

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDEL DESVARIEUX,)
)
)
v.) Criminal No. 04-80-P-H
)
) Civil No. 05-221-P-H
UNITED STATES OF AMERICA,)
)
)

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

In Custis v. United States, 511 U.S. 485 (1994) the United States Supreme Court held that, with the exception of state court convictions obtained in violation of a defendant's right to counsel, a defendant being sentenced in federal proceedings could not, in the context of the federal proceedings, collaterally attack the prior state court convictions used to enhance the federal sentence.

Abdel Desvarieux, represented by counsel, has filed a 28 U.S.C. § 2255 motion challenging the 204-month sentence he received for a federal narcotics violation on the grounds that three state court convictions used to enhance his federal sentence are invalid because his guilty pleas were not voluntary and he did not understand the consequences of his pleas. Desvarieux states that he has ongoing proceedings in Massachusetts state courts challenging three prior convictions that were used by this Court in calculating his criminal history. The United States has filed a motion to dismiss (Docket No. 3) and Desvarieux has filed a response to that pleading. I recommend that the Court grant the United States' motion and deny Desvarieux 28 U.S.C. § 2255 relief.

Discussion

Desvarieux's pleadings in this case stand out from the 28 U.S.C. § 2255 motion crowd because he is one of the rare § 2255 movants that is represented by counsel. Unfortunately his attorney seems to have a vision of § 2255 at odds with prevailing norms. Desvarieux has a very simply stated, although not simply executed, plan of attack on his federal sentence. Desvarieux lists three Massachusetts convictions that he, allegedly (but not verifiably), is currently waging collateral attacks against in the Massachusetts courts. These three convictions were foundation stones apropos Desvarieux's Category VI sentence and they, or at least one of them, would have to be vacated by the Massachusetts court before this court would consider resentencing the defendant.

Counsel's short falls in responding to the motion to dismiss are as follows. First, even though the United States' initial attack on his § 2255 motion is that neither Desvarieux nor his attorney on his behalf have complied with the verification requirements of 28 U.S.C. § 2242 ¶ 1 and Rule 2(b)(5) of the Rules Governing Section 2255 Proceedings, counsel has failed to take any step to rectify this deficiency. Instead Desvarieux argues: "Clearly, this Court should not lightly brush aside efforts by criminal defendants to obtain justice, as such is one of the fundamental foundations of the American justice system. As such, the Petitioner respectfully submits that this Court has the power to view substance over form." (Pet'r Resp. at 2-3.)

Second, Desvarieux's response to the United States' argument that he waived his right to challenge the use of the Massachusetts conviction in arriving at his federal sentence is mystifying. On this score he reflects that the United States' "argument rests

upon the fact that the Petitioner, at sentencing, stated that he understood that he would not be able to challenge any of the prior convictions at a later time." (Id. at 3.)

Desvarieux notes that this Court's warning, "while arguably being binding on future action in federal court, did not prevent the Petitioner from challenging the convictions under State law." (Id.) What counsel fails to comprehend is that this 28 U.S.C. § 2255 motion is a "future action in federal court." Furthermore, neither the United States nor this Court are suggesting that Desvarieux is prevented from waging challenges to his state court convictions in Massachusetts courts solely because of his concession at his federal sentencing (although the United States is of the view that such challenges would be rebuffed by the state courts). Such an argument would be for the Massachusetts state attorney to make in the context of the state collateral challenges.¹

Third, as to the United States' argument that Massachusetts habeas corpus relief vis-à-vis the three predicate convictions is unavailable to Desvarieux, counsel indicates that, "Petitioner at no time has stated that he is seeking relief under a Massachusetts habeas corpus petition." (Pet'r Resp. at 4-5.) The oddity of this assertion is that counsel has represented in his 28 U.S.C. § 2255 motion that he has existing challenges to the 1996, 1997, and 1998 Massachusetts convictions pending in the state courts (Sec. 2255 Mot. at 2) and in his response to the United States' motion to dismiss he concludes by indicating that his "prior state convictions were the result of invalid pleas, and procedures are under way to withdraw said pleas." (Pet'r Resp. at 6.) Not only has counsel failed to comply with the verification requirements of 28 U.S.C. § 2242 ¶ 1 and Rule 2(b)(5) of

¹ Counsel urges that the United States is arguing that Federal Rule of Criminal Proceeding 32 and all statements made in the federal sentencing proceedings are applicable to the Commonwealth of Massachusetts. (Pet'r Resp. at 4.) This is a misinterpretation of the United States' position.

the Rules Governing Section 2255 Proceedings in making these factual representations,² he has not even deigned to describe the nature of these state proceedings that allegedly are underway.

Finally, the fourth and final flailing parry by Desvarieux's counsel is his response to the United States' argument that Desvarieux has failed to exercise the due diligence standard of Johnson v. United States, 544 U.S. 295 (2005) apropos waging his challenge to his state court predicate offenses. In counsel's view the fact that this 28 U.S.C. § 2255 motion was timely filed under the 28 U.S.C. § 2255 ¶ 6(1) statute of limitation makes the Johnson due diligence inquiry irrelevant. Granted, Johnson is irrelevant to the question of the timeliness of this § 2255 motion as it was filed within the ¶ 6(1) parameters.³ However, the United States' Johnson due diligence argument is a reflection of its Custis-based recognition that Desvarieux cannot use a 28 U.S.C. § 2255 proceeding to attack the validity of his state court convictions but must first have those convictions overturned by collaterally attacking them in the state courts (and if necessary and/or possible a 28 U.S.C. § 2254 petition). The Johnson holding gave a federal prisoner, who could not overturn a state court conviction within the ¶ 6(1) year, the leeway to pursue § 2255 relief under ¶ 6(4) on the grounds that the efforts in state court were diligently pursued once the defendant knew that the state court convictions subjected him or her to an enhanced federal conviction. By jumping out of the gate in an effort to meet the ¶ 6(1) deadline Desvarieux may now have spent his first-time § 2255 round and could well be subject to

² And the record is devoid of any exhibit suggesting that challenges are pending in Massachusetts courts.

³ Some 28 U.S.C. § 2255 movants are able to attack the state conviction within the ¶ 6(1) year. See Mateo v. United States, 398 F.3d 126 (1st Cir. 2005).

the provisions of § 2255 governing second or successive motions should he succeed in actually obtaining the relief he is supposedly seeking in the state courts at this time.

Desvarieux concludes his response to the motion to dismiss by asking the Court to vacate his sentence and schedule a new sentencing hearing. (Pet'r Resp. at 6.) Given the contours of this case and the legal standards cited above, this request is preposterous.

Conclusion

For the reasons above I recommend that the Court **GRANT** the United States' motion to dismiss (Docket No. 3), thereby dismissing the petitioner's § 2255 motion (Docket No. 1).

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.

May 3, 2006.

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

DESVARIEUX v. USA

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Related Case: [2:04-cr-00080-DBH](#)

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

Date Filed: 11/23/2005

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government
Defendant

Petitioner

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