

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Crim. No. 88-42-P-C
)	(Civil No. 95-397-P-C)
THOMAS A. CARINO,)	
)	
Defendant)	

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

Thomas A. Carino moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Carino pleaded guilty, upon the advice of counsel, to two counts of bank robbery and one count of being a convicted felon in receipt and possession of a firearm that had been transported in interstate commerce, in violation of 18 U.S.C. §§ 922(g).¹ On September 23, 1988 the court sentenced Carino to 327 months of imprisonment, and specified that he serve the first fifteen years of that sentence under Count III (section 922(g)) without the possibility of release. Judgment Including Sentence Under the Sentencing Reform Act (Docket No. 4) at 1-2. Carino bases his motion on a claim of ineffective assistance of counsel.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief.” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam). Finding Carino’s allegations insufficient to justify relief if accepted as

¹ “It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm” 18 U.S.C. § 922(g).

true, I recommend that his motion be dismissed without a hearing.

Carino claims that his attorney's advice to plead guilty to the section 922(g) charge was constitutionally deficient. Although the firearm that he possessed in Maine was manufactured out of state,² he claims he did not cause it to move in interstate commerce. Thus, he argues, the requisite nexus between possession and commerce was lacking, and his attorney should not have advised him to plead guilty.³

The First Circuit has already rejected Carino's underlying argument. In *United States v. Gillies*, 851 F.2d 492, 493 (1st Cir.), *cert. denied*, 488 U.S. 857 (1988), the court held that the "possess[ion] in or affecting commerce" element of section 922(g) requires only "simple in-state possession of a gun that, sometime in the past, arrived from out of state." Carino acknowledges this holding, but argues that *Gillies* is wrongly decided in light of the Supreme Court's reasoning in prior cases. Petitioner's Traverse (Docket No. 21) at 5-6. Specifically, he claims that *Scarborough v. United States*, 431 U.S. 563 (1977), and *Barrett v. United States*, 423 U.S. 212 (1976), "clearly found that . . . Section 922(g) requires the showing of a direct commerce nexus." Petitioner's Traverse at 5.

² Carino states that the firearm found at his Lewiston, Maine residence was manufactured in Florida, whereas the Federal Bureau of Investigation Special Agent to whom Carino confessed states that the firearm was made in Italy. Memorandum in Support of Motion Pursuant to 28 U.S.C., Section 2255 ("Section 2255 Memo.") (Docket No. 15) at 5; Affidavit of Ronald W. Dox ¶¶ 12-13, Exh. C to Government's Response to the Petition to Vacate, Set Aside or Correct Sentence (Docket No. 19). This discrepancy is irrelevant to my recommended decision because in either case the gun traveled in interstate or foreign commerce.

³ Initially, Carino argued that *United States v. Lopez*, 131 L.Ed.2d 626 (1995), rendered section 922(g) unconstitutional. Section 2255 Memo. at 16-17. He now concedes that section 922(g) is constitutional as drafted, Petitioner's Traverse (Docket No. 21) at 2, but claims his conduct does not satisfy the jurisdictional element of section 922(g).

The cases do not support Carino’s claim. In *Barrett*, 423 U.S. at 216, 225, the Court held that the unambiguous language of 18 U.S.C. § 922(h) prohibited a convicted felon from receiving a firearm that had previously moved in interstate commerce. In *Scarborough*, 431 U.S. at 563-64, the Court considered a provision of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (“Omnibus Crime Control Act”), which was then codified at 18 U.S.C. App. §§ 1201-1203. Section 1202(a) made it unlawful for a convicted felon to “possess[] . . . in commerce or affecting commerce . . . any firearm.” *Scarborough*, 431 U.S. at 564. The Court observed that several provisions of Title VI of the Omnibus Crime Control Act, as then codified at 18 U.S.C. §§ 922(g),⁴ (j)-(k), required a direct nexus between commerce and the proscribed conduct. *See Scarborough*, 431 U.S. at 570 (citing *Barrett*, 423 U.S. at 217). In contrast, section 1202(a) required only the “minimal nexus” that “the firearm have been, at some time, in interstate commerce.” *Id.* at 575.

Carino’s emphasis on the *Scarborough* Court’s discussion of section 922(g), as it then existed, is misplaced. Carino was convicted under a later version of section 922(g) that combines offenses formerly proscribed by, *inter alia*, 18 U.S.C. App. § 1202(a) and 18 U.S.C. § 922(g). *Gillies*, 851 F.2d at 495 (citing H.R. Rep. No. 495 at 23, *reprinted in* 1986 U.S.C.C.A.N. at 1349). The *Gillies* court reasoned that Congress was cognizant of the *Scarborough* decision when it consolidated these provisions in section 922(g), and therefore interpreted “possess[ion] . . . affecting commerce” as broadly as the *Scarborough* Court had. *Gillies*, 851 F.2d at 495. Even if Carino’s argument had merit, which it does not, *Gillies* would nonetheless be binding as the controlling authority in this case. Accordingly, counsel’s advice was neither constitutionally deficient nor

⁴ At the time, section 922(g) made it illegal for a convicted felon to “ship or transport any firearm or ammunition in interstate or foreign commerce.” *Scarborough*, 431 U.S. at 570. Mere possession was covered by 18 U.S.C. App. § 1202(a). *Id.* at 564.

prejudicial to Carino. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (announcing two-prong test for ineffective-assistance-of-counsel claims).

For the reasons set forth above, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be ***DENIED*** without an evidentiary hearing.

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 this 20th day of June, 1996.

David M. Cohen
United States Magistrate Judge