

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LESLEY TERDIK :
v. : NO. 5:92CR00046(EBB)
NO. 3:99CV00802(EBB)
UNITED STATES OF AMERICA :

RULING ON MOTION TO VACATE,
SET ASIDE OR CORRECT SENTENCE

Petitioner, Leslie Terdik, has filed a motion, pursuant to 28 U.S.C. § 2255, that the court vacate, set aside or correct the sentence imposed upon him by this court following a finding of violations of two conditions of his supervised release. The grounds cited by the defendant in his motion are a violation of due process in the reliance of the court on allegedly "materially false information, unsworn misleading statements [and] malicious lies" of the Assistant United States Attorney and petitioner's supervising probation officer and the failure of the probation officer and the Assistant United States Attorney to disclose to the petitioner unspecified evidence favorable to him. He further alleges ineffective assistance of counsel, both at the hearing culminating in the revocation of his supervised release and on the appeal therefrom.

Petitioner was found guilty on November 12, 1993, of eleven counts of knowingly and intentionally intercepting and endeavoring to intercept wire communications, in violation of 18 U.S.C. § 2511(1)(a). He was thereafter sentenced to 30

months' imprisonment, to be followed by a three-year term of supervised release. A mandatory special assessment of fifty dollars for each count was imposed for a total of five hundred fifty dollars. Petitioner's appeal of his conviction and sentence was unsuccessful and the Second Circuit Court of Appeals affirmed both.

Following completion of his sentence of imprisonment, petitioner began his term of supervised release on April 19, 1996. Petitioner was brought before the court on July 3, 1996, for his failure to comply with a condition of his supervised release that he participate in mental health counseling as directed by his probation officer. Following a hearing, the court continued petitioner on supervised release, ordering him to comply fully with the counseling requirements.

Petitioner was again brought before the court on April 28, 1998, pursuant to a petition filed by his probation officer which cited petitioner for two violations of his supervised release: First, violation of the condition that he not leave the district without the permission of the court or his probation officer, and second, that he not commit a federal, state or local crime.

The first violation claimed was that petitioner had traveled to the Grand Cayman Islands from approximately November 9 to 14, 1997, without permission. The second violation claimed a possible violation of 18 U.S.C. § 1001 in that petitioner

completed a monthly supervision report for the month of November, 1997, which he certified to be true and in which he falsely stated that he had not traveled outside the district without permission. Attached to the probation officer's petition was a copy of Mr. Terdik's customs declaration on his return from the Grand Cayman Islands and at the hearing his passport revealed entry into the Cayman Islands on November 9, 1997, and exit on November 14, 1997.

At the hearing, petitioner's counsel indicated petitioner admitted that he left the district without permission and that his statement was filed. The court then inquired of the petitioner whether he was in agreement with counsel that he did not wish to contest the claimed violations and he replied "No, your Honor. At the time, I do not wish to contest it." Hearing transcript, unnumbered p. 5.

The court then proceeded to a consideration of the appropriate sentence to be imposed, having found the petitioner in violation of both conditions. His counsel urged the court to sentence petitioner at the low end of his guideline range, having indicated to the court that petitioner had ill-advisedly accepted the invitation of a friend, who had been awarded an all-expense paid round trip for two, to accompany him.¹

¹Petitioner in his memorandum now claims the trip was an award to him for outstanding work performance although he made no effort to correct his counsel's representation at the hearing.

Although invited to do so, petitioner declined to make any comment prior to the imposition of sentence. Hearing Transcript, unnumbered page 14.

The court sentenced petitioner to an eighteen-month term, eight months above the guideline range of four to ten months and six months less than the statutory maximum. The sentence imposed was selected because of petitioner's instant violations, his prior lack of cooperation in the requirement of mental health counseling which resulted in a violation hearing and the court's continuing him on supervision with an order to cooperate in the counseling, and his sporadic token payments on his special assessment,² all of which, in the court's view, evidenced petitioner's disdain for the requirements of the judicial system. Petitioner appealed the sentence imposed and the sentence was affirmed.

Petitioner appears to claim that his probation officer orally modified the prohibition of out-of-district travel when "[p]rior to submit employment application, defendant requested Mr. Hassen 'if it would be any problem to travel outside the jurisdiction for business related matters.' Mr. Hassen responded that 'I don't see anything wrong with that.'"

²From the time of his release on April 19, 1996, petitioner made the following payments: Feb. 24, 1997, \$50; \$5 payments on Oct. 7, Nov. 13 and Dec. 29, 1997, and Feb. 11 and Feb. 19, 1998; April 2, 1998 \$15 and April 27, 1998, one day before the violation hearing, payment of the \$260 balance. Ex. 5 to petitioner's "Objection to Government's Brief to Show Cause."

Petition Additional Page 2 Section "B". Assuming the truth of this representation, the probation officer's alleged response to a hypothetical pre-employment inquiry could not reasonably be construed as permitting out-of-district travel in connection with yet-to-be secured employment in what petitioner, in his discretion, would consider to be a business-related matter. Nor did petitioner offer this explanation at the violation hearing although the court gave him an opportunity to do so.

Petitioner also objects to the court's consideration of the July 3, 1996, violation hearing. He alleges, without citation, that the special condition of mental health counseling was imposed in violation of due process, the Constitution and the laws of the United States. Additional Page 4 Section "B". The court imposed that condition pursuant to the provisions of U.S.S.G. § 5D1.3(d)(5) based on the entire record of the underlying offense conduct and information in the presentence report.

Petitioner also objects to the court's consideration of his failure to make other than sporadic payments on his special assessment. Although on Additional Page 2 Section "B" petitioner asserts that during 1996 he was employed by Curran Volkswagen Inc. in Stratford, on Additional Page 2 Section "C" he claims he was unable to gain employment until January, 1997. Assuming the truth of the latter representation from January, 1997, to April 27, 1998, petitioner paid only \$90 toward the

special assessment. Petitioner made one five-dollar payment in the month of November, 1997, although on November 5, 1997, his paycheck was for \$661.01, on November 12, 1997, \$590.92 and November 26, 1997, \$720.76.³ Nevertheless on his customs declaration on return from the Grand Cayman Islands, petitioner showed an expenditure of \$92 for a T-shirt, rum, cigarettes and cologne. The record shows no good faith effort to comply with payment of the mandatory special assessment.

Relief under 28 U.S.C. § 2255 is available where the court lacked jurisdiction to impose sentence, or the sentence imposed was in excess of the maximum authorized by law or is otherwise subject to collateral attack for a fundamental error which "inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185, (1979) quoting Hill v. United States, 368 U.S. 424, 428 (1962). Petitioner has alleged violations of his right to due process and the effective assistance of counsel, which, if substantiated, would entitle him to the relief sought but he has failed to do so.

Petitioner's due process claim alleges false information, misleading statements and lies by the Assistant United States Attorney and the probation officer and failure by them to disclose to him unspecified exculpatory information. The

³As noted in the probation office monthly supervision report for November, 1997, petitioner told the probation officer that he missed work the week of Nov. 10-14, 1997, because he had been suffering from flu-like symptoms.

alleged false information relates to petitioner's earlier refusal to participate in counseling, failure to pay his special assessment and failure to pay child support. The government's reference to petitioner's earlier hearing on his failure to cooperate in the mental health counseling condition of his supervised release and his failure to pay his special assessment was clearly supported by the record. Petitioner's failure to pay child support (which, the court notes, petitioner does not deny) was nevertheless not a consideration in this court's sentencing determination. Furthermore, the court's consideration of petitioner's "tardy payment of his special assessment and his initial delay in entering counseling" were raised by the petitioner in his appeal, Defendant-appellant's brief on appeal, p. 10-12, and were rejected by the appellate court. Petitioner may not relitigate in a habeas corpus proceeding matters which were raised and considered on appeal. Riascos-Prado v. United States, 66 F,3d 30, 33 (2d Cir. 1995).

Petitioner's claim of ineffective assistance of counsel is rejected. Petitioner claims counsel failed to investigate the alleged "oral" permission for travel or petitioner's ability to pay his assessment.

To succeed on a claim of ineffective assistance of counsel, petitioner has the heavy burden of showing that counsel's performance was deficient and prejudiced the defense in that it involved errors so serious as to deprive the petitioner of a

fair trial whose result was reliable. Strickland v. Washington, 466 U.S. 668, 687 (1984) Petitioner must show that counsel's representation fell below an objective standard of reasonableness, id., 688, the court's examination of counsel's performance must be "highly deferential", id., 689, and the petitioner must overcome a strong presumption that his attorney's performance fell "within the wide range of reasonable professional assistance," id. Furthermore, petitioner must show that, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. Id., p. 694 Petitioner has met neither prong of the Strickland test.

Even had counsel confirmed the pre-employment conversation petitioner claims to have had with his probation officer, counsel would have been hard-pressed to argue to the court that the probation officer's off-hand response to a hypothetical question reasonably entitled petitioner to travel outside the district without notice to his probation officer and to state falsely on his monthly supervision report that he had not done so. Additionally the evidence clearly showed petitioner's employment and that he could have made at least nominal payments on his special assessment and failed to do so.

Petitioner's counsel, an experienced defense attorney, wisely concentrated his efforts in this court on arguing for a sentence at the lower end of the guideline range. That he did

not succeed in this endeavor is not evidence of ineffective assistance on his part; rather it was because of petitioner's own conduct. Furthermore, on appeal, he pressed the same issues with respect to the length of sentence, i.e., consideration by the court of petitioner's first revocation hearing and failure to pay his assessment which petitioner now raises. Counsel's assistance has not been shown to be ineffective under the Strickland standard.

Accordingly, the motion [Doc. No. 4] is denied. A certificate of appealability shall not issue, petitioner having failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(a)(2).

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, CT, this _____ day of August, 1999.