

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JOHN W. NARDUCCI, JR.,	:	
Plaintiff,	:	
	:	
v.	:	Criminal No. 3:99 CR 248 (CFD) and
	:	Civil No. 3:01 CV 1945 (CFD)
UNITED STATES of AMERICA,	:	
Respondent.	:	

ORDER

Pending is defendant’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #31]. For the following reasons, the Motion is DENIED.

Background

The defendant, John Wayne Narducci, Jr., pled guilty to an Information charging him with three counts of bank robbery pursuant to 18 U.S.C. § 2113(a), on November 3, 1999. Also on that date, Narducci pled guilty to a one-count Indictment transferred from the District of Vermont pursuant to Fed. R. Crim. P. 20, also charging him with bank robbery under 18 U.S.C. § 2113(a). On October 17, 2000 the Court sentenced Narducci to 151 months’ imprisonment and three years of supervised release, based in part on its conclusion that Narducci qualified as a career offender under the United States Sentencing Guidelines.¹ Narducci did not file a direct appeal of his sentence, nor did he raise any objections to the plea agreement or the Presentence Report (“PSR”) during his sentencing proceedings.

On October 9, 2001, Narducci filed the Motion to Vacate, Set Aside, or Correct Sentence

¹The sentence was at the bottom of the guidelines range of 151 to 188 months.

pursuant to 28 U.S.C. § 2255 presently before the Court. Narducci's motion appears to assert eight grounds for relief. One and three through seven all assert that Narducci was denied effective assistance of counsel. In ground one ("a" in the complaint), Narducci asserts that he was denied his right to appeal when his attorney, Assistant Federal Public Defender Gary Weinberger, failed to file an appeal as instructed. In three through seven, Narducci asserts that he was denied effective assistance of counsel because of the following: he was advised by Weinberger to sign a plea agreement that did not contain "evidence" of the prior convictions upon which his status as a career offender was based (ground three or "c" in the complaint); Weinberger failed to object to the PSR guidelines calculations despite Narducci's requests to do so (ground four or "d" in the complaint); Weinberger did not object to the assignment of criminal history category points in the PSR (ground five or "e" in the complaint); Weinberger did not object to the Government's failure to produce evidence of his prior convictions (ground six or "f" in the complaint); and, Weinberger failed to object to the lack of evidence in the record that Narducci was 18 years old at the time of the bank robberies, that the bank robberies were crimes of violence, and the government had not proved the prior convictions (ground seven or "g" in the complaint). In the second ground ("b" in the complaint), Narducci claims that the Court lacked jurisdiction to enhance his sentence by way of the Career Offender Guideline, U.S.S.G. § 4B1.1, the Court failed to indicate the reasons he was treated as a career offender, and the Government failed to prove the prior convictions. On March 18, 2002, Narducci filed a supplement to his § 2255 motion [Doc. # 43] asserting an eighth ground for relief—that the government had failed to prove the existence of the predicate prior offenses by a preponderance of the evidence.

Boiling down these claims, it appears that they are: (1) that the Court lacked jurisdiction to

sentence Narducci; (2) that the Court failed to indicate why he was a career offender; and, (3) that Weinberger was ineffective as his counsel because he failed to: (a) require evidence of the prior convictions for Narducci's career offender status; (b) challenge his criminal history calculations apart from the career offender status; (c) challenge the career offender status on the basis that Narducci was not eighteen years old at the time of the four bank robberies; (d) challenge the bank robberies as a crime of violence for the purposes of applying the career offender guideline; and (e) file a notice of appeal on these bases. The Court will first address the claims of ineffective assistance of counsel, then the two challenges to the Court's jurisdiction and sentencing decision.

Discussion

A. Ineffective Assistance of Counsel and Denial of Appeal Rights

To succeed on a claim of ineffective assistance of counsel, a movant must demonstrate that the 1) counsel's performance "fell below an objective standard of reasonableness" and 2) that it is reasonably probable that, "but for the deficiency, the outcome of the proceeding would have been different." McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999). See also DeLuca v. Lord, 77 F.3d 578, 584 (2d Cir. 1996).

Here, Narducci has not satisfied either element of this two part inquiry with respect to the performance of Attorney Weinberger. Counsel is afforded wide latitude in executing litigation strategy. See Strickland, 466 U.S. at 689. The United States Supreme Court has recognized that "there are countless ways to provide effective assistance in any given case" and has cautioned against post hoc criticisms of counsel's strategy. See id. at 689. Weinberger's failure to require that the Government offer at the sentencing hearings evidence of Narducci's prior convictions in the form of certified copies

of the prior judgments, his failure to object to the PSR’s criminal history calculations, and his failure to object to an alleged lack of evidence of Narducci’s age and the violent nature of the bank robberies could not be viewed as unreasonable. Indeed, it would have been unreasonable for Weinberger to have insisted on more evidence by the Government as to the prior convictions when he was certain that the Government would be able to produce the records of conviction. Moreover, as the Government has noted, “it was eminently reasonable for Attorney Weinberger not to raise a frivolous claim when doing so may have impacted whether the petitioner received a reduction in offense level for acceptance of responsibility under U.S.S.G. § 3E1.1.” Mem. in Opp. to Pet.’s Mot. to Vac. Conv. and Sent. [Doc. # 44], at 16-17. Asking for documentary proof of the prior convictions would have been frivolous, not only because there was no dispute as to their existence by Narducci—and there still is no such dispute—but also because, as the Government suggests, and as Weinberger insists he informed Narducci, the Government was not required to produce such records under the circumstances.²

However, even if Narducci could demonstrate that Weinberger’s performance fell below the “objective standard of reasonableness” his claim still fails because he cannot show that the outcome would have been different but for Weinberger’s alleged errors and omissions. See Pham v. United States, 317 F.3d 178, 182 (2d Cir. 2003) (“Generally, a defendant suffers prejudice if there is a reasonable probability that his reliance on counsel's ineffective assistance affected the outcome of the proceedings.”). Narducci’s claims are all premised on the notion that his sentence was wrongly

²Narducci points to 21 U.S.C. § 851 as requiring such proof, but that statute does not apply to this case; it applies to narcotics charges in Title 21 of the U.S. Code.

enhanced by his categorization as a career offender. However, there is nothing in the record to suggest that this result would have been different if Weinberger appealed the sentence, objected to the guidelines calculations, or demanded proof of the prior judgments or Narducci's age at the time of the bank robberies. As the Government notes in its opposing memorandum, Narducci does not dispute that he committed the four bank robberies, that he was over eighteen when he committed them, or that they were crimes of violence. Nor does he dispute that he had many prior convictions which satisfied the career offender guidelines provision.³ Finally, as to Narducci's claims that certain of his prior convictions were assigned incorrect points in determining his criminal history, even if he were correct (which he is not), those miscalculations are irrelevant given the "automatic" offense levels and criminal history designations set forth in U.S.S.G. § 4B1.1.

Narducci also claims that he directed Weinberger to file an appeal of his sentence both before and after the sentencing proceedings. In his affidavit dated June 18, 2002, Weinberger states that he does not recall Narducci having asked him to file an appeal of his sentence before the sentencing

³Narducci does not dispute any of the qualifying convictions on which his career offender status was based. The record establishes that he was convicted of assault on a public safety officer on November 14, 1990, possession of a weapon in a correctional institution and assault in the second degree on August 15, 1990, two separate counts of possession of a weapon in a correctional institution (involving different incidents) on February 26, 1992, and assault on a public safety officer on February 26, 1992. The government's response to the instant motion includes certified copies of these prior convictions and also includes other convictions which would qualify as career offender predicates. See United States' Mem. In Opp. to the Pet.'s Mot. to Vac. Conv. and Sent. [Doc. # 44], Ex. 6-9. The PSR correctly listed four of these convictions, but omitted the 1990 assault and one of the 1992 weapon convictions. See Presentence Report, ¶¶ 65-68. The omissions are not material. Narducci also does not dispute his date of birth as February 27, 1969. This would have made him over 18 for the bank robberies and prior convictions.

hearings⁴ and that Narducci did not ask him to file an appeal after sentencing. Nothing in Narducci's statements at the sentencing proceedings suggests that he was already seeking an appeal. Additionally, as the Government has noted, Narducci did not proceed with a pro se appeal after Weinberger allegedly failed to file an appeal. These facts corroborate Weinberger's assertion that there was not a timely request for an appeal. Narducci's claim that he requested that Weinberger file an appeal both before and after the sentencing proceedings is completely unsupported in the record. Finally, it appears that the basis for Narducci's appeal would have been his career offender calculation, and, as indicated above, there has been no issue of fact raised as to that status; Narducci has not denied the prior convictions, his age, or the bank robberies.

As Narducci has not demonstrated that Attorney Weinberger's performance "fell below an objective standard of reasonableness" or that it is reasonably probable that, "but for the [alleged] deficiency, the outcome of the proceeding would have been different," McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999), both of which he would have to show in order to prevail on a claim of ineffective assistance of counsel, his claim for relief is denied as to ground one and grounds three through eight.

Lack of Jurisdiction and Basis for his Sentence

The petitioner's claim of "lack of jurisdiction" of the sentencing court is unclear. The petitioner does not cite any authority for this proposition. However, the Court clearly had jurisdiction over the

⁴If Narducci had made such a request, Weinberger claims he would have informed him that it could not be determined if there were any grounds for an appeal of the sentence prior to the conclusion of the sentencing proceedings. See United States' Mem. in Opp. to Petitioner's Mot. to Vacate Conviction and Sentence, Ex. 2 (Aff. of Gary Weinberger).

petitioner pursuant to 18 U.S.C. § 3231, which grants the district courts original jurisdiction in federal criminal cases such as this. Finally, the record was very clear as to the basis for Narducci's sentencing range and sentence, and his career offender status. Accordingly, ground two is denied also.

Conclusion

For the preceding reasons, the petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. #31] is DENIED. A certificate of appealability will not issue, as Narducci has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); cf. United States v. Walters, 47 Fed. Appx. 100, 2002 WL 31059155, at **2 (3d Cir. Sept 17, 2002) (unpublished opinion) (petitioner's claim that sentencing court misapplied Sentencing Guidelines did not present a constitutional issue sufficient for grant of certificate of appealability); United States v. Cepero, 224 F.3d 256, 267-68 (3d Cir. 2000) (same).⁵

SO ORDERED this ____ day of June 2003, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

⁵As an alternative argument, the government argues that because Narducci did not first raise these claims on a direct appeal, did not demonstrate "cause" for not doing so, and has not shown prejudice from his inability to do so, he has waived these claims and cannot raise them for the first time in a habeas petition under 28 U.S.C. § 2255. As the Court finds that Narducci's claims are without merit, it need not reach this argument.