

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DENNIS J. MOONEY,)
)
)
v.) Civil No. 03-210-B-S
) Criminal No. 01-03-B-S
)
UNITED STATES OF AMERICA,)
)
)

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Dennis Mooney participated in a robbery of the Budget Host Motel in Waterville, Maine in which he and two others temporarily made off with \$195 and a de-corded Playstation. He is now serving a 330 month sentence after a jury found that he was guilty of one count of conspiracy to commit robbery and one count of using or carrying a firearm in connection with a crime of violence, a sawed-off pump shotgun having been wielded during the trio's raid. Mooney has now filed a 28 U.S.C. § 2255 motion identifying four grounds. (Civil No. 3-210-B-S, Docket No. 1.) The United States has responded. I now recommend that the Court **DENY** the motion as, for the reasons identified below, Mooney is not entitled to collateral relief from his sentence.

Discussion

Mooney pursued a direct appeal to the First Circuit. The Panel offered this summary of the events leading up to Mooney's conviction:

In the early morning hours of November 27, 2000, Matthew Sliker ("Sliker"), the overnight clerk of the Budget Host Motel in Waterville, Maine had just completed his duties. Sliker was playing a copy of the video game "Syphonfilter 2," which had been rented from a store called

"Movie Gallery," on a Sony Playstation in the lobby when the defendant, Dennis Mooney ("Mooney") and his brother, David Mooney ("David"), entered and inquired about a room. After asking about the price, Mooney told Sliker they needed to get money and both men left the hotel. Sliker followed them outside to smoke a cigarette and watched the two men approach other men standing next to a dark gray Volkswagen Jetta.

After Sliker returned to the lobby, David and Mooney came back into the motel. David asked to play the video game, and Sliker began filling out a registration form with Mooney. Marquis Craig ("Craig") then entered the lobby and approached the registration desk. Wearing a blue bandana over his face, Craig pulled out a sawed-off pump shotgun with a scope, pointed it toward the ceiling, loaded a round into the chamber, and then put the gun on the counter. The defendant ordered Sliker to raise his hands and not to set off any alarms. Craig demanded money, and after Sliker unlocked the cash drawer, the defendant took \$195. David then used a telephone cord to tie Sliker's ankles to his wrists. Pointing the gun in Sliker's face, Craig warned him that if he waited less than two hours to call the police, he would be killed. One of the robbers grabbed the Sony Playstation, and they fled in the Jetta. In the car, Mooney divided the money among the robbers and his other co-conspirators, Nathan D'Amico ("D'Amico") and Manuel Roderick ("Roderick").

Eventually, Sliker's hands became untied and he called the police. He described the defendant as a white male, 18-21 years old, with thin sideburns and a red tinted jaw-line goatee, wearing a dark blue or black bandana and a black or tan jacket with the word "American" across the back. The police intercepted the robbers on the highway as they headed toward Portland. The defendant, David, D'Amico and Roderick were arrested at the scene and brought to the Portland police station. Craig exited the vehicle and fled into the woods, but was later found and arrested. In the car, the police found a Sony Playstation, a Syphonfilter 2 video game from Movie Gallery, two dark blue bandanas, and a sawed-off pump shotgun with a scope.

Later that night, on the way to the Portland police station, Sliker and two detectives stopped to inspect the dark gray Jetta that the police had pulled over earlier. Sliker recognized it as the car used in the robbery. He also identified the shotgun. Once Sliker arrived at the station, he identified one of the robbers, David, in a photographic lineup.

Sliker then waited in the lobby. In an attempt to isolate him from the suspects in custody, a member of the police department who was not involved in the robbery investigation brought Sliker to the back of the station. During the escort, Sliker passed the defendant, who was in handcuffs. Sliker recognized him right away and told one officer that the defendant was the robber who took the money out of the cash register.

At the trial, cooperating witnesses Craig, David, and D'Amico identified the defendant as one of the three men who committed the robbery. They also testified that the defendant had suggested robbing the

Budget Host Motel. Sliker corroborated their testimony by identifying the defendant as one of the robbers. In addition, the defendant's former girlfriend and the government's handwriting expert testified that Mooney authored letters in which he admitted his participation in the robbery.

After deliberating for two hours, the jury found Mooney guilty of the robbery conspiracy and using or carrying a firearm in the commission of a violent crime. The defendant was sentenced to a term of twenty-seven years and six months.

United States v. Mooney, 315 F.3d 54, 57-58 (1st Cir. 2002). In that direct appeal Mooney challenged his conviction on three grounds: “(1)the prosecutor made improper remarks in her opening statement that denied him a fair trial; (2) the trial judge erred in allowing the government's handwriting expert to opine that the defendant was the author of letters implicating his participation in the robbery; and (3) he was unduly prejudiced by the government's delayed disclosure of evidence.” Id. at 57. None of these grounds are reiterated by Mooney in any way in this collateral attack.

Scope of § 2255 Relief

In a passage that nicely frames the legal framework of Mooney’s four § 2255 grounds, the First Circuit has explained:

Although the language of 28 U.S.C. § 2255 is quite general, the Supreme Court has restricted collateral attack for claims that do not allege constitutional or jurisdictional errors; such claims are said to be cognizable only where the alleged error presents “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). Thus, a guideline violation alone is not automatically a basis for relief under 28 U.S.C. § 2255. Knight v. United States, 37 F.3d 769, 772-73 (1st Cir.1994).

However, if the claim is repackaged as one of ineffective assistance of counsel, as [the § 2255 movant’s] is here, it becomes a constitutional claim. Not every error amounts to ineffectiveness. See Lema v. United States, 987 F.2d 48, 51 (1st Cir.1993). An ineffective assistance of counsel claim will succeed only if the defendant--who bears the burden on both points, Scarpa v. DuBois, 38 F.3d 1, 8-9 (1st Cir.1994)--shows (1) that counsel's performance fell below an objective standard of

reasonableness, and (2) that but for the error or errors, the outcome would likely have been different, Strickland, 466 U.S.[668,] 687 [(1984)].

Since the absence of any error in sentencing would eliminate any prejudice, and therefore [the § 2255 movant's] ineffectiveness claim, it is useful to begin by considering the correctness of the [sentencing] calculation.

Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002).

Ground I: Ineffective Assistance in Not Challenging Mooney's Career Offender Status

In his first § 2255 ground Mooney contends that at the time of his appeal his attorney was ineffective because he did not appeal the District Court's determination that Mooney qualified as a career offender. Mooney believes that his attorney should have reasserted the argument made to the sentencing judge that one of his predicate offenses for that status - a January 1999 breaking and entering conviction -- was not an actual crime of violence because no violence was involved in the crime.

For purposes of the Career Offender status, United States Sentencing Guideline §4B1.1(a) provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). The United States Sentencing Guidelines defines the term "crime of violence"

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a).

The conduct underlying Mooney's guilty plea conviction was a 1999 conviction for breaking and entry when he entered the building of Dingolo Construction and Realty. (PSI at 9 ¶ 30.) Mooney claims in his § 2255 pleadings that, in fact, all that happened was that he and his three friends were intoxicated and in need of shelter, so they entered the basement of an unlocked apartment building and fell asleep in a storage bin. (Sec. 2255 Mot. at 7.)

At the sentencing proceeding, Mooney's attorney challenged the use of the 1999 breaking and entry conviction as a predicate offense for his career offender status. During the pre-sentence conference counsel stated that he understood that technically the conviction qualified but that he wanted to continue to press the objection, stating: "As a fundamental matter and as a factual matter, Judge, it did not present a crime of violence." (Pre-sentence Conference Tr. at 8.) During the sentencing hearing, Mooney's attorney articulated the challenge in the following manner:

[O]ffense 30, the breaking and entering offense, Your Honor, although technically may qualify as a crime of violence under the definitions that are established in the sentencing guidelines, I want to point out to the court[,] did not, in fact, even raise the specter of any violence. Although it was, as the police reports indicate, a nighttime entry into a dwelling, they also made clear that this was an entry into a basement area, that the defendant was hiding in a storage locker, and that --- and that he was doing so implicitly for the purpose of gaining shelter from the elements.

And that being said, I would suggest that the basis upon which the courts and most notably the Supreme Court have stated that entry for the purposes of committing an offense into a structure may well carry with it a risk, if you will, of violence, that that was not the case here and hence is distinguishable, and entry for the purpose of merely acquiring some shelter would not carry the same risk.

Now, unfortunately, the court, we understand and acknowledge, must go by the statutory language of conviction here, but I think it is appropriate that the court understand and recognize our position is that the facts attendant to this matter were such that they are distinguishable from

your average burglary or breaking and entry, and hence did not bring the risk of violence.

(Sentencing Tr. at 26-27.) The United States argued then, as it does here, that there is no dispute in the First Circuit that breaking and entering into a dwelling (or commercial building)¹ qualifies as a U.S.S.G. § 41B.1 crime of violence because of the risk that the person breaking in will use violence or that a person in the building will use violence to stop the entry. (*Id.* at 27-28.) The prosecutor also indicated that there was no reason for the Court to look beyond the charging instruments and the elements of the predicate offense at the defendant's motivations. (*Id.* at 27.)

The Court concluded that the fact that Mooney broke in to gain shelter was irrelevant: "The risk is that because individuals may be present or some other issue that may arise resulting in violence." "So," the Court observed, "it certainly does involve conduct that presents a serious risk of physical injury to another." (*Id.* at 28.) Accordingly, the Court determined that Mooney qualified as a career offender. (*Id.* at 28, 38.)

Citing Taylor v. United States, 495 U.S. 575 (1990) and United States v. Payne, 966 F.2d 4, 6 (1st Cir. 1992), Mooney faults his attorney for not arguing to the First Circuit on direct appeal that this offense was not in fact a violent offense. Mooney is not arguing that he did not plead guilty to breaking and entering, nor does he challenge the fact that he and his friends entered the building in the nighttime and remained there until discovered. Mooney also does not dispute the fact that he received an eighteen-month sentence from the Massachusetts court. Rather, his contention is that his actual conduct

¹ There was some discussion about the fact that the structure, initially identified as a dwelling, was in fact a commercial building. However, defense counsel conceded that, while he could make some argument along this line, he did not think this factor would change the complexion of the issue. (*Id.* at 29.)

vis-à-vis the entry was not at all violent but was a passive unauthorized entry in pursuit of shelter.

In Taylor the United States Supreme Court set out to determine the meaning of 18 U.S.C. § 924(e)(2)(B)'s word "burglary" in view of the diverse definitions amongst the states whose convictions generated the predicate offense. 495 U.S. at 577-78, 580. The Court rejected the Eighth Circuit's conclusion that Congress intended "burglary" for § 924(e)(2)(B)'s purposes to turn on the definition of burglary used by the state of conviction. Id. at 590. It also rejected the position of some other circuits that the appropriate definitional fulcrum was the common-law meaning of burglary. Id. at 592-96.² The Court settled on a definition of "burglary" in "the generic sense in which the term is now used in the criminal codes of most States." Id. at 598. "Although the exact formulations vary," the Court observed, "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with the intent to commit a crime." Id. (citing LaFave & Scott, Substantive Criminal Law § 8.13 (a),(c), (e), pp. 466, 471, 474 (1986)).

However, the import of Taylor for Mooney is not the substance of the preceding discussion because the viability of this ground turns not on whether Mooney's Massachusetts conviction met the Taylor burglary elements. Taylor also answers that more general question of how a Court undertakes the 18 U.S.C. § 924(e) and U.S.S.G. § 41B.2(a)(2) analysis vis-à-vis a defendant's prior crimes for any sort of predicate offense, including the U.S.S.G. § 41B.1(a)(2) inquiry into whether the predicate crime "otherwise involves conduct that presents a serious potential risk of physical injury to

² The Court also rejected the petitioner's own definition which required that the predicate conviction had to have an element that the conduct presented a serious risk of physical injury to another. Id. at 596-97.

another.”³ The Court concluded: “We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.” Id. at 602 (footnote omitted). The First Circuit has applied the Taylor categorical approach in many ACCA/career offender situations. See, e.g., United States v. Delgado, 288 F.3d 49 (1st Cir. 2002); United States v. Shepard, 231 F.3d 56 (1st Cir. 2000); United States v. DeJesus, 984 F.2d 21 (1st Cir. 1993); United States v. Harris, 964 F.2d 1234 (1st Cir. 1992).

The record before me does not indicate what Massachusetts statutory provision Mooney was charged under, as Mooney notes on his copy of the Presentence Investigation Report. In Payne the First Circuit held, addressing this very area of Massachusetts law, that “a sentence imposed for a previous crime may be used to resolve uncertainties about the maximum sentence allowable for that crime.” 966 F.2d at 5.

³ With respect to Armed Career Criminal prosecutions at issue in Taylor, 18 U.S.C. § 924(e)(2)(B) provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

....

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

18 U.S.C. § 924(e). The First Circuit looks at cases interpreting both the ACCA and the career offender provisions when undertaking a categorical approach to the predicate offense determination. United States v. Winn, ___ F.3d ___, 2003 WL _____, * n.1 (1st Cir. Apr. 9, 2004); United States v. Delgado, 288 F.3d 49, 52 n.5 (1st Cir. 2002).

With respect to identifying the actual provision to which Mooney pled guilty, Massachusetts has one statutory provision for “Breaking and Entering at Night”:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, or who attempts to or does break, burn, blow up or otherwise injures or destroys a safe, vault or other depository of money, bonds or other valuables in any building, vehicle or place, with intent to commit a larceny or felony, whether he succeeds or fails in the perpetration of such larceny or felony, shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.

Mass. Gen. Laws Ann. ch. 266 § 16. It has another provision for entering without breaking at night or breaking and entering in day time:

Whoever, in the night time, enters without breaking, or breaks and enters in the day time, a building, ship, vessel, or vehicle, with intent to commit a felony, the owner or any other person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years. Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years or in the house of correction for not more than two and one-half years.

Id. § 17. Payne, upon which Mooney relies, held “that [even] an attempt to violate Mass.Gen.Laws Ann. ch. 266, § 17 or 18 is a “violent felony,”” 966 F.2d at 5 (emphasis added).

Vis-à-vis the commercial building facet of Mooney’s breaking and entry conviction the First Circuit addressed this concern in United States v. Fiore, 983 F.2d 1, 4-5 (1st Cir. 1992). Fiore argued that the commercial identity of the building in question meant that his prior conviction was not a “burglary” for purposes of the career offender guidelines. Noting that the defendant had overlooked the “otherwise” clause, the First Circuit reasoned:

In this case, the ‘otherwise’ clause gets the grease from the goose. No less an authority than the Supreme Court has observed that commercial burglaries often “pose a far greater risk of harm” than burglaries of dwelling places. Taylor, 495 U.S. at 594. Moreover, this court has held with echolalic regularity, albeit in the ACCA context, that burglary of a commercial building poses a potential for episodic violence so substantial as to bring such burglaries within the violent felony/crime of violence ambit. See Payne, 966 F.2d at 8 & n. 6; United States v. Wilkinson, 926 F.2d 22, 29 (1st Cir.), cert. denied, 501 U.S. 1211(1991); United States v. Patterson, 882 F.2d 595, 604 (1st Cir.1989), cert. denied, 493 U.S. 1027 (1990). The fact that we made this determination in interpreting the ACCA’s identically worded ‘otherwise’ clause is a distinction without a difference. See United States v. Doe, 960 F.2d 221, 225 (1st Cir.1992); see also supra note 2. Hence, Fiore’s state court conviction for conspiracy to commit breaking and entering of a commercial structure comprises a crime of violence under the career offender guideline because the object of the conspiracy satisfies the “otherwise” clause of U.S.S.G. § 4B1.2(1)(ii) (Nov.1991).

Id. at 4 -5. And, needless to say, Mooney is not arguing in this case that his was not a violent offense in the sense that he was actually pleading guilty to breaking and entering a vehicle or the like. Cf. Delgado, 288 F.3d 49.

What Mooney faults his attorney for not doing is not presenting this ground in his direct appeal and asking the First Circuit to examine the actual circumstance underlying his prior conviction. See DeJesus, 984 F.2d at 23. However, under the categorical approach the question is not whether there was a probability of physical harm given Mooney’s conduct on the night in question, but whether there is a “probability of physical harm presented by the mine-run of conduct that falls within the heartland of the statute.” Id. at 24 (emphasis added). Fiore stands for the proposition that breaking into a commercial building “poses a potential for episodic violence so substantial as to bring such burglaries within the violent felony/crime of violence ambit.” 983 F.2d at 4. It is clear that the First Circuit would have disapproved if the Sentencing Court had inquired into the circumstances of the crime beyond the definitional documents before it, see

United States v. Sacko, 178 F.3d 1, 5 (1st Cir. 1999); United States v. Damon, 127 F.3d 139, 145 (1st Cir. 1997),⁴ and certainly it would not have embraced efforts by counsel on appeal to have the Panel itself call for such an inquiry. Mooney conceded during sentencing and concedes now that the facts alleged in the PSR – that Mooney entered the commercial building at nighttime, plead guilty to breaking and entering, and was sentenced to eighteen-months – were accurate. The First Circuit had stated that such, “admissions during the sentencing process are an example of reliable evidence that would permit a sentencing court to conclude that the defendant's guilty plea to a prior offense constituted an admission to a generic violent felony or crime of violence.” Shepard, 231 F.3d at 68.

Ground II: Ineffective Assistance of Counsel for Allowing Mooney to Be Convicted of Both Carrying and Possessing the Same Firearm

Mooney complains that he was indicted on three separate firearm counts all for the same conduct. (Sec. 2255 Me. at 11-12.) Mooney states: “It is a fact of Federal Law that a Petitioner can not be charged nor convicted for carrying and possessing a firearm that was the same gun [] [b]ecause this constitutes impermissible pyramiding of penalties for the same offense.” (Id.) Counsel, Mooney, argues, should have objected to the Court’s instructions. (Id. at 12.)

However, as indicated by the United States, Mooney was found guilty of only one of the three firearm counts and was acquitted on the other two. There simply was no

⁴ Damon is a case that represents the flip-side of this concern. There, the United States was trying to prove that the defendant’s conduct actually qualified as a violent offense even though the predicate state statutory crime had been determined to be typically non-violent.

“impermissible pyramiding” in fact and, so, Mooney cannot demonstrate prejudice, a showing essential under Strickland. See 466 U.S. at 687.⁵

Somewhat disjointedly, Mooney also complains that the Court instructed the jury that Mooney could be convicted of using or carrying a firearm even if Mooney was not the one who actually used the firearm, if the jury concluded that Mooney aided and abetted whoever used the firearm. (Sec. 2255 Mem. at 11.) However, this count also charged Mooney as an aider and abettor under 18 U.S.C. § 2, and no purpose would have been served by lodging a challenge to these instructions as it would have been a position contrary to the law in this Circuit, see United States v. Sullivan, 85 F.3d 743, 747-48 (1st Cir. 1996), as well as many others, see United States v. Price, 76 F.3d 526, 529 (3d Cir. 1996) (collecting cases). Accordingly, lodging such a challenge could have only ill served Mooney’s position with the Court; there was no deficiency of performance on this score. See Strickland, 466 U.S. at 687.

Grounds III and IV: Section 2255 Challenges to Sentencing Court’s Career Offender Determination and Assertion that Mooney’s Prior Convictions Over-Represented the Seriousness of his Prior Criminal History

In his third ground Mooney argues that this Court improperly considered four of his prior offenses as four discrete offenses when determining Mooney’s criminal history category rather than treating them as related cases under United States Sentencing Guideline § 4A1.2(a). Mooney contends that the four cases were “functionally consolidated” as they were all treated at the same time and Mooney received the same concurrent sentence as to all four convictions. In a related vein, in his fourth and final ground, Mooney contends that the criminal history relied on at sentencing

⁵ The United States also proffers substantial alternative reasons why this claim has no merit. (Gov’t Response Sec. 2255 Mot. at 32.)

overrepresented the seriousness of Mooney's prior convictions. These were crimes, Mooney observes, that he committed when he was only eighteen and nineteen and the 1999 burglary conviction did not even involve any form of violence. Mooney believes that he should have received a downward departure under United States Sentencing Guideline § 4A1.3 and that this would have been appropriate to remedy the fact that he had fallen in a career offender guideline range.

With respect to these sentencing issues Counsel argued at the time of sentencing:

Based upon the record that's before the court, the court should be satisfied that Mr. Mooney is obviously a young man, age 22 at this point in time. That the predicate offenses upon which his career offender status is based were offenses committed by him at age 18 and 19, that they were resolved together, and although they might not be related by virtue of an order of consolidation, Your Honor, that concurrent sentences were imposed upon the defendant, that they were imposed by the same court at the same time, and it seems evident that they were resolved as part of a plea resolution, Your Honor, by him at the time.

It's highly unlikely that anyone at that point in time advised him that these offenses could qualify for career offender treatment, but such is the case. And the fact that he resolved them by way of a plea agreement or plea bargain is not really relevant towards career offender status but it's something I believe the court can consider, along with the totality of the circumstances in determining that the defendant's criminal history by virtue of his career offender status over represents the – his actual criminal history, Your Honor.

He's listed as a – and qualifies for criminal history treatment as a Category VI. Yet, here's an individual who the longest amount of time he's ever done is 90 days. Now he's looking at a sentence by career offender terms in the 15-, 16-, 18-, 20-year range, Your Honor, and as well, I think the court is within its discretion to consider the effect of a sentence that would be imposed on Count 2, which is a mandatory, consecutive ten-year sentence.

So what we've got is – is an individual who jumps from 90 days, on the basis of a plea bargain, to now a potential 28- or 30-year sentence. And I think that the court is authorized, if you will, and has the discretion to depart downward on the sentence to be imposed on Count 1, and we'd ask that the court do so.

Now, that doesn't in any way suggest that I'm attempting to diminish the underlying conduct or his involvement in it, but I think that the courts have indicated in the past and this court is authorized to

consider the fact that, you know, essentially we're going from one end of the spectrum to the extreme other end on a very, very young individual, who is looking at a whopping amount of time and – and mostly by virtue of the fact that his career offender overstates his actual position before the court.

That's the basis of our argument, and hence we suggest that this case lies outside the heartland of most. Significantly, all career offender cases are individuals that come before the court who are disposed very differently than Mr. Mooney in terms of youth, age, the age he committed the underlying offenses, the extent to which the underlying offenses, you know, generated sentences, the – quality, if you will, of the underlying offense, and the extent of his criminality involved therein.

(Sentencing Tr. at 30-32.) In response to the United States' sentencing arguments, counsel stated, in part:

Judge, you know, we've got a 22-year-old man who's facing, at the maximum end of things, 30-plus years in prison for this incident. And when we talk about rehabilitation and general deterrence and – and public safety and, you know, all the legitimate goals of sentencing, I think that the sentence that Mr. Mooney, on the high end, could face here, even on the low end, is extreme and significant and more than as is necessary in order to send a message to him specifically and others generally for deterrence purposes, and ask, then, that you exercise some measure of discretion, depart downward, and impose a sentence that is commensurate with, you know, his foreseeable involvement in the offense.

(Id. at 36-37.)

Alas, the Court reflected:

With regard to the downward departure, let me preface my remarks with my understanding in my view that I have discretion to make a downward departure. I, however, decline to do so. I don't believe that the criminal history under – understates his background here. Those offenses, prior offenses were close in time to this offense. There was no plea agreement involving those prior offenses, two separate dates for those prior offenses, no order of consolidation.

Obviously, I'm concerned that the defendant did 90 days and is now facing a serious offense here. That's really because of the defendant's own actions. The request for downward departure is therefore denied.

....

Truly the seriousness of this offense is quite great and the court certainly sees the need to protect the public from further crimes of this

defendant. This is truly a tragic case. It's tragic for the – Mr. Sliker, who was involved in this, and it's truly tragic for the defendant. [Mooney's attorney is] entirely correct that this defendant has gone from 90 days' incarceration to a huge amount of time at such a young age.

The Court cannot ignore, however, the violence that this defendant has engaged in from age --- just as a young adult right up to the present.

(Id. at 37-38, 41.)

United States Sentencing Guideline § 4A1.2(a), provides: “Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c).” Application Note 3 explains:

Related Cases. Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (**i.e.**, the defendant is arrested for the first offense prior to committing the second offense).

Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.

U.S.S.G. § 4A1.2, cmt. n.3.

The four offenses at issue were: A May 15, 1998, arrest for domestic assault of Mooney's girlfriend; an October 13, 1998, arrest for Assault and Battery with a dangerous weapon, to wit, Mooney plead guilty to assaulting a man with a metal chain; a December 17, 1998, arrest for nighttime breaking and entry into a building (but which may have involved vehicles instead)⁶; and the January 16, 1999, arrest for breaking and entry into the Dingolo Construction and Realty building discussed above in relation to Mooney's first ground. Each of these convictions had a separate docket number.

⁶ In the presentence conference there was some discussion of the December 17, 1998, breaking and entry not qualifying for career offender purposes because police reports indicated that the property entered was a vehicle and would not be considered a violent crime.

As indicated above, Mooney was arrested for each offense prior to his arrest on his next offense.⁷ The § 4A1.2 otherwise analysis is facially inapplicable.

Furthermore, there was no order of consolidation to present at the time of sentencing, as Counsel and the Court observed, and Mooney has not now produced any evidence but a conclusory assertion in support of his § 2255 motion.⁸

It is also worth noting that Application Note 3 discussed above further provides that “where prior related sentences result from convictions of crimes of violence, § 4A1.1(f) will apply.” United States sentencing Guideline § 4A1.1(f) counsels:

Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. Provided, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. § 4A1.1(f).

Furthermore, with respect to Mooney’s efforts to collaterally attack the failure to downward depart, the sentencing excerpts quoted above make it clear that on counsel’s rather strenuous urging the Court fully considered the contours of Mooney’s criminal history in light of the severity of his sentence, declining to exercise the discretion it recognized it had. Even on direct appeal, Mooney could not succeed on this score.

United States v. Gendraw, 337 F.3d 70, 72 (1st Cir. 2003) (“As a general rule, this Court has no authority to review District Court decisions to deny a downward departure.”).

⁷ The United States contends that the subsequent criminal conduct was after each preceding arrest but that is not evident on this record.

⁸ It is Mooney’s burden to produce this evidence. See United States v. Correa, 114 F.3d 314, 318 (1st Cir. 1997) (section 2255 movant has burden of producing a “formal indicia of consolidations; the mere fact that sentencing occurred at the same time is not sufficient evidence that the convictions were consolidated for purposes of sentencing).

Once again, collateral attack for claims that do not allege constitutional or jurisdictional errors are not cognizable unless the alleged error presents “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill, 368 U.S. at 428; see also Knight, 37 F.3d at 772-73. Mooney’s two challenges to the Court’s sentencing determinations fall far shy of raising concerns of this magnitude.

Conclusion

For the foregoing reasons, I recommend that the Court **DENY** Mooney’s 28 U.S.C. § 2255 motion.

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 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.

April 30, 2004.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

MOONEY v. USA

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: 1:01-cr-00003-GZS

Case in other court: None

Date Filed: 11/25/03

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government

Defendant

Cause: 28:2255 Motion to Vacate / Correct Illegal
Sentenc

Plaintiff

DENNIS J MOONEY

represented by **DENNIS J MOONEY**
10488-036
FEDERAL DETENTION
CENTER
P.O. BOX 562
PHILADELPHIA, PA 19105
PRO SE

V.

Defendant

USA

represented by **MARGARET D.**
MCGAUGHEY
OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email:
margaret.mcgaughey@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED