

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL A. PLACZEK)
)
 Petitioner)
)
 v.) **Civil No. 93-294-B-C**
)
 UNITED STATES OF AMERICA,)
)
 Respondent)

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. 2255**

Petitioner Daniel A. Placzek moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. 2255. Following a jury trial in this court, the petitioner was convicted on July 16, 1992 of one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and two counts of willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206. On October 22, 1992 the court sentenced the petitioner to thirty months incarceration. He did not appeal his conviction or sentence. At no time during these proceedings has the petitioner been represented by counsel.

The petitioner has asserted a plethora of arguments why his sentence should be vacated, set aside or modified. Specifically, he asserts that (1) he was denied his Sixth Amendment right to counsel, (2) the court lacked subject matter jurisdiction over this criminal matter, (3) his First Amendment rights were violated by the court's failure to address his substantive questions of law, (4) he was denied due process by the court's failure to rule on his motion for arrest of judgment, (5) he was denied due process when the court permitted a special agent of the Internal Revenue Service to sit at the prosecution's table but did not make him testify, (6) he was denied due process because he never consented to a jury trial, (7) the presiding judge violated his oath of office and the judicial code of ethics, and (8) his sentence was improperly enhanced under the United States Sentencing

Guidelines.

I. Right to Counsel

The petitioner first claims that his Sixth Amendment right to counsel was violated by the court's failure to appoint counsel to represent him in this matter. A claim alleging a Sixth Amendment violation of the right to counsel may properly be raised for the first time in a 2255 motion without a showing of cause and prejudice. See *United States v. Mala*, 7 F.3d 1058, 1062-63 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1839 (1994) (ineffective assistance of counsel claims should be raised in collateral proceeding); *United States v. Kobrosky*, 711 F.2d 449, 457 (1st Cir. 1983) (same). Accordingly, I will address the merits of the petitioner's Sixth Amendment claim.

At the stage of the criminal proceedings where the constitutional right to counsel attaches, a court may not allow a defendant to proceed *pro se* unless the defendant has knowingly, intelligently and voluntarily relinquished his right to counsel. *Farreta v. California*, 422 U.S. 806, 835 (1975); *United States v. Hafen*, 726 F.2d 21, 24-26 (1st Cir.), *cert. denied*, 466 U.S. 962 (1984); *Maynard v. Meachum*, 545 F.2d 273, 277-79 (1st Cir. 1976). Although the defendant need not possess the skill and expertise of a lawyer to competently choose self-representation, he should be aware of "the dangers and disadvantages of self-representation," so that the record will show that "he knows what he is doing and his choice is made with eyes open." *Farreta*, 422 U.S. at 835 (citations and internal quotations omitted).

The First Circuit does not require its district courts to issue any particular warning or make specific findings of fact before allowing defendants to waive counsel, although this is recommended. *Hafen*, 726 F.2d at 25, 26; *Meachum*, 545 F.2d at 277, 279. Instead, the validity of a given waiver is assessed based on the particular facts and circumstances surrounding the defendant's case, with no particular piece of information being essential for an effective waiver. See *United States v. Campbell*, 874 F.2d 838, 846 (1st Cir. 1989); *Meachum*, 545 F.2d at 279. The

waiver itself must be clear, express and unequivocal. *United States v. Betancourt-Arretuche*, 933 F.2d 89, 92 (1st Cir.), *cert. denied*, 112 S. Ct. 421 (1991). When making a waiver the defendant should also have an awareness of (1) the magnitude of the undertaking and the disadvantages of self-representation, (2) the seriousness of the charges and the penalties he faces and (3) the fact that there are technical rules governing the conduct of a trial and that presenting a defense is not a simple matter of telling one's story. *Meachum*, 545 F.2d at 279. The defendant's knowledge of these relevant facts, however, need not appear on the record. *Id.* The district court may properly consider such factors as the defendant's background, conduct, experience, prior representation by counsel, previous involvement with the criminal justice system and the availability of standby counsel at trial, in determining whether the defendant "understood what he was getting into." *Id.* Finally, where a *pro se* defendant affirmatively acquiesces in the arrangements at trial, as here, and then later seeks to collaterally attack his waiver of counsel, the burden of proof is on the defendant to establish that he did not knowingly and intelligently waive his constitutional right to counsel. *Campbell*, 874 F.2d at 846; *Meachum*, 545 F.2d at 277-78. The facts surrounding this case all indicate that the petitioner's waiver of counsel was knowing, intelligent and voluntary. At the initial appearance on March 26, 1992 neither the petitioner nor his codefendants were represented by counsel. The court first informed the defendants of the particular charges against them and the potential penalties they faced. *See* Transcript of Arraignment ("Tr. I") (Docket No. 136) pp. 8-9. The court then advised the defendants of their right to court-appointed counsel if they could not afford lawyers. *Id.* at 9. The court also made clear that, if they so desired, standby counsel would be appointed for the defendants to consult during the course of the criminal proceedings. *Id.* at 14. One defendant exercised this right. *Id.* at 17.

When asked individually whether he requested the court to appoint an attorney to represent him, the petitioner clearly and unequivocally answered no. *Id.* at 20. Following his rejection of counsel, the court then warned the petitioner and his codefendants about the dangers associated with self-representation and again instructed them that counsel would be appointed if they so

requested.

Gentlemen, I want to advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law; you are not familiar with court procedure; you are not familiar with the Rules of Evidence, and I would strongly urge you not to try to represent yourself. You will have a further opportunity -- in fact, at any time that you wish to be represented by counsel, you certainly are invited to make that request and the Court will certainly allow you to engage counsel of your own or will appoint counsel to represent you if you make that request and are found eligible for such appointment.

Id. at 20-21. Right before the close of the hearing, the court again cautioned the petitioner about the hazards of proceeding *pro se*.

Mr. Placzek . . . as I explained to each of you, it is not advisable for you to be representing yourself. These are complicated matters involving complicated legal principles. You are not prepared to adequately represent yourself. I don't believe it's in your interest to be doing that.

Id. at 72. The petitioner did not ask for counsel following either of the court's warnings, or at any other time during his initial appearance, although he was clearly aware that he was entitled to make such a request.

From the four-plus months from his initial appearance until trial, although he did file numerous motions and memoranda on other points, the petitioner did not at any time request the court to appoint counsel. *See, e.g.* Docket Nos. 10, 20, 21, 26, & 28. On July 8, 1992, at the start of trial, the court noted on the record that the petitioner and all but one of his codefendants had refused to exercise their right to court-appointed counsel or standby counsel and wished to proceed on their own. In his preliminary instructions to the jury, with all the defendants present in court, the trial judge stated as follows:

These defendants also have a right to be represented by counsel in this proceeding, that has been explained to them, and they have declined to be represented by counsel and they appear here formally in what we call a *pro se* capacity, that is, representing themselves. It is every person's constitutional right to represent himself if he wishes

to.

In the case of Mr. Leach, the Court has previously appointed stand-by counsel, Mr. Beneman, to represent him, and consult with him if Mr. Leach wishes to. He is not required to but if he wishes to have the benefit of Mr. Beneman's assistance, it is available to him at all times during the course of trial. That is another right that is the entitlement of these defendants to exercise if they wish to.

See Transcript of Proceedings ("Tr. II") (Docket No. 133) p. 24. Yet again, at no time following the court's statement did the petitioner object or assert that he wished to have counsel or standby counsel appointed. The petitioner proceeded to try the case on his own, eventually being convicted on all counts.

Given the petitioner's clear, steadfast determination to represent himself in this case, in the face of the court's express admonitions to the contrary, I find that the petitioner made a voluntary, knowing and intelligent waiver of his constitutional right to counsel. He was repeatedly informed of his right to court-appointed counsel or standby counsel and twice warned of the risks associated with self-representation. He was apprised of the potential penalties he faced and of the technical nature of the trial proceedings. He also apparently had some prior familiarity with the criminal justice system, being a convicted felon and having been previously charged with other offenses. *See* Government's Motion in Limine Regarding the Admission of Evidence of Other Crimes, Wrongs or Acts Pursuant to Rule 404(b) (Docket No. 11) at 1-2; Tr. I at 69. Yet he nonetheless chose to go forward on his own, never once requesting the appointment of counsel throughout the four-plus months he represented himself up to and through trial. "His decision to represent himself was made with eyes wide open and with knowledge of the possible repercussions of such a choice." *Campbell*, 874 F.2d at 846. This is sufficient to constitute an effective, constitutional waiver of his right to court-appointed counsel. *See, e.g., United States v. Beasley*, 12 F.3d 280, 285 (1st Cir. 1993). Accordingly, I find that the petitioner's Sixth Amendment rights were not violated by the court's failure to appoint counsel.

II. Subject Matter Jurisdiction

The petitioner next asserts that the court lacked subject matter jurisdiction over this criminal matter. Because a lack of subject matter jurisdiction divests a court of all authority upon which it may have acted, such claims can presumably be raised for the first time in a 2255 motion for collateral review. *See United States v. Harper*, 901 F.2d 471, 472-73 (5th Cir. 1990) (indictment's failure to charge offense). Nevertheless, the petitioner's assertions regarding subject matter jurisdiction in this case are completely without merit. First, this being a criminal matter for which the indictment alleged federal tax offenses committed in Maine, this court had subject matter jurisdiction. *See, e.g., United States v. Lussier*, 929 F.2d 25, 27 (1st Cir. 1991); *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 500 U.S. 920 (1991); Fed. R. Crim. P. 18. Contrary to the inane assertion of the petitioner, the prosecution was not required to cite the "implementing regulations" that correspond to the statutes that the petitioner supposedly violated, there not being any, as these are criminal statutes. This matter is not, as the petitioner has attempted to paint it, a civil tax action. As for the petitioner's contention that the court lacked jurisdiction because the prosecution failed to comply with the certification requirements of 26 U.S.C. 7401, I note that this certification statute applies only to civil tax actions, not criminal prosecutions. *See Sullivan v. United States*, 348 U.S. 170, 171-72 (1954) (predecessor to 26 U.S.C. 7401).

III. Remaining Claims

The petitioner's remaining claims all involve issues that should have been raised on direct appeal. A 2255 petition is not a substitute for a direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982). The failure to raise these issues on appeal constitutes a procedural default; the petitioner must therefore show cause and prejudice to obtain collateral relief at this juncture. *Id.* at 167-68; *Suveges v. United States*, 7 F.3d 6, 10 (1st Cir. 1993). The petitioner asserts no specific grounds to show cause for his procedural default. However, reading his petition liberally, given his *pro se* status, the petitioner appears to suggest that his failure to appeal the issues now raised should

be excused due to his lack of counsel. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2567 (1991).

The petitioner's lack of counsel in this case, not constituting a violation of his Sixth Amendment rights, is insufficient to excuse his procedural default. *See id.* As already discussed, the petitioner voluntarily, knowingly and intelligently waived his constitutional right to counsel. Moreover, the petitioner was repeatedly informed of his appellate rights, the time limit and procedure for exercising those rights, and the conclusiveness and finality associated with failing to exercise those rights. Following sentencing, the court instructed the petitioner as follows:

The Court advises you at this time that you have a right to appeal your conviction and the sentence I have just imposed.

Do you understand that? . . .

Do you understand what I just said to you? I'm seeking to advise you about your right to appeal. Do you understand that you have a right to appeal the conviction and the sentence? The record will reflect the defendant refuses to answer.

I will state to you, Mr. Placzek, that you do have a right to appeal the conviction and the sentence that I have just imposed thereof, and that in order to effectively exercise your right to that appeal, you must cause to be filed with the Clerk of the Court within 10 days of today, and not thereafter, a written notice of appeal.

And I advise you that if fail to do so, you will lose your right of appeal. And I further advise you that if you lose your right of appeal for that reason, that is, for failure to timely file the specified notice of appeal, that that loss is irrevocable and your right of appeal cannot be reinstated subsequently by any court or any judge. Do you understand that? The record will reflect the defendant refuses to answer.

I advise you, Mr. Placzek, that if you wish to appeal either or both of your conviction or sentence in this matter, that you cause to be filed with the Clerk of this Court within 10 days of this day and not thereafter a written notice of appeal. Do you understand? And, again, the record should reflect the defendant refuses to answer the Court's inquiry.

The Court is satisfied, for the record, that he has heard the Court's advice in respect to his appellate rights and finds that he knows of the Court's advice and of his right of appeal and the method of exercising such right of appeal.

Tr. II at 48-50. These instructions and warnings to the petitioner clearly indicate that he was aware of his appellate rights and the procedure for exercising them. He has proffered no reason why he did not exercise his right to appeal. I thus find no good cause for the petitioner's procedural default in failing to appeal his conviction and sentence, the petitioner apparently having chosen to forego his right to appeal. *See Johnson v. United States*, 838 F.2d 201, 203-04 (7th Cir. 1988).

In any event, cause aside, I find that the petitioner's remaining claims lack all merit so that he has failed to show any prejudice resulting from the alleged errors.

A. First Amendment Violation

The petitioner claims that his First Amendment rights were violated by the court's failure to address his substantive questions of law. This argument is frivolous. Even if the court failed to address the petitioner's substantive questions of law, as alleged, I do not know how this would amount to a violation of his First Amendment rights.

B. Failure to Rule on Motion

The petitioner claims that his due process rights were violated by the court's failure to rule on his Motion for Arrest of Judgment. This motion was filed on July 22, 1992. *See Moving for Arrest of Judgment by Affidavit* (Docket No. 47). Contrary to the petitioner's assertions, the court did rule on this motion on October 2, 1992, denying it. *See id.* (endorsement). The petitioner was advised of this ruling by letter dated October 2, 1992, a letter which he received but returned to the court as not being "in proper form." *See Notice of Non-Acceptance* (Docket No. 103).

C. Internal Revenue Service Agent

The petitioner claims he was denied due process by the court's allowing a special agent of

the Internal Revenue Service to sit at the prosecution's table and not making him testify even though he was on the prosecution's witness list. This individual was properly permitted to sit at the prosecution's table per the government's request. *See* Fed. R. Evid. 615 & advisory committee notes. There was no requirement that this individual testify, even if he was on the prosecution's list of potential witnesses.

D. Consent to Jury Trial

The petitioner claims that he was denied due process because he never consented to a jury trial. This argument is frivolous. There is, obviously, no requirement that an individual consent to being indicted and tried for a criminal offense. As for his consent to proceed before a jury, a criminal defendant does not have a constitutional right to a nonjury trial, therefore the petitioner's consent to a trial before a jury was not required. *See Singer v. United States*, 380 U.S. 24, 34 (1965); *United States v. Houghton*, 554 F.2d 1219, 1226 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977).

E. *Violation of Judicial Code of Ethics*

The petitioner claims that the presiding judge violated his oath of office and the judicial code of ethics by failing to guard the petitioner's rights and by impeding the petitioner's defense. He has cited no facts to support this allegation and I can glean none from the record.

F. *Enhancement of Sentence*

The petitioner's last argument is that his sentence was improperly enhanced under the United States Sentencing Guidelines. At sentencing the court imposed a two level enhancement under U.S.S.G. 3C1.1 for obstruction of justice, a two level enhancement under U.S.S.G. 2T1.9 for encouraging others to violate the tax laws and a three level enhancement under U.S.S.G. 3A1.2(a) for committing an offense against government officials. *See* Memorandum of Sentencing Judgment (Docket No. 116).

On the obstruction of justice enhancement, the court ruled that such an adjustment was applicable because the petitioner failed to heed the conditions of bail and failed to obey an order of the court. Tr. 44; Memorandum of Sentencing Judgment at 2-3. Under U.S.S.G. 3C1.1, a two level enhancement is warranted if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." While on bail awaiting trial, the petitioner failed to report to his supervising officer, failed to be present at his residence and left the state of Maine, all contrary to the terms and conditions of his release. *See* Order Denying Admission to Bail (Docket No. 31) at 2. His bail was subsequently revoked on June 1, 1992 and an arrest warrant issued. *Id.* at 2-3. Despite the efforts of the United States Marshals Service, the petitioner eluded arrest and remained at large until July 7, 1992, a period of over five weeks. *Id.* at 3. Such evasive conduct, taken after the prosecution of this action had commenced and in clear violation of the terms of his release, warranted a finding that the petitioner willfully attempted to obstruct or impede the prosecution of the case against him.

United States V. McCarthy, 961 F.2d 972, 979-80 (1st Cir. 1992).

The court also assessed a two level enhancement against the petitioner under U.S.S.G. 2T1.9. That provision of the guidelines says that, "[i]f the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws . . . , increase by 2 levels." U.S.S.G. 2T1.9(b)(2). In addition to his co-conspirators, the court found that the petitioner advised, encouraged and assisted several other individuals in the preparation of false federal tax returns. Tr. II at 43; Memorandum of Sentencing Judgment at 2. The petitioner has cited no facts that impugn this finding. A two level enhancement was thus warranted under U.S.S.G. 2T1.9(b)(2).

Finally, the court levied a three level enhancement against the petitioner under U.S.S.G. 3A1.2. That section of the guidelines states that if "the victim was a government officer or employee . . . and the offense of conviction was motivated by such status . . . , increase by 3 levels." The court found that the intended victims of the petitioner's tax offenses were government officials who had encountered him in the course of their authorized duties. Tr. II at 44; Memorandum of Sentencing Judgment at 2. The court also found that the petitioner's tax offenses were motivated by the official status of those government officials who he felt had wronged him. *Id.* The petitioner does not dispute the finding that tax forms were sent to government officials; he merely argues that any impact on these individuals was "minimal and nebulous" so as not to justify a two level enhancement in his sentence. Nevertheless, the guidelines are clear -- a three level enhancement is required if the person against whom the crime was committed is a government officer and such crime was motivated by that official status. These predicate facts not being in dispute, a three level enhancement was warranted under U.S.S.G. 3A1.2.

IV. Conclusion

For the foregoing reasons, I find that the petitioner has asserted no cognizable grounds for collateral relief under 28 U.S.C. 2255. Because his claims lack merit in the face of the record,

there is no need for holding an evidentiary hearing. *Barrett v. United States*, 965 F.2d 1184, 1186 (1st Cir. 1992); *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990). Accordingly, I recommend that the defendant's 2255 petition be ***DENIED***.

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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

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.

Dated at Portland, Maine this 7th day of July, 1994.

David M. Cohen
United States Magistrate Judge