

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODERICK A. CAMPBELL

v.

C.A. No. 97-274T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge.

Roderick A. Campbell, has moved, pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct sentence. In addition, Campbell has filed a motion for partial summary judgment on his § 2255 motion. For the reasons set forth below, both motions are denied.

Background

In 1994, Campbell was convicted by a jury of six counts relating to the manufacture and distribution of phenylacetone (P2P).¹ Campbell was sentenced to concurrent terms of imprisonment ranging from 240 months to 288 months and concurrent terms of supervised release ranging from 3 years to 6 years. Campbell also was fined \$100.00 and directed to pay a \$300.00 special assessment plus the costs of supervision in monthly installments during the period of supervised release.

Campbell's conviction and sentence was affirmed on appeal, United States v. Campbell, 61 F.3d 976 (1st Cir. 1995), and his petition for certiorari was denied. Campbell v. United States, 517

¹ The charges on which petitioner was adjudged guilty were: conspiracy to manufacture, distribute and possess with intent to distribute P2P, in violation of 21 U.S.C. §§ 841(a)(1) and 846; knowingly and intentionally manufacturing P2P, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2; maintaining a place for the purpose of manufacturing P2P, in violation of 21 U.S.C. § 856; and knowingly and intentionally distributing P2P on three dates in February, March and April 1993, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2.

U.S. 1161 (1996).

Facts

The facts underlying Campbell's conviction are recited in the First Circuit's decision. They may be summarized as follows. In 1993, an undercover Drug Enforcement Agency (DEA) agent who claimed to be seeking a steady source of P2P for use in manufacturing methamphetamine approached Campbell and Campbell agreed to set up a laboratory that would produce P2P.

Campbell, later, delivered a sample of a substance that he said was P2P but that testing revealed was not P2P. Campbell told the agent that the negative test results were due to his use of an alternative manufacturing method which was designed to avoid the distinctive odor associated with P2P. Campbell subsequently delivered another sample, that was manufactured in the traditional manner, and that tested positive for P2P.

In March 1993, Campbell and his associate, Harold Farrell, began making deliveries to the agent. Farrell indicated that they would supply 100 gallons of P2P. During March and April, Campbell and Farrell made six deliveries of mixtures containing P2P and seven deliveries of substances that subsequently were determined not to contain any P2P.

At Campbell's trial, a DEA chemist, who had viewed Campbell's laboratory when Campbell was arrested, testified that he had observed chemical reactions consistent with the manufacture of P2P and that the lab contained all of the chemicals necessary to produce P2P. Campbell's defense was that he never intended to manufacture P2P and that he was attempting to deceive his buyer. He claimed that the presence of P2P in some of the deliveries was inadvertent.

The Section 2255 Motion

Campbell presents nine reasons why his § 2255 motion should be granted: (1) the

government withheld exculpatory test results; (2) certain samples which allegedly tested positive for the presence of P2P had been contaminated, either intentionally or inadvertently, and the testimony concerning the analysis of those samples was perjured; (3) defense counsel was ineffective at trial in failing to expose the alleged perjury and in failing to conduct an adequate examination on scientific topics; (4) defense counsel's representation was otherwise deficient in that counsel did not oppose the court's imposition of increased penalties by reason of prior criminal convictions despite the government's failure to file an information as required by 21 U.S.C. § 851; (5) 21 U.S.C. § 851² is unconstitutional on its face and as applied to petitioner; (6) the government failed to prove that Campbell acted with the intent necessary for a conviction pursuant to 21 U.S.C. § 841; (7) Campbell was erroneously sentenced as having intended the P2P for use in the manufacture of methamphetamine; (8) the offense level enhancements that he received for obstruction of justice and abuse of his special skill as a chemist, and the court's upward departure from the otherwise applicable sentencing guideline range in order to reflect Campbell's past criminal conduct and that he was likely to commit other crimes in the future, should all be reevaluated in view of new evidence; and (9) the court lacked authority to impose the costs of supervision.³

Discussion

I. The § 2255 Standard

² As set forth at n.7, infra., the penalty provision to which petitioner apparently refers is 21 U.S.C. § 841.

³ The petitioner's claim that the district court lacked authority to impose the costs of supervision was not set forth in the initial § 2255 motion. Instead, Campbell raised this ground in a separately filed document captioned "Motion to Correct Illegal Sentence". More appropriately, the claim as treated as part of petitioner's § 2255 motion. See United States v. Zuleta-Molina, 840 F.2d 157 (1st Cir. 1988).

28 U.S.C. § 2255 provides 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.

In order to be cognizable under § 2255, claims based on other than constitutional or jurisdictional grounds must present exceptional circumstances that justify permitting a collateral attack. Stated another way, the alleged error must amount to “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). Section 2255 is not a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982). Accordingly, errors warranting a reversal on direct appeal will not necessarily support a collateral attack. Knight v. United States, 37 F.3d 769, 772 (1st Cir. 1994). See United States v. Addonizio, 442 U.S. 178, 184 (1979).

II. The Claims

A § 2255 movant is procedurally precluded from obtaining review of issues not presented on direct appeal absent a showing of both “cause” for the default and “prejudice” or, alternatively, that he is “actually innocent.” E.g., Brache v. United States, 165 F.3d 99, 102 (1st Cir. 1999). Although many of Campbell’s claims were not raised at trial or on appeal, he has failed to make either of the required showings with respect to these claims.⁴ Moreover, his claims lack merit.

⁴ Additionally, Campbell has not demonstrated “actual innocence.” “ ‘Actual innocence’ means factual innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, ___, 118 S.Ct. 1604, 1612 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)). In order

A. The Exculpatory Evidence Claim

Campbell asserts that the government violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963), by allegedly failing to disclose that some of the samples claimed by the DEA to contain P2P, previously had been found by the Rhode Island Department of Health (RIDOH) not to contain P2P.

Presumably, Campbell relies on the alleged nondisclosure as “cause” for his failure to raise this issue sooner, but he has not established that this evidence was otherwise unknown or unavailable to him. See United States v. Pandozzi, 878 F.2d 1526, 1530 (1st Cir. 1989) (quoting Jarell v. Balcom, 735 F.2d 1242, 1258 (11th Cir. 1984)); Lugo v. Munoz, 682 F.2d 7, 9-10 (1st Cir. 1982).

Moreover, Campbell has presented no evidence that any of the samples determined by the DEA to contain P2P tested negative. Campbell points to what he claims is a negative RIDOH report with respect to DEA Sample 17 but he has failed to establish that the substance in the report is the substance in Sample 17. Furthermore, contrary to Campbell’s assertion, the RIDOH report indicates that the substance did contain P2P.

B. Evidence Tampering and Perjury Claims

Campbell alleges that any P2P contained in the samples tested by the DEA was the product of intentional or inadvertent contamination by DEA agents or that trial testimony regarding the test results was perjured. However, Campbell has failed to demonstrate “cause” for failing to raise this issue sooner.

to establish “actual innocence,” a defendant must “demonstrate that, in light of all the evidence it is more likely than not that no reasonable juror would have convicted him.” Id. (internal quotations omitted). The evidence adduced at trial clearly evinces Campbell’s guilt of the charges for which he was convicted.

In addition, Campbell has failed to present any credible evidence in support of his claims. Campbell's allegations are based, largely, on the affidavits of two chemists, Wayne A. Morris and John William Scuggs. For the most part, these affidavits consist of nothing more than a recitation of post-trial representations made by Campbell to Scuggs concerning the manufacturing process that Campbell employed and unsubstantiated assertions by Morris that the government's testing methods were unreliable.

C. The Ineffective Assistance Claims

Campbell claims that his counsel was ineffective in not exposing the aforementioned perjury; in failing to adequately examine expert witnesses; and, in failing to challenge the enhancement of his sentence pursuant to 21 U.S.C. § 841 on the ground that the government did not file an information regarding Campbell's prior state court convictions as required by 21 U.S.C. § 851.

In order to establish that he was deprived of his Sixth Amendment right to effective assistance of counsel, Campbell must demonstrate that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

An attorney's performance is deficient when it is "so inferior as to be objectively unreasonable." United States v. McGill, 11 F.3d 223, 226 (1st Cir. 1993). In employing this rather deferential standard, counsel's performance must be evaluated without "the distorting effects of hindsight" and in light of the circumstances as they existed at the time. Strickland, 466 U.S. at 689.

Campbell has fallen far short of satisfying even the first prong of the Strickland test. He has failed to identify, and the Court is unable to discern any way in which counsel's performance at trial was deficient. The fact that counsel was not, also, a research chemist, that does not set him apart

from the vast majority of defense attorneys. Counsel had demonstrated sufficient familiarity with the subject; and, more importantly, the facts of the case, to do a very creditable job of conducting the best defense possible in light of the overwhelming evidence against Campbell. Moreover, Campbell was afforded ample opportunity to “educate” counsel before trial and confer with counsel during the trial regarding the technical aspects of each witness’ testimony. Campbell also had the opportunity to present any technical evidence that he desired when he testified.

Campbell’s claim that counsel was deficient in not challenging the sentence enhancement under 21 U.S.C. § 841 also lacks merit. Although the docket sheet does not reflect it, a review of the file reveals that the required information identifying Campbell’s prior felony convictions⁵ was filed by the government before empanelment.⁶

D. The Constitutionality of 21 U.S.C. § 851

Campbell contends that 21 U.S.C. § 851⁷ is unconstitutional on its face because it provides for increased penalties based upon prior state court felony drug convictions, thereby violating the prohibitions against ex post facto laws, bills of attainder and double jeopardy, and because it violates

⁵ 21 U.S.C. § 851(a)(1) provides in pertinent part:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. * * *

⁶ A jury was empaneled on January 27, 1994. As used in § 851(a)(1), “before trial” means prior to jury selection. See United States v. Cartagena-Carrasquillo, 70 F.3d 706, 715 (1st Cir. 1995) (citing Kelly v. United States, 29 F.3d 1107, 1110 (7th Cir. 1994)).

⁷ 21 U.S.C. § 851 simply sets forth the procedures to be employed in applying the increased penalties delineated elsewhere in Title 21. To the extent that Campbell seeks to challenge the substantive provision, the appropriate reference is to 21 U.S.C. § 841(b)(1)(C).

the Ninth and Tenth Amendments. Campbell also asserts that the court's application of this provision violated his right to due process and was in excess of the court's jurisdiction under Article III.

Since Campbell has not demonstrated "cause" for failing to raise these claims on appeal, he is procedurally precluded from litigating them now.

Moreover, even if Campbell could raise these issues, his arguments rest on the erroneous premise that the consideration of his prior convictions constituted either a redetermination of his guilt or an additional punishment for the state law violations. The Supreme Court has "repeatedly upheld recidivism statutes 'against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection and privileges and immunities'." Parke v. Raley, 506 U.S. 20, 27 (1992) (quoting Spencer v. Texas, 385 U.S. 554, 560 (1967) (internal citations omitted)). It also has held that "[e]nhancement statutes * * do not change the penalty imposed for the earlier conviction." Nichols v. United States, 511 U.S. 738, 747 (1994). Sentencing enhancement provisions are not bills of attainder. See Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977) (key features of a bill of attainder include a legislative determination of guilt and imposition of punishment upon an identifiable individual with provision of the protections of a judicial trial).

E. Knowledge and Intent

Campbell argues that, because P2P is only a precursor to methamphetamine, the government was required to prove that he knew that the P2P could be used to manufacture methamphetamine. This argument, too, is procedurally barred.

Even if Campbell could raise the issue, Campbell is incorrect in asserting that the government was required to prove that he knew that P2P could be used to manufacture methamphetamine.

Section 841(a)(1) makes it unlawful to “knowingly or intentionally * * * manufacture* * * a controlled substance.” 21 U.S.C. § 802(6) defines “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.” Since P2P has been designated as a schedule II “immediate precursor”, 21 C.F.R. § 1308.12 (g)(1)(i), it is a “controlled substance” within the meaning of § 841 and the government was required to prove only that Campbell knowingly or intentionally manufactured P2P.

In any event, the evidence is overwhelming that, in fact, Campbell did know that P2P was a precursor to methamphetamine.

That evidence also undercuts Campbell’s argument that his guideline sentencing range was calculated on the erroneous premise that he possessed P2P “for the purpose of manufacturing methamphetamine”, thereby triggering a conversion equivalent of 416 grams of marijuana per gram of P2P rather than 75 grams of marijuana per gram of P2P. See Drug Equivalency Tables, U.S.S.G. § 2D1.1 comment.(n.10).

More importantly, Campbell’s challenge to use of the 416 gram multiplier was considered and rejected by the First Circuit on direct appeal. United States v. Campbell, 61 F.3d at 985-86. Although Campbell now attempts to recharacterize and to provide additional legal theories in support of his argument, the gravamen of his claim remains the same as the one rejected on appeal and will not be revisited. E.g. Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994) (quoting Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967)).

F. The Sentencing Enhancements

Campbell argues that the offense level enhancements for obstruction of justice and abuse of his special skill as a chemist, and the upward departure based on his past criminal conduct and the

likelihood that he would commit other crimes in the future were erroneous. Once again, this is simply a rehash of arguments made and rejected on direct appeal. Consequently, they cannot be raised in Campbell's § 2255 motion.

Campbell attempts to circumvent that prohibition by asserting that the matter should be reevaluated in view of "new evidence." However, the "new evidence" consists of nothing more than the previously rejected claims of evidence tampering and perjury. Thus, Campbell's arguments lack any factual foundation.

G. Imposition of the Costs of Supervision.

Finally, Campbell argues that this Court had no authority to impose the costs of supervised release because Campbell was indigent. Since Campbell had failed to present any "cause" for not raising this issue on appeal, he is procedurally barred from raising it now.

In addition, Campbell ignores the fact that the Court deferred payment of the costs of supervision until Campbell was released from prison and could begin using his considerable talents to earn the money to pay those costs.

Conclusion

For the above reasons, Campbell's § 2255 motion is denied. Because Campbell is not entitled to relief on any of his claims, his motion for partial summary judgment is also denied.

IT IS SO ORDERED.

Ernest C. Torres
Chief Judge

May , 2000

