UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IRVIN D. WOODS

v. C.A. No. 01-222L

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ronald R. Lagueux, Senior United States District Judge.

The petitioner, Irvin D. Woods, 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, Woods and a co-defendant, Kevin B. Lockhart, 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 defendants' participation in a scheme to purchase several kilograms of cocaine for resale.

In February 1997, Detective Freddie Rocha of the Providence Police Department acting undercover as a drug dealer, 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. Due to an equipment malfunction, Rocha's attempt to tape-record the telephone conversation was unsuccessful. However, Rocha

testified at trial as to his recollection of the conversation.

Rocha recalled that he 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 $24,000.00 per kilogram.

The next day, Woods and Rocha again spoke by telephone.[1] 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

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[1] Rocha's attempt to record this conversation also was unsuccessful.

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 $30,000.00 in cash.

Following a jury trial, Woods and Lockhart were adjudged guilty of both counts of a two-count indictment that alleged: conspiracy to 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).

On each of the two counts of conviction, Woods was sentenced to a 120-month term of imprisonment, with the sentences imposed to be served concurrently. Additionally, on both counts the court imposed concurrent terms of 5-years supervised release.

Both Woods and Lockhart appealed from their convictions, with Woods also challenging his sentence. The Court of Appeals affirmed. United States v. Woods, 210 F.3d 70 (1st Cir. 2000).

Woods now seeks relief pursuant to 28 U.S.C. § 2255.[2]

Discussion.

In support of his 2255 motion, Woods contends that the prosecution failed to disclose exculpatory evidence to him; that he was denied any opportunity to cross-examine the government's confidential informant, in contravention of his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution; and, that he received a sentence that is violative of the Supreme Court's subsequent pronouncement in Apprendi v. New Jersey, 530 U.S. 466 (2000). Also, although not entirely clear from his motion, Woods apparently contends that the government engaged in sentencing factor manipulation with regard to drug quantity.

Moreover, Woods proffers several allegations of ineffective assistance of counsel, including that trial counsel failed to present an entrapment defense; did not adequately cross-examine law enforcement agents; did not protect petitioner's rights under the Sixth Amendment; and, improperly admitted to the jury that Woods had purchased an illegal drug. Also, petitioner claims that defense counsel failed to present to him a government-proposed plea agreement under which he allegedly would have

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[2] Lockhart also filed a motion pursuant to 28 U.S.C. § 2255. Lockhart's petition has been denied by the court. See, Lockhart v. United States, C.A. No. 01-035L (D.R.I.), Memorandum and Order (9/21/01)(Lagueux,J.).

received a shorter sentence than that ultimately imposed.

Finally, in his "traverse" to the government's response to his § 2255 motion, Woods challenges the district court's determination that he had not satisfied the requirements of U.S.S.G. 5C1.2, the "safety valve" provision.

Woods' claims of sentencing factor manipulation and that the district court erred in denying him sentencing relief under the safety-valve provision were considered and rejected by the First Circuit on direct appeal. Woods, 210 F.3d at 75-76. Neither claim may 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)). Further, other than his claims of ineffective assistance of counsel, Woods 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).

Woods did not present his Confrontation Clause, Apprendi or exculpatory evidence claims on appeal. However, he has neither alleged nor demonstrated that "cause" existed for his failure to pursue any of these substantive claims in the direct proceeding.[3]

Moreover, Woods does not allege that he was "actually innocent" of either count of conviction. In fact, any such argument would be futile.

"To establish actual innocence, petitioner must demonstrate

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[3] The fact that the Supreme Court did not issue its decision in Apprendi until June 2000, following the First Circuit's denial of Woods' appeal, does not constitute "cause" for petitioner's failure to pursue his claim in the direct proceedings. "[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), petition for cert. filed (Nov. 6, 2001)(No. 01-7140); United States v. Sanders, 247 F.3d 139, 145-46 (4th Cir.), cert. denied, U.S. , 122 S.Ct. 573 (2001); United States v. Smith, 241 F.3d 546, 548 (7th Cir.), cert. denied, U.S. , 122 S.Ct. 267 (2001).

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 insufficiency." Id. (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

The evidence adduced at trial overwhelmingly demonstrated Woods' guilt of the crimes of conviction. Thus, he cannot support a claim of "actual innocence" as to either count.

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 v. Washington, 466 U.S. 668, 687-88 (1984).

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.

Woods contends that his attorney was ineffective in failing to present an entrapment defense. Woods' counsel elected to make an opening statement immediately following the government's opening statement and prior to the prosecution's presentation of any evidence. Both counts of the indictment identified cocaine as the controlled substance at issue. Apparently anticipating that the government would prove that cocaine was the subject of the parties' negotiations, Woods' attorney raised the entrapment issue in his opening remarks. Ultimately, however, defense counsel abandoned the entrapment defense and adopted a new strategy.

At the conclusion of the government's direct case, both Woods and Lockhart moved for judgments of acquittal on each count of the indictment. In so doing, both defendants argued that the government had not proven that cocaine, rather than some other contraband, was the subject of the attempt and conspiracy.

During trial, Detective Rocha testified that cocaine had

been expressly mentioned during the hotel meeting even though no such reference could be discerned from the tape recording of that conversation. Several portions of the tape were inaudible. Thus, the tape was not a complete memorialization of the parties' discussion.

The motions for acquittal were denied. Thereafter, both defendants rested without presenting any evidence.

In their closing arguments, Woods and Lockhart, again contending that the government had failed to meet its burden of proving the crimes charged, focused on the alleged paucity of evidence of defendants' intent to acquire and distribute cocaine. The defendants argued that the government had failed to prove beyond a reasonable doubt, that cocaine, as opposed to some other contraband, was the subject of the contemplated transaction.

Woods has not demonstrated that, in view of the circumstances existing at the time, his attorney's strategic decision to shift from an entrapment defense to a challenge to the sufficiency of the government's evidence that a cocaine transaction had been contemplated by the defendants was objectively unreasonable. "[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance." United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)(citing United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978)).

Next, Woods complains that his attorney "in effect, admitted to the jury that defendant had purchased an illegal drug." Petition under 28 U.S.C. § 2255 at 5, ¶ 12(A). However, he has not provided any further delineation of this claim. Moreover, to the extent that, during closing argument, defense counsel may have implied to the jury that the illegal purchase of another controlled substance, albeit not cocaine, was contemplated, that suggestion did not amount to a concession of guilt of the crimes charged in the indictment. Under the circumstances, counsel's attempt to distinguish between cocaine and other controlled substances was patently reasonable.

In further support of his § 2255 motion, Woods contends that his attorney failed to effectively cross-examine the government's two witnesses, Rocha and Providence Police Detective Patrick McNulty. As best as can be determined from his motion, Woods alleges that defense counsel failed to adequately inquire concerning certain benefits allegedly received by the confidential informant in exchange for her assistance in the investigation. Woods does not further delineate the basis for this claim of ineffective assistance. In short, he has failed to satisfy either prong of the Strickland standard.

Similarly, Woods has failed to set forth, with any specificity, the basis for his claim that his attorney was ineffective in failing to adequately protect one or more of his

Sixth Amendment rights. In fact, he does not even identify which of his Sixth Amendment rights he contends were violated. Accordingly, this allegation requires no further discussion.

Finally, Woods alleges that his attorney failed to advise him of a plea agreement, proposed by the government, under which he would have received a lesser sentence than that ultimately imposed. Both petitioner's § 2255 motion and his "traverse" are devoid of any specifics concerning the terms of the alleged proposal, when the proposal was allegedly made, how he learned of the offer, or even whether he would have pled guilty if he had been advised of the proposal in a timely manner. Woods' bald assertion requires no further consideration by this court. See David v. United States, 134 F.3d 470 (1st Cir. 1998) (district court not required to conduct evidentiary hearing prior to dismissing § 2255 movant's vague, unsupported claim that his defense counsel had failed to timely communicate a proposed plea agreement to him).

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 the United States forthwith.

IT IS SO ORDERED

Ronald R. Lagueux
Senior United States District Judge
December , 2001