

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GARRY JULIEN)	
)	
Movant)	
)	
v.)	Civil No. 04-131-P-H
)	Criminal No. 01-25-P-H
UNITED STATES OF AMERICA,)	
)	
Respondent)	

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

Garry Julien is serving a sentence after a jury found him guilty of one count in a federal indictment, possession with intent to distribute crack cocaine. Julien was arrested after a March, 19, 2000, search commencing in a Holiday Inn Express hotel room in which he was present. The search uncovered crack cocaine, cash, various drug dealing accouterments, and a baseball sized ball of marijuana which had been thrown out the window.

Julien has filed a 28 U.S.C. § 2255 motion arguing that his conviction and sentence were the product of ineffective assistance of counsel in violation of his Sixth Amendment rights under the United States Constitution. Julien complains that his attorney did not advocate to secure him a "safety valve" downward departure and that counsel failed to cultivate three witnesses that could have aided Julien's defense. The United States has filed a response arguing that Julien's grounds are without merit. I now recommend that the Court **DENY** Julien 28 U.S.C. § 2255 relief.

Discussion

Julien is entitled to relief if he can demonstrate that his "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Both of Julien's grounds claim that his Sixth Amendment rights to effective assistance of counsel were violated. Therefore, Julien must demonstrate, one, that counsel's performance "fell below an objective standard of reasonableness," and, two, that "there is a reasonable probability that, but for counsel's unprofessional errors," he would have had a better result at trial and/or during sentencing. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); see also Ramirez-Burgos v. United States, 313 F.3d 23, 28 (1st Cir, 2002).

Safety Valve

Julien's first line of attack is premised on 18 U.S.C. § 3553(f)(5), and its United States Sentencing Guideline clone, § 5C1.1(a)(5). Section 3553(f)(5) of title 18 provides that:

the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing

criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553.

The United States identifies three flaws in Julien's argument that counsel was ineffective in not recognizing and advocating that Julien was a candidate for application of the 18 U.S.C. § 3553(f)(5)/ U.S.S.G. § 5C1.1(a)(5) safety valve. In my view the second argument is the clearest cut: Julien's Presentence Investigation Report identified three criminal history points, including two juvenile adjudications, one when he was sixteen and the second when he was eighteen. (PSI at 11-12.) Julien was not a candidate for the adjustment because he had more than one criminal history point and therefore was outside the ambit of subsection (a) and, therefore, not within the orbit of the safety valve.

Failure to Investigate Witnesses

Julien was charged along with two co-defendants, Ricardo King and Brian Goodine. Julien wanted counsel to bring out the fact that his involvement in the drug conspiracy was non-existent or very peripheral. Julien claims that he gave counsel the names of witnesses who could testify on issues relevant to his position that he had minimal drug related affiliation with his co-defendants. (Sec. 2255 Mem. at 10.) Julien states that he "requested that trial counsel call certain witnesses to testify as to the fact that [he] was not known to vend[] drugs in this area with Mr. King or any other person charged in the government's conspiracy charge nor was [he] known to deal drugs on an

individual level in this area." (Id. at 14.) Specifically, Julien gave the following names and summaries (I here resummaries)of potential testimony to counsel:

Kenny Scott:

Scott was an individual that could have provided "a glimpse into who really sold drugs in the area." He could have testified that King and others involved in the operation did not sell drugs while Julien was present. He could have also testified that Scott had a conversation with Brian Goodine in which Scott learned that King, and not Julien, put the drugs outside the hotel room's window. (Sec. 2255 Mem. at 10; Resp. to Gov't Opp'n at 4.) This testimony could help impeach King. (Resp.to Gov't Opp'n at 4.) Julien believes that these three witnesses could have assisted his case in view of the "constant inconsistencies of the government[']s main witnesses (Mr. King and Ms. Virgie)." (Sec. 2255 Mem. at 11.)

Tracey O'Neill:

O'Neill's Conversation with Goodine: O'Neill was familiar with Julien, King, and Goodine. O'Neill could testify that she had a conversation with Goodine in which he confided that he did not want to tell anyone that there were drugs in the hotel room the night of the search because Goodine was concerned that the information would alarm the others. O'Neill could also testify the Goodine expressed his remorse for getting Julien caught up in the situation. Julien states that this testimony would have corroborated the testimony of Goodine at trial in which Goodine testified that Julien did not know about the drugs in the hotel room prior to the search. (Resp. to Gov't Opp'n at 5.)

O'Neill's Interactions with Defense Counsel: O'Neill was Julien's girlfriend during the pendency of the criminal charges and counsel was aware of this relationship. O'Neill met with Julien's attorney on a few occasion but then refused further meetings because Julien's attorney "continuously exhibited prurient behavior which in turn discouraged her from further contact." O'Neill confided to Julien that she and Julien's attorney had a couple of restaurant dinners, supposedly to discuss the case but there was little or nothing said about Julien's case. One incident of the attorney's suggestive behavior towards her – answering the door barefoot with beer in hand – is detailed in a letter attached as an exhibit to Julien's § 2255 motion. According to O'Neill, this conduct by Julien's attorney made her "loath to testify" or have further contact with defense counsel, whose actions and gestures "never veered far from a prurient nature."

Beth Bentley:

At trial the United States introduced evidence that Julien participated in the rental of cars in furtherance of the drug conspiracy. Bentley who assisted Julien with the rentals could have provided a sense of clarity

apropos where Julien got the rental cars from and could have testified that the reason she rented cars for Julien had nothing to do with the drug trade.

Julien states that his attorney did not even attempt to contact Scott or Bentley.

With respect to the prejudice prong of Strickland, ultimately Julien was only convicted of Count X, possession with the intent to distribute crack cocaine; the United State successfully moved to dismiss the conspiracy count when the jury failed to agree on this charge. The testimony of Scott and Bentley pertained to the conspiracy charge. Accordingly, as to these aspects of this ground Julien cannot meet his burden of demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, he would have had a better result at trial.

With respect to O'Neill and her description of the prurient conduct of counsel toward her, I do not, unlike the United States, understand Julien to be arguing that counsel should have called O'Neill to testify at the trial about counsel's "purported romantic pursuit of her." (Opp'n Sec. 2255 Mot. at 31-32.) Rather, Julien is arguing that O'Neill was "rebuffed from cooperation" due to counsel's overtures. (Resp. to Gov't Opp'n at 2.) However, O'Neill's testimony regarding Goodine's post-arrest statements to her, assuming it could be elicited under the rules of evidence, would not have made a demonstrable difference given the fact that it was merely a corroboration of Goodine's own testimony on that score.¹

Conclusion

For these reasons I recommend that the Court **DENY** Julien 28 U.S.C. § 2255 relief.

¹ The United States points out that counsel would have good reason not to call O'Neill beyond the problems under the rules of evidence.

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.

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

Dated December 13, 2003.

JULIEN v. USA

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

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

Date Filed: 06/23/2004

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government

Defendant

Plaintiff

GARRY JULIEN

represented by **GARRY JULIEN**

Reg No 04029-036

REG NO 04029-036

FCI SCHUYLKILL

MINERSVILLE, PA 17954

PRO SE

V.

Defendant

USA

represented by **MARGARET D.**

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