

> Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process. . . . 'Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.' . . . Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend as well to the denial of counsel on appeal.

Id. at 87-88.

"Every court that has squarely confronted th[e] question since Penson has held that failure to take an appeal, despite the defendant's request, is ineffective assistance without regard to the probability of success on appeal." Castellanos v. United States, 26 F.3d 717, 719 (7th Cir. 1994) (citing Bonneau v. United States, 961 F.2d 17 (1st Cir. 1992); Williams v. Lockhart, 849 F.2d 1134, 1137 n.3 (8th Cir. 1988); United States v. Horodner, 993 F.2d 191, 195 (9th Cir. 1993); United States v. Davis, 929 F.2d 554, 557 (10th Cir. 1991)); see also United States v. Guerra, 94 F.3d 989, 994 (5th Cir. 1996). It therefore appears clear that Washington need not allege any specific prejudice which may have flowed from his attorney's failure to appeal, so long as he requested that he do so--prejudice is presumed.[4]

Of course, defendant's claim is dependent on his actual

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[4] As the Castellanos court held:

> One obvious difficulty with this application of the 'prejudice' component is that the defendant never receives the benefit of a lawyers's services in constructing potential appellate arguments. Although the district judge conscientiously tried to imagine what a lawyer might have done, an advocate often finds things that an umpire misses--especially when the umpire is asking whether the court of appeals was likely to reverse his own decision. Few district judges believe that their decisions are likely to be overturned; if they believed that they would have done things differently in the first place.

Castellanos, 26 F.3d at 718. I find Judge Easterbrook's reasoning persuasive and am convinced the Third Circuit would find likewise if confronted with the question.

request that his attorney file an appeal. See Castellanos, 26 F.3d at 719 ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue."). His refusal to file an appeal would only constitute "defective performance" if he refused to file an appeal despite Washington's request. While the United States has introduced the affidavit of defendant's attorney stating that Washington never requested an appeal, a hearing is necessary in order to resolve this factual dispute. See Day, 969 F.2d at 42 (court must assume truth of defendant's allegations).[5]

[5] Defendant also claims that counsel was ineffective for failing to inform him of his right to appeal. The court suspects that the defendant has suffered no prejudice from this alleged violation as 1) the court informed him of his right to appeal, see Esquivel v. Estelle, 580 F.2d 814, 815 (5th Cir. 1978) (if court informs defendant of right to appeal, counsel's failure to do so is harmless) and 2) the defendant's own motion states that he requested his counsel file an appeal and thus must have been aware of his right to do so. Nevertheless, because the court must grant a hearing on the issue of counsel's conduct regarding the appeal, the court will not rule on this issue at this time.

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ORDER

AND NOW, this day of June, 1997, after consideration of the defendant's motion pursuant to 28 U.S.C. § 2255, the defendant's memorandum in support thereof, and the government's reply thereto, IT IS HEREBY ORDERED as follows:

1. Defendant's claim that trial counsel was constitutionally ineffective for failing to seek a sentence reduction pursuant to U.S.S.G. § 5K2.0 based on the overcrowded condition in the federal prison system is DISMISSED WITH PREJUDICE.

2. Defendant's remaining claims may proceed.

3. Edmund Campbell, Jr., 510 Swede Street, Norristown, PA 19401 is HEREBY APPOINTED as counsel for the defendant and the clerk is direct to send a copy of this order to him.

5. A hearing is scheduled for August 22, 1997 at 10:00 a.m., Courtroom 3-B, United States Courthouse, 601 Market Street, Phila., PA 19106 for the purpose of establishing a factual record.

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William H. Yohn, Jr., Judge