

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
v.) Crim. No. 97-0037-B
)
MICHAEL NASON,)
)
 Defendant)

RECOMMENDED DECISION

Defendant has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. section 2255. The Government filed its response pursuant to the Court's Order to do so on May 22, 1998. The Court has reviewed the arguments presented by the parties, as well as the record in this matter, and concludes that the Motion to Vacate may be summarily dismissed without a hearing pursuant to Rule 3(b) of the Rules Governing Motions to Vacate Sentence, 28 U.S.C. foll. § 2255.

1. Whether the Petition is facially defective.

The Government first asserts that the Motion should be summarily dismissed in its entirety for Defendant's failure to make the factual allegations underlying his claims under oath, as required by Rule 2, Rules Governing Habeas Petitions. *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995). In this case, Defendant referred to an unsworn memorandum for a recitation of the grounds upon which he seeks relief in the Motion. The Government is correct that the interpretation of Rule 2 in this Circuit is strict: "A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. . . . Facts alluded to in an unsworn memorandum will not suffice." *Id.* at 1413 (citations omitted). The Motion in this case is fatally defective for Defendant's failure to swear under oath to the veracity of his factual allegations. The Motion fares equally poorly in other respects.

2. *Whether Defendant waived his claims by failing to raise them on direct appeal.*

The Government also asserts that Defendant's grounds for relief raise only "nonconstitutional claims that could have been, but [were] not, raised on direct appeal." *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Such claims do not entitle a defendant to collateral relief in the absence of exceptional circumstances. *Id.*

Defendant essentially raises two points of error in his Motion to Vacate. First, he challenges an information filed pursuant to 21 U.S.C. section 851, which alleged four prior felony drug offenses, thereby enhancing Defendant's sentence pursuant to 21 U.S.C. section 841(a)(1). Specifically, Defendant asserts the Court lacked jurisdiction to impose the enhancement because it made no factual finding that Defendant was served notice of the information (count 1), that the Court's failure to make such findings and the fact that Defendant did not receive notice of the information deprived him of his right to due process (counts 2 and 3), and that his attorney was ineffective for failing to inform him of the ramifications of the section 851 information or to raise the jurisdictional and due process issues before either this Court or the First Circuit Court of Appeals (count 4). Second, Defendant asserts that he was deprived of his right to a public trial when the press and general public were not provided earphones with which to hear certain tape recordings offered into evidence by the Government.

The Court is not persuaded that Defendant's claims regarding the section 851 information are not cognizable. *See Suvegas v. United States*, 7 F.3d 6 (1st Cir. 1993). The claim has been procedurally defaulted, but Defendant may overcome the failure to raise this issue earlier upon a showing of cause for the procedural default and resulting prejudice. *Id.* at 10. Ineffective assistance

of counsel relative to the issue, as Defendant has alleged, may constitute cause, and an enhanced sentence would certainly amount to prejudice. *Id.*

The simplest route to the finish line in this case, however, is to simply note that the record clearly indicates Defendant's attorney was served with a copy of the Government's section 851 notice that it intended to seek a sentence enhancement. The Court can find no authority to support Defendant's further assertion that the Court is required to make a factual finding on the record to that effect.¹ A court's power to impose an enhanced sentence vests when the section 851 notice is filed with the court and served upon the defendant, as the statute states. 21 U.S.C. § 851(a)(1); *Suvegas*, 7 F.3d at 10 (noting that the failure to file a section 851 notice is jurisdictional).

There is a requirement in the statute that the Court apprise the defendant in open court of his rights relative to challenging the underlying convictions. 21 U.S.C. § 851(b). In this Circuit, the failure to do so is subject to harmless error analysis. *United States v. Romero-Carrion*, 54 F.3d 15 (1st Cir. 1995). Defendant does not now assert that he was not the person convicted, and he would not have been permitted to otherwise challenge his underlying convictions, all of which were more

¹ The case cited by Defendant involved an inadequate resolution of a dispute regarding whether the defendant had been properly served. *Kelly v. United States*, 29 F.3d 1107, 1110 (7th Cir. 1994). Because the trial court's finding did not clearly indicate *when* service had been made, the Seventh Circuit Court of Appeals remanded the matter for re-sentencing. *Id.*

In addition, Defendant's citation in his Reply brief to authority for the proposition that jurisdiction must "affirmatively appear in the record" evidences a misunderstanding on Defendant's part of what exactly constitutes "the record." Docket entry number 37 in this case is the Government's "Information Charging Prior Convictions," filed on September 25, 1992. It includes a Certificate of Service indicating that Defendant's counsel was mailed a copy of the Information by first class mail. The record thereby does establish the jurisdictional prerequisite for the sentence enhancement.

than five years old. 21 U.S.C. § 851(e). Accordingly, any failure of the Court to apprise Defendant of his rights under section 851(b) is harmless error. *See id.*

The Court is also not persuaded that Defendant's claim that he was deprived of a public trial is nonconstitutional, but this is again an issue we need not resolve. Defendant's argument regarding the Court's inability to provide audio equipment for more than the direct participants in his trial is subject to plain error analysis for Defendant's failure to timely object to the procedure. *United States v. Mitchell*, 85 F.3d 800, 807 (1st Cir. 1996). "Plain error" simply means that the error is obvious, and that it "must have affected the outcome of the District Court proceedings." *United States v. Marder*, 48 F.3d 564, 571 (1st Cir. 1995) (quoting *United States v. Olano*, 507 U.S. 725, ___, 113 S. Ct. 1770, 1778 (date)). Defendant's assertion regarding the inadequate number of headsets is simply that it deprived him of a public trial. He does not allege, nor can the Court envision how he might allege, that the outcome of his trial would have been different had members of the press been afforded an opportunity to listen to the tapes.

3. *Whether Defendant was denied the effective assistance of counsel.*

Defendant claims that his trial attorney failed to inform him of the section 851 notice or its ramifications relative to his sentence, and that his appellate attorney failed to raise his arguments regarding the notice on appeal. Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Defendant must show the Court that counsel's performance was deficient. *Id.* at 687. Defendant must also show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any

particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.*

In this case, Defendant's arguments fail on the second prong of *Strickland*. As to trial counsel, Defendant asserts that he would have elected to enter a guilty plea rather than proceed to trial in order to avoid the enhanced sentence. A change of plea, however, would not have had Defendant's desired effect, because the notice may be filed "before trial, or before the entry of a plea of guilty." 21 U.S.C. § 851. With respect to appellate counsel, this Court has already determined that Defendant's arguments regarding section 851 are without merit. Defendant has failed to show that his attorneys' performance prejudiced him in any way.²

Conclusion

For the foregoing reasons, I hereby recommend the Court DENY Defendant's Motion to Vacate, Set Aside or Correct Sentence.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

² We further note that, while it is not necessary to address the counsels' performance, the Court finds nothing in the record to suggest that Defendant received substandard representation from either attorney.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on June 16, 1998.