

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBIN WADE,)
)
)
v.) Criminal No. 02-04-B-S
)
) Civil No. 06-92-B-S
UNITED STATES OF AMERICA,)
)
)

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

Robin Wade has filed a 28 U.S.C. § 2255 motion seeking relief from her March 26, 2002, conviction and sentence on charges of narcotic importation. Wade was sentenced to a term of 120 months imprisonment. The United States has filed a response opposing Wade's motion and seeking summary dismissal (Docket No. 7). I recommend that the Court grant the United State's motion and deny Wade's § 2255 relief for the following reasons.

Discussion

In her 28 U.S.C. § 2255 motion Wade asserts three challenges. First, she contends that it was impermissible under Blakely v. Washington, 542 U.S.296 (2004) for this court to enhance her sentence upon a finding that she was a manager/supervisor without the question having been submitted to the jury for proof beyond a reasonable doubt. Second, Wade argues that this court allowed hearsay statements that a co-conspirator made to a custom agent as evidence at the sentencing in contravention of Crawford v. Washington, 541 U.S. 36 (2004). And, third, she asserts that the indictment failed to specify the quantity of drugs for which Wade was being charged with importing

and, thus, ran afoul of the rule of *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2004).

The Travel of Wade's Case and the Limitations of 28 U.S.C. § 2255 Review

The United States succinctly set forth the history of Wade's criminal case and her pre-§ 2255 challenges in setting forth its argument as to why she is not entitled to habeas review of her three claims:

The first obstacle for Wade is that she had at least four prior opportunities to raise all three of her § 2255 claims and yet she saved them for the instant collateral challenge. At her first sentencing, Wade challenged the recommendation that she be found a manager or supervisor under USSG § 3B1.1, but did not challenge the constitutionality of the court's making that finding itself rather than requiring that it be presented to a jury. She also challenged [United States Customs Agent Phillip] Riherd's hearsay testimony, but not on the grounds that its admission violated her Confrontation Clause rights. Thus, none of the § 2255 issues was presented at the original sentencing.

Similarly, in her first appeal, Wade had a full chance to challenge trial and sentencing errors, but did not avail herself of it. This was notwithstanding the fact that she was represented by counsel, whose *Anders* brief was rejected and who was ordered to file an advocate's brief in Wade's behalf. Wade, however, challenged only the drug test condition of supervised release. She made no mention whatever of proof and pleading requirements, the leadership adjustment she received, or her Confrontation Clause rights. For its part, the First Circuit remanded solely for reconsideration of the drug testing condition of supervised release. Otherwise, the appellate court affirmed Wade's conviction and sentence. Thus, Wade abandoned a second chance to raise these issues.

A third opportunity to make the sentencing claims arose at Wade's second sentencing hearing. There as well, however, Wade made no mention of issues under *Blakely*, *Crawford*, or *Apprendi*. Indeed, Wade expressly acknowledged that the only issue to be addressed at her resentencing was the drug testing condition of supervised release. The sentencing court reaffirmed its prior findings under the Sentencing Guidelines, which included drug quantity and the leadership adjustment, and expressly warned Wade that she might not be permitted to appeal any other sentencing issues. Even at that juncture, Wade made no effort to raise the issues she now seeks to have litigated. Wade took a second appeal, which would have given her yet a fourth chance to raise these claims, albeit under the plain error standard that applies to unpreserved trial issues. See *United States v. Epstein*, 426 F.3d 431, 437 (1st Cir.

2005). Instead of doing so, however, Wade voluntarily withdrew her second appeal. Thus, she relinquished yet a fourth opportunity to raise the three issues posed in her § 2255 petition.

Having abandoned so many chances to make these claims, Wade may not have them adjudicated in a § 2255 petition unless she can demonstrate cause for not raising them earlier and resulting prejudice, or actual innocence. See Bousley v. United States, 523 U.S. 614, 622 (1998). The only effort she makes to carry this heavy burden is to suggest that because Blakely, 542 U.S. 296, and Crawford, 541 U.S. 36, on which she relies, were both decided after counsel filed the Anders brief in her first appeal, cause for the procedural default exists. Concededly, Crawford was decided on March 8, 2004, which was after Wade's appellate counsel filed her Anders brief. Blakely was decided June 24, 2004, which was after appellate counsel filed both Wade's Anders brief and the advocate's brief the First Circuit required. However, both Blakely and Crawford were decided before the Government consented to remand and well before the First Circuit issued its remand order or the court resentenced Wade and she appealed again. Indeed, Crawford was published even before Wade filed her advocate's brief in the first appeal.

An inferior court must apply a new rule of criminal procedure to all cases where the conviction is not yet final. See Derman v. United States, 298 F.3d 34, 39 (1st Cir. 2002). Thus, had Wade raised either her Blakely issue or the one under Crawford in her first appeal, the First Circuit would have been obligated to apply both decisions. See id. Moreover, Rule 28(j) of the Federal Rules of Appellate Procedure specifically allows a party to draw the appellate court's attention to additional authorities at any time before the court's decision issues. This rule is even more generous where the party invokes it in response to a newly-issued Supreme Court decision and allows plain error review. See United States v. Barbour, 393 F.3d 82, 94 (2004). At any time during the eight months that elapsed after Blakely was decided, or the year after Crawford issued, indeed at any time up until the day the First Circuit remanded the case for resentencing, Wade could have filed a Rule 28(j) letter addressing either decision. Surely she could have tried to raise one or more of these issues in her second sentencing and second appeal. Because she failed to do so, she cannot surmount this initial procedural hurdle that exists for all three of her § 2255 claims. For this reason alone, her petition should be dismissed. See Bousley, 523 U.S. at 622.

(Gov't Mot. Summ. Dismissal at 10-13.)

A 28 U.S.C. § 2255 motion is not a substitute for direct appeal and § 2255 movants must clear a higher hurdle to bring a § 2255, as opposed to a direct appeal, claim. See United States v. Frady, 456 U.S. 152, 164 (1982); United States v. Addonizio,

442 U.S. 178, 184-85 (1979). Once Wade's "chance to appeal has been waived or exhausted," this court is "entitled to presume" that she "stands fairly and finally convicted, especially when, as here," she "has had a fair opportunity to present" her "federal claims to a federal forum." Frady, 456 U.S. at 164. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that [s]he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted); accord Massaro v. United States, 538 U.S. 500, 504 (2003).

Cause is "something external to the petitioner" that "cannot be fairly attributed to him" or her. Coleman v. Thompson, 501 U.S. 722, 753 (1991). "[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." Murray v. Carrier, 477 U.S. 478, 492 (1986). A showing that the factual or legal basis for a claim was not reasonably available to counsel or that interference by some officials made compliance with the procedural rules impracticable, would constitute cause under this standard. Strickler v. Greene, 527 U.S. 263, 283 n. 24 (1999) (citations omitted). "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Coleman, 501 U.S. at 753 (1991) (quoting Murray v. Carrier, 477 U.S. at 488). "Attorney error that constitutes ineffective assistance of counsel is cause, however." Id. at 753-54. See also Lynch v. Ficco, 438 F.3d 35, 46 (1st Cir. 2006).

A showing of actual prejudice must be made along with the adequate showing of cause. Reed v. Farley, 512 U.S. 339, 358 (1994); Frady, 456 U.S. at 168 -69. In order to show prejudice, a movant must show "a reasonable probability' that the result of the trial would have been different" had the claimed errors, which were procedurally defaulted, not occurred. Strickler, 527 U.S. at 289. Furthermore, Wade "must shoulder the burden of showing, not merely that the errors ... created a possibility of prejudice, but that they worked to h[er] actual and substantial disadvantage, infecting" her proceedings "with error of constitutional dimensions." Frady, 456 U.S. at 170.

If a defendant fails to establish "cause" and "prejudice" to excuse a procedural default, he or she can obtain collateral review of a constitutional claim only by demonstrating that the constitutional error "has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496; accord Bousley, 523 U.S. at 623. "Actual innocence means factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at 615. To establish actual innocence, Wade must demonstrate that "it is more likely than not that no reasonable juror would have convicted" in light of the new evidence proffered in the habeas proceeding. Schlup v. Delo, 513 U.S. 298, 327 (1995).

Wade, who did not file any pleading in response to the United States' motion for summary dismissal, has not given this court a basis to find cause and prejudice or a viable claim of actual innocence to excuse her procedural default of her three grounds.

The United States also provides reasons for why, if the Court reached the merits of Wade's claims, she would not be entitled to relief. It argues: under United States v. Booker, 543 U.S. 220 (2005) sentencing factors such as Wade's leadership adjustment can be found by the court by a preponderance of the evidence so long as the Sentencing

Guidelines are not mandatory (Gov't Mot. Summ. Dismissal at 14); the First Circuit has held in United States v. Luciano, 414 F.3d 174, 179 (1st Cir. 2005) that Crawford does not apply to sentencing proceedings (Gov't Mot. Summ. Dismissal at 16); and Wade was charged under the default penalty provision of 21 U.S.C. § 960(b)(3) which limits the term of imprisonment to 20 years and Wade received a sentence of 120 months which was consistent with Blakely (id. at 16-17).¹

Conclusion

For the reasons above, I recommend that the Court grant the United States' motion (Docket No. 7) and dismiss Wade'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.

December 7, 2006.

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

¹ These arguments suggest that, even had she tried to overcome her procedural default, Wade would have had difficulty proving prejudice.

WADE v. UNITED STATES OF AMERICA

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.

KRAVCHUK

Related Case: [1:02-cr-00004-GZS](#)

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

Date Filed: 08/31/2006

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government
Defendant

Petitioner

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