

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KEVIN B. LOCKHART

v.

C.A. No. 01-035L

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ronald R. Lagueux, United States District Judge.

Petitioner, Kevin B. Lockhart, has filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion is denied.

Facts and Travel.

In 1998, Lockhart and a co-defendant, Irvin D. Woods, were convicted of attempting and conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. § 2. The convictions stemmed from their participation in a scheme to purchase several kilograms of cocaine for resale.

In February 1997, Detective Freddie Rocha of the Providence Police Department called a Massachusetts telephone number and spoke with an individual later identified as Woods. The detective's telephone call was precipitated by his receipt of information from a confidential informant indicating that some people in Massachusetts were seeking to purchase a large quantity of cocaine.

Rocha asked Woods if he was "looking for work." Based upon his experience as a narcotics investigator, Rocha understood that phrase as a reference to cocaine. Without using the word

"cocaine", Rocha and Woods discussed the price of the drugs, which they agreed would be \$15,000.00 per kilogram. The agreed price was substantially less than the then-market price in New York of \$24,000 per kilogram.

The next day, Woods paged Rocha and the two men arranged to meet in Providence. Woods told Rocha that his "partner" would accompany him. When Woods arrived in Providence, he was accompanied by Lockhart, who Woods introduced to Rocha as his partner. Rocha, Woods and Lockhart then met the confidential informant in a room in a nearby hotel where they proceeded to negotiate the sale of four kilograms of cocaine. Unbeknownst to Woods and Lockhart, the conversation was tape recorded by law enforcement officers who were stationed in an adjacent room.

The parties agreed that Woods and Lockhart would pay cash for two kilograms and receive the remaining two kilograms on credit. Lockhart assured Rocha that he would pay the balance by the weekend. Lockhart boasted that he could "handle" five kilograms per week. When Rocha replied that Lockhart could do so only if he had a significant customer base, Woods interjected that he had done business on such a scale previously. When Lockhart left the room to retrieve the initial payment from his vehicle, Woods told Rocha that Lockhart was his "main man" and "main partner." Woods explained that Lockhart provided the necessary financing for the drug operation. Lockhart was arrested

while returning to the hotel room with approximately \$30,000 in cash.

Following a jury trial, Woods and Lockhart were adjudged guilty of both counts of a two-count indictment that alleged: conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count I); and, attempting to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846 and 18 U.S.C. § 2 (Count II). Both Woods and Lockhart appealed from their convictions. The Court of Appeals affirmed. United States v. Woods, 210 F.3d 70 (1st Cir. 2000). Lockhart now seeks relief pursuant to 28 U.S.C. § 2255.¹

Discussion.

In support of his § 2255 motion, Lockhart contends that his trial counsel was ineffective in that the attorney allegedly failed to investigate and present an adequate defense, and that he purportedly refused to allow Lockhart to testify at trial. Also, petitioner alleges that defense counsel failed to adequately advise him concerning whether to accept a proposed plea agreement. Although not entirely clear from his motion and memorandum, Lockhart apparently also complains that his attorney

¹ Woods has also filed a motion pursuant to 28 U.S.C. § 2255. See, Woods v. United States, C.A. No. 01-222L (D.R.I.). That application remains pending and will be addressed separately by this Court in due course.

failed to request that the jury be instructed as to the weight to be afforded to the government's transcript of the tape-recorded hotel conversation.

In further support of his § 2255 motion, Lockhart alleges that the prosecution failed to prove all of the elements necessary to support a conspiracy conviction and, accordingly, that the court erred in denying his motion for an acquittal on that count. Also, he contends that Rocha's trial testimony was inconsistent with his grand jury testimony; that the tape recording of the hotel meeting was improperly admitted at trial; and, that the district court committed error in denying Lockhart's motion for severance. Finally, Lockhart alleges that the indictment was defective because it did not specify drug quantity and that, since drug amount was not proven beyond a reasonable doubt, his sentence is violative of Apprendi v. New Jersey, 530 U.S. 466 (2000).

Lockhart's claims that this Court erred in denying his motions for severance and acquittal were considered and rejected by the First Circuit on direct appeal. Woods, 210 F.3d at 77-79. Accordingly, those claims may not be relitigated here. 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)). Moreover, other than his claims of ineffective assistance of counsel, Lockhart is procedurally precluded from

pursuing his remaining arguments in the instant proceeding.

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.

Section 2255 is not a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982). A movant is procedurally precluded from obtaining § 2255 review of claims not raised on direct appeal absent a showing of both "cause" for the default and "actual prejudice" or, alternatively, that he is "actually innocent" of the offenses for which he was convicted. Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted). Claims of ineffective assistance of counsel are not subject to this procedural hurdle. Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994).

In attempting to allege "cause" for his failure to pursue his claims on direct appeal, Lockhart provides only a general, perfunctory statement that the issues "were never brought up because petitioner's attorney failed or refused to raise them on

direct appeal.”² Petitioner’s § 2255 Motion at 6, ¶ 13. In fact, Lockhart has not demonstrated that his procedural default was caused by counsel’s ineffectiveness. Specifically, petitioner has not demonstrated that his attorney’s failure to pursue any one of the claims was objectively unreasonable. See Strickland v. Washington, 466 U.S. 668 (1984).

Not only has Lockhart failed to satisfy the “cause” and “prejudice” standard with regard to his defaulted claims, he does not allege “actual innocence” of the charges of conviction. In fact, any such argument would be futile.

“To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” Bousley, 523 U.S. at 623 (internal quotations and citations omitted).

“‘Actual innocence’ means factual innocence, not mere legal

² Additionally, with regard to his Apprendi-based claim, Lockhart relies on the fact that Apprendi was not decided by the Supreme Court until June 2000, as “cause” for not pursuing that claim previously. “[A] claim that ‘is so novel that its legal basis is not reasonably available to counsel’ may constitute cause for a procedural default.” Bousley v. United States, 523 U.S. 614, 622 (1998) (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). However, Apprendi-type claims do not so qualify. United States v. Moss, 252 F.3d 993, 1001-1002 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 145-46 (4th Cir. 2001); United States v. Smith, 241 F.3d 546, 548 (7th Cir.), petition for cert. filed (Jul. 19, 2001) (No. 01-5367).

Further, even if Lockhart could surmount this procedural hurdle, his Apprendi claim is not cognizable in the instant § 2255 proceeding. See Moss, 252 F.3d at 997; Sanders, 247 F.3d at 146 (both holding that Apprendi is not retroactively applicable to cases on collateral review).

insufficiency.” Id. (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)). Lockhart cannot demonstrate “actual innocence” because, as the First Circuit noted, there was “abundant evidence from which a rational jury could infer beyond a reasonable doubt Lockhart’s knowledge that he was purchasing cocaine with intent to sell.” Woods, 210 F.3d at 77.

Remaining before the Court for consideration are petitioner’s claims of ineffective assistance of counsel. A defendant who alleges deprivation of his Sixth Amendment right to effective assistance of counsel must demonstrate both: (1) that the attorney’s performance fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by that deficiency. Strickland, 466 U.S. at 687-88.

Judicial scrutiny of counsel’s conduct is highly deferential. Id. at 689. “[The] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy’.” Id. (quoting Michel v. Louisiana, 350 U.S. 91 (1955)). The adequacy of counsel’s performance is evaluated from the attorney’s perspective at the time of the challenged conduct and in light of all the circumstances then existing. Id. at 689-90.

In order to satisfy the “prejudice” prong, the defendant

must demonstrate that there is a reasonable probability that, but for the attorney's deficient representation, the result of the proceeding would have been different. Id. at 694.

Lockhart has failed to demonstrate that any aspect of his attorney's performance was objectively unreasonable. First, petitioner contends that defense counsel failed to investigate and prepare an adequate defense. In substance, Lockhart faults his attorney for not obtaining or presenting evidence that allegedly would have shown that he was not attempting to purchase cocaine and was not Woods' partner.³ However, he does not specifically identify any witnesses who would have allegedly so testified and has not identified any other evidence that would have supported such a defense. He has not provided any affidavits from any putative witnesses or otherwise delineated their anticipated testimony.

Similarly, although Lockhart faults his attorney for not proffering expert testimony which, he contends, would have demonstrated the inaccuracy of the government's tape recording and its transcript of the hotel meeting, he has not specified what aspects of the tape recording or transcript he contends were inaccurate and has not provided the Court with any alternative version of the hotel conversation.

³ Lockhart does not delineate any other aspects of his purported defense.

Lockhart complains that his attorney failed to allow him to testify at trial. However, as with his other allegations of ineffective assistance, petitioner has failed to articulate this claim with any specificity. In fact, Lockhart does not specify whether he ever discussed the possibility of testifying with his attorney or otherwise indicated any desire to testify. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. See Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) ("[C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal * * * or (2) that [the] defendant reasonably demonstrated to counsel that he was interested in appealing.").

In further support of his claim that his attorney's representation was ineffective, Lockhart alleges that defense counsel failed to provide competent advice to him concerning whether to accept a proposed plea agreement. Lockhart contends that if his attorney had fully and accurately advised him of the potential sentence he could receive if he was convicted after trial, he would have accepted the plea offer. Instead, he claims, his attorney encouraged him to reject the plea agreement. According to Lockhart, under the terms of the proposed agreement,

the government would have recommended a sentence of 188-months in exchange for Lockhart's guilty plea. In contrast, following trial, Lockhart was sentenced to concurrent terms of 360-months imprisonment on each count, which, as a result of his status as a "career offender," was the minimum sentence available under the sentencing guidelines.

Lockhart's claim that counsel failed to render competent advice concerning whether to accept the proposed plea agreement and that he relied on that advice in choosing to proceed to trial is contradicted by the representations made by petitioner to the Court at his sentencing hearing. In particular, Lockhart stated:

[A]lmost from the beginning, I prepared to plead guilty and accept my responsibility in this case. [Defense counsel] explained to me how he had met several times with [the government prosecutor], and my acceptance would do away with enhancement in this case. I was ready and wanted to do that, however, peer pressure caused me to go to trial and watch my co-defendant raise the defense of entrapment. I was persuaded to go along with it. * * * I should have accepted my responsibility in the beginning.

United States v. Lockhart, Cr. No. 97-24L, sentencing transcript (10/8/98) at 13-14.

Thus, although, in hindsight, Lockhart regrets his decision to proceed to trial, it is clear from his own admissions at sentencing that he made that choice after being appropriately advised by defense counsel. In apparent contravention of his attorney's advice, Lockhart elected to proceed to trial. As he

acknowledged at sentencing, that decision was the result of Lockhart's reliance upon the advice given to him by others. He cannot now contend otherwise.

Finally, Lockhart complains that his attorney was ineffective in failing to request that the jury be instructed on the appropriate weight it was to afford to the government's transcript of the hotel conversation.

As previously set forth, Lockhart contends that both the tape-recording and the transcript contained unspecified inaccuracies in the memorialization of the hotel conversation. Apparently, he also contends that the transcript is inconsistent with the tape recording. Again, however, he has not delineated any of the alleged inconsistencies. Thus, he has not shown that his attorney performed deficiently in not requesting a jury instruction on the issue.

Moreover, the Court instructed the jury that the tape recording itself was evidence but that the transcript was not; that the transcript was furnished simply as an aid to the jury in listening to the tape; and, that, if the jurors perceived any variation between the two, the tape, not the transcript, would govern. Tr. (3/20/98) at 22-23. In sum, because the jury was properly instructed, Lockhart cannot demonstrate that he was prejudiced by his attorney's alleged failure to specifically request a particular instruction on the subject.

Conclusion.

For the above reasons, petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is denied and dismissed. The Clerk shall enter judgment for defendant, United States, forthwith.

IT IS SO ORDERED.

Ronald R. Lagueux
United States District Judge
September , 2001