

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA )  
 )  
v. ) Crim. No. 96-0048-B  
 )  
HARRY MURPHY SEAVEY, )  
 )  
Defendant )

***RECOMMENDED DECISION ON MOTION  
TO VACATE, SET ASIDE OR CORRECT SENTENCE***

Defendant was convicted in this Court following a plea of guilty to one count (Count I) of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924, one count (Count II) of “Hobbs Act” robbery in violation of 18 U.S.C. § 1951(a), and one count (Count III) of using a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c).

Defendant was thereafter sentenced to two concurrent terms of imprisonment of 188 months on Counts I and II, and a consecutive term of imprisonment of 60 months on Count III. The conviction and sentences were affirmed on direct appeal. *United States v. Seavey*, No. 97-2067, 1998 WL 1247107 (1<sup>st</sup> Cir. June 12, 1998).

Defendant has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. section 2255. The Government has responded to the Motion and Defendant has filed a brief in reply.

The Court may resolve a motion to vacate sentence without need of an evidentiary hearing “when (1) the motion is inadequate on its face, or (2) the movant’s allegations, even if true, do not entitle him to relief, or (3) the movant’s allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1<sup>st</sup> Cir. 1998) (internal quotation marks

and citations omitted). In this case, I am satisfied that an evidentiary hearing is not necessary, and that the Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. section 2255 should be denied.

### *Discussion*

Defendant sets forth four separate grounds upon which he claims he is entitled to relief. Many of these allegations are either “contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *United States v. Mosquera*, 845 F.2d 1122, 1124 (1<sup>st</sup> Cir. 1988). Others do not entitle him to relief even if they are true.

Defendant first asserts that he was denied the effective assistance of counsel for counsel’s failure to seek dismissal of the indictment on the grounds that Defendant had been denied the right to a speedy trial. The record indicates, however, that Defendant personally signed three waivers of his right to a speedy trial for certain periods in connection with three motions to continue his trial. Considering the time periods excluded by those waivers, and another of Defendant’s pretrial motions, *see* 18 U.S.C. sections 3161(h)(1)(F) and (h)(8)(A), Defendant plead guilty only 58 days after he was arraigned. The Speedy Trial Act affords a seventy-day period during which the trial must commence. 18 U.S.C. § 3161(c)(1).

Defendant does not assert that there were irregularities with respect to the speedy trial waivers. He merely states that counsel should have moved to dismiss because counsel knew that Defendant’s speedy trial rights had been violated. It has long been the rule in this Circuit, however, that “[c]ounsel is not required to waste the court's time with futile or frivolous motions.” *United States v. Wright*, 573 F.2d 681, 684 (1<sup>st</sup> Cir. 1978). Defendant is not entitled to relief on this ground.

Defendant also asserts that he received ineffective assistance of counsel for counsel's failure to object to Defendant's classification as an "Armed Career Offender." Specifically, Defendant argues that the Government did not file a necessary "851 Information," and that in any event, his civil rights had been restored with respect to his state convictions. Both of these arguments also serve as the basis for Defendant's claims in grounds II and III, in which Defendant seeks relief on the basis of the Court's error in classifying him as an "Armed Career Offender."

Contrary to Defendant's argument, however, 21 U.S.C. section 851 sets forth procedures for establishing prior convictions for persons convicted for drug offenses under Title 21 of the U.S. Code. 21 U.S.C. § 851(a). Defendant was not convicted under that Title, but was instead classified as an "Armed Career Criminal" within the meaning of the United States Sentencing Guidelines ["USSG"], Guideline 4B1.4. Accordingly, the Court did not err on this basis, and counsel was not required to make the argument Defendant proposes.

Defendant's assertion that his civil rights had been restored is similarly flawed. The First Circuit Court of Appeals has addressed essentially the same argument as it applied to Maine law regarding civil rights following felony convictions. *United States v. Sullivan*, 98 F.3d 686 (1<sup>st</sup> Cir. 1996). The court of appeals found that because Maine law restricts the right to own firearms following felony convictions, even though other civil rights may be unaffected, those convictions can serve as predicate offenses under the Armed Career Criminal Act. *Id.* at 689. Again, this Court did not err in this regard, nor was counsel ineffective for failing to raise this futile argument. Defendant is not entitled to relief on his claim for ineffective assistance on the basis

of his classification as an Armed Career Criminal, nor on grounds II and III of the Motion alleging Court error in this regard.

Defendant's third claim of ineffective assistance of counsel asserts that counsel should have argued for a downward departure "for mitigating circumstances that existed in [Defendant's] case, which the record in the court supported said mitigating circumstances." Def. Memo. at 4. The record reveals that counsel did investigate the possibility of a downward departure, and concluded that there was no legal basis for the argument, and it further reflects counsel's representation that Defendant agreed with his conclusion in this regard. Tnsct. Sent. at 3-4. Defendant does not challenge that representation, nor does he offer the Court a basis upon which he believes he could have been afforded such a departure. The Court has searched without success for a basis upon which the departure could have been granted. *See, eg., United States v. Williams*, 891 F.2d 962, 965-66 (1<sup>st</sup> Cir. 1989) (finding the guidelines adequately accounted for a defendant's desire to change his life in the reduction for acceptance of responsibility, and noting that the guidelines specifically prohibit a reduction on the basis of drug or alcohol addiction). The record reflects that Defendant's counsel used the mitigating circumstances to the best possible advantage, Tnsct. Sent. at 12-15, and that Defendant received the lowest possible sentence under the guidelines. Tnsct. Sent. at 9, 22. Counsel's assistance was not ineffective for his failure to argue for a downward departure. To the extent Defendant also seeks relief on the basis of the Court's error in failing to consider a downward departure, the claim is not reviewable on this Motion to Vacate Sentence. *See, Knight v. United States*, 37 F.3d 769, 772 (1<sup>st</sup> Cir. 1994) (citation omitted) (nonconstitutional, nonjurisdictional errors afford relief under

section 2255 only if they amount to “‘a fundamental defect which inherently results in a complete miscarriage of justice’”).

Defendant next asserts that counsel was ineffective for failing to object to the six-level enhancement under U.S.S.G. § 2B3.1(b)(2). The First Circuit Court of Appeals addressed this argument, and concluded that the enhancement in this case was rendered moot by the fact that Defendant was determined to be an Armed Career Criminal, and his offense level was determined under U.S.S.G. § 4B1.4(b). *Seavey*, 1998 WL 124107, \*1. Defendant’s counsel was not ineffective for failing to object to an enhancement that caused no prejudice to Defendant. To the extent Defendant also seeks relief on the basis of the Court’s error in imposing the enhancement, again the claim is not reviewable on this Motion to Vacate Sentence. *See, Knight*, 37 F.3d at 772.

Finally, Defendant asserts that he “did not freely enter into his plea of guilty; . . . did not understand the nature of the charges against him, and . . . did not know the direct consequences of his plea.” He also alleges ineffective assistance of counsel for counsel’s advice with respect to his plea. Defendant incorrectly argues that the record is devoid of evidence that he was properly informed of his rights, and that the plea was voluntary. The transcript of Defendant’s change of plea is replete with Defendant’s affirmative responses to the Court’s questions regarding whether he understood the implications of the plea and the rights that would be forfeited. Defendant’s only proffered reason why his own statements should be disregarded is his assertion that he was following counsel’s instructions to answer “yes” regardless of the question. Importantly, Defendant does not assert that he has acquired a new understanding of these issues that would have caused him to answer differently. Nor does he assert that he would have elected to proceed

to trial if he had understood them differently at the time. *See, Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”). Defendant is not entitled to relief on this basis.

### ***Conclusion***

For the foregoing reasons, I hereby recommend Defendant’s Motion to Vacate, Set Aside or Correct Sentence 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) (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.

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.

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Margaret J. Kravchuk  
United States Magistrate Judge

Dated on: February 24, 2000