

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
v.)	Crim. No. 93-9-B
)	
KENNETH M. GARDNER, JR.)	
)	
Defendant)	

***PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION ON
DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255***

On August 20, 1996, the defendant, Kenneth M. Gardner, Jr., filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994 & Supp. 1997). A recommended decision to deny the motion was filed by me on April 16, 1997. The Court affirmed the recommended decision on June 25, 1997. One of the claims initially raised by Gardner related to the calculation of his sentence pursuant to the Sentencing Guidelines, and whether his attorney failed to file an appeal of the sentence as directed by Gardner. Gardner withdrew this claim prior to the Court's ruling on the motion, however, even though the government had conceded the propriety of such a hearing and the Court had, in fact, scheduled one. Because the Court was concerned that the parties may have been confused regarding the status of the issue, it invited Gardner to inform the Court whether he wished to pursue the Sentencing Guideline calculation claim. When Gardner subsequently informed the Court that he did, in fact, wish to pursue the claim, another evidentiary hearing was scheduled on the matter.

On November 24, 1997, the Court conducted an evidentiary hearing on the issue whether Gardner lost his right to appeal because his lawyer failed to file an appeal as instructed by Gardner. The defendant testified, as did his former lawyer, Richard S. Emerson, Jr., Esq. Having considered

the evidence presented at the hearing, as well as the post-hearing briefs filed by the parties, I conclude that Gardner has not met his burden of establishing by a preponderance of the evidence that he received ineffective assistance of counsel, and, accordingly, recommend that the motion be denied.

I. Background

Gardner pleaded guilty on June 23, 1993, to charges of distributing cocaine and of using or carrying a firearm during and in relation to a drug trafficking offense in violation of 21 U.S.C. § 841(a)(1) (1981) and 18 U.S.C. § 924(c) (Pamph. 1997). On January 3, 1994, the Court sentenced Gardner to a total of ninety-three months' imprisonment. Gardner testified that immediately following the sentencing hearing, he spoke with his attorney, Emerson, regarding an appeal of his sentence. Gardner stated that his sentence had been lengthier than he expected, and that he was displeased by the criminal history points assigned him by the Court, the Court's failure to give him credit for acceptance of responsibility, and the Court's calculations regarding the weight of the controlled substances used in establishing a sentence range.

Gardner claims that he asked Emerson to file an appeal on his behalf, and that Emerson replied he would do so if Gardner filed a petition to proceed *in forma pauperis*. Gardner also recalled discussing with Emerson the cost of an appeal, and explained that he did not himself act on proceeding *in forma pauperis* because he did not understand how to do so. Gardner further recalled that the Court told him that if he wished to appeal the sentence, he had to do so within ten days. Emerson's recollection of events was somewhat different. He testified that any discussion between Gardner and him regarding an appeal was brief, because Gardner did not wish to pursue one at the time. Although they did discuss the sentence in some detail, including their joint relief that

the Court did not consider the firearms that were recovered from the trunk of the car and did not pursue an upward departure, Emerson recalled thinking that an appeal would have been a waste of time and money.

On January 26, 1994, Gardner telephoned Emerson from prison to inquire whether he had appealed the sentence. Gardner recalls being told by Emerson that there was no point in pursuing an appeal in a negotiated plea case, and therefore he decided to let the matter go. In a letter dated February 8, 1994, however, Emerson responded as follows to Gardner:

I did not file an appeal of your sentence. I do not believe anything occurred that would result in a change that would benefit you. We talked about this in great detail, and I continue to feel that you got the "deal" up front because they didn't reindict you nor did they charge you with what could have been two more consecutive sentences.

II. Findings of Fact

After consideration of the evidence, I find that Gardner most likely did not directly instruct Emerson to file an appeal following his sentencing hearing. In particular, I find the testimony of Gardner's former attorney to be more credible than that of the defendant, himself. The letter from Emerson to Gardner buttresses Emerson's in-court testimony that he did not agree to pursue an appeal on behalf of Gardner. Gardner himself testified that he understood that an appeal was contingent on his filing a petition to proceed *in forma pauperis*. Gardner admits that he never filed such a petition, nor any documents related to an appeal. Such admissions weigh against Gardner's claim that he instructed Emerson to proceed directly on an appeal. What is more, although Gardner learned in early February, 1994, that Emerson had not filed an appeal, he did not file the current motion alleging ineffective assistance of counsel until two and one-half years later, on August 20, 1996. Moreover, his claim pertaining to losing his right to appeal was not asserted until his

supplementary filing after the government already had responded to the original motion. Finally, Emerson's version of events and his explanation of the legal strategy of foregoing an appeal seems more credible and sensible, especially in view of the sentence imposed on Gardner by the Court. The burden of pursuing an appeal was Gardner's alone; his assumption that Emerson would do so on his behalf was to his own detriment.

III. Conclusions of Law

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that his counsel's performance was deficient. *Id.* at 687. He must also show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* Under these particular facts, Gardner "must show to the satisfaction of the trial court that he did not voluntarily, knowingly and intelligently forego his right to appeal but that he lost his right by deception practiced upon him by his counsel." *Desmond v. United States*, 333 F.2d 378, 381 (1st Cir. 1964).

I conclude that Gardner's motion to vacate, set aside or correct his sentence should be denied. Gardner has not met his burden of establishing ineffective assistance of counsel on the part of Emerson. As discussed above, I find that Emerson never actually promised to pursue an appeal in this matter, and, thus, Emerson's performance was not deficient. Based on the above findings of fact, I conclude as a matter of law that Gardner himself waived his right to an appeal.

IV. Conclusion

For the foregoing reasons, I recommend that Gardner's motion to correct his 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.

Eugene W. Beaulieu
United States Magistrate Judge

Dated this 10th day of December, 1997.