

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
)	
v.)	Crim. No. 94-21-B
)	
)	
DANIEL GEORGE SULLIVAN,)	
)	
Defendant)	

***RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255***

The defendant, Daniel George Sullivan, moves the Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994 & Supp. 1997). Sullivan was convicted of receiving a stolen firearm as a convicted felon, 18 U.S.C. §§ 922(g) (Pamph. 1997), 924(a)(2) (Pamph. 1997) (Count I); aiding and abetting the sale of stolen firearms, 18 U.S.C. §§ 922(j), 924(a)(2) (Count II); and aiding and abetting the sale of firearms to a convicted felon, 18 U.S.C. §§ 922(d), 924(a)(2) (Count III). He was sentenced to a term of 188 months' imprisonment on Count I, and to terms of 120 months' imprisonment on each of Counts II and III, all to be served concurrently. Sullivan also was sentenced to five years of supervised release following his term of imprisonment. He now challenges his convictions and sentences, contending that he received ineffective assistance of counsel at various stages of the proceedings.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted).

Because I find that Sullivan's allegations, accepted as true, do not entitle him to relief, I recommend that his motion be denied without an evidentiary hearing.

I. Background

The grand jury returned an indictment against Sullivan on May 10, 1994, charging him with the above three counts. A trial was held from July 26, 1994, through July 29, 1994, on which date the jury returned guilty verdicts on all three counts. The district court sentenced Sullivan as an armed career criminal pursuant to U.S.S.G. § 4B1.4, finding that Sullivan had been convicted of at least three prior crimes of violence or serious drug offenses. A judgment was entered on November 14, 1994. On appeal, the United States Court of Appeals for the First Circuit affirmed the judgment. *United States v. Sullivan*, 98 F.3d 686, 690 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1344 (1997).

II. Discussion

Sullivan contends that he received ineffective assistance of counsel at the pre-trial, trial, and sentencing phases of the proceedings in five ways. Sullivan contends that his counsel:

(1) should not have stipulated that one of the pistols at issue was a "firearm" for purposes of the applicable statute because live rounds of ammunition were not used when it was test fired; (2) should have challenged the government's search warrant based on asserted perjury, or should have moved to suppress the firearms recovered thereunder because they were found on property outside the scope of the warrant; (3) should have objected to the government's failure to provide discovery related to a witness, William Cornelius; (4) should have sought a dismissal, downward departure, or other limitation on Sullivan's sentence due to his "disproportionate" treatment in comparison to others involved in the crimes; and (5) should have challenged the use of Sullivan's prior state convictions as predicates to his being sentenced as an armed career criminal.

The government contends that Sullivan's motion should be denied without a hearing because the allegations either are refuted by the record, are conclusions rather than statements of fact, and do not, in any event, establish deficient performance by Sullivan's attorney or prejudice to his case.

"To establish a Sixth Amendment violation, [] [a petitioner] has to show that his lawyer's performance 'fell below an objective standard of reasonableness,' and that prejudice resulted because, absent the mistake or mistakes, there is a reasonable probability that the outcome would have been different." *United States v. Alston*, 112 F.3d 32, 36-37 (1st Cir. 1997) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-688, 691-692 (1984)).

A. Stipulation

Sullivan first contends that his attorney should not have stipulated that the pistol identified in Count I of the indictment met the definition of a "firearm" under the federal statute. He maintains that in view of the fact that a report from the Maine State Police revealed that the weapon was test fired "with a primed cartridge casing only," live rounds of ammunition were not used, and his counsel erred by stipulating that the pistol technically was a firearm.

For purposes of federal law, a firearm may be said to be "any weapon . . . which will or is designed . . . to expel a projectile by the action of an explosive;" 18 U.S.C. § 921(a)(3)(A) (1976). This definition does not require the government to prove, for purposes of the statute, that a projectile actually was expelled from the weapon, or even that the weapon actually was capable of expelling a projectile at the time of its seizure. Rather, to satisfy the definition, courts have required the government to show that the weapon, as originally *designed*, was capable of doing so. *United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir.), *cert. denied*, 510 U.S. 848 (1993) (filing down of gun's hammer merely temporarily altered gun's capability, and did not change fact that gun was

designed to "expel a projectile"); *United States v. Gutierrez-Silva*, 983 F.2d 123, 125 (8th Cir. 1993) (although unloaded, handgun satisfied statutory requirement that weapon be designed to "expel a projectile").

Sullivan alleges no bad faith or negligence on the part of the government in conducting the test firing of the pistol. Indeed, the test firing "properly helped to confirm that the gun was 'designed' to expel a bullet by explosion," *Alston*, 112 F.3d at 35. Instead, Sullivan now objects *after the fact* that his attorney stipulated to the pistol being a firearm in view of the fact that the test firing took place without live rounds. Yet Sullivan's counsel was under no obligation to make arguments that were not "plausible options," *Isabel v. United States*, 980 F.2d 60, 65 (1st Cir. 1992) (citation omitted), especially in view of the fact that Sullivan's defense strategy at the trial was premised on his contention that, while he knew the weapons at issue were firearms, he wanted nothing to do with them since he was a convicted felon. Sullivan himself testified under oath to such a belief. That Sullivan's counsel stipulated to the pistol identified in Count I of the indictment being a firearm may be presumed to have been sound trial strategy, and Sullivan has not overcome this presumption. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (citation omitted).

Finally, even if the stipulation could be said to have amounted to error on the part of his attorney, no prejudice may be said to have resulted to Sullivan's case as a result of the stipulation, since independent evidence was presented at the trial to show that the pistol was fully operable as a firearm. Sullivan has failed to demonstrate deficient performance or prejudice on the part of his counsel with respect to this claim.

B. Search warrant

Sullivan also contends that he received ineffective assistance of counsel because his lawyer failed to challenge the search of his Bar Harbor home on two grounds: first, because the warrant affidavit contained perjury; second, because the search conducted pursuant to the warrant exceeded its proper scope. In order to succeed on this claim, Sullivan must prove "that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence" *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1985). Even assuming, *arguendo*, that the verdict would have been different had the evidence of the two commemorative pistols been excluded, I cannot conclude that Sullivan's counsel would have succeeded in his effort to suppress the pistols based on Fourth Amendment considerations.

Sullivan's counsel initially could have sought a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to suppress the pistols based on the alleged perjury or false statements contained in the warrant affidavit. Such a hearing only could take place, however, if Sullivan made "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-156. Sullivan has provided no basis in his petition to support his allegation of police perjury, however. Rather, he offers conclusory allegations void of any factual support in the record. This shortcoming is fatal to his claim, for "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Id.* at 171. Sullivan's challenge to the affidavit of Lieutenant Mosley of the Bar Harbor Police Department is based on his allegation that the police already possessed prior to seeking the warrant eight of the ten firearms they listed therein. This allegation

also is conclusory, however, and is unsupported by any evidence or statements of fact in Sullivan's petition. It thus is difficult to conceive how Sullivan's attorney could be expected to have succeeded in obtaining a *Franks* hearing in the first place. Even if the perjury allegation had been successful at a *Franks* hearing, and the tainted statements regarding the eight weapons had been excluded from the affidavit, other evidence contained in the affidavit more than supports a finding of probable cause for the search of the two pistols. To his detriment, Sullivan does not challenge in the current petition the remaining information in the detailed affidavit, such as evidence from the burglary of the Silk residence or the information provided to police by a co-conspirator, that establishes probable cause. It thus appears certain that his lawyer could not have succeeded in a bid to suppress evidence of the pistols even if he had prevailed at a *Franks* hearing.

As far as Sullivan's second claim--that the government exceeded the scope of the warrant--is concerned, a review of the warrant discloses that it was sufficiently broad enough to encompass the search of Sullivan's home. The warrant describes with particularity the place to be searched, the home of Sullivan plus two appurtenant structures at 1400 Sand Point Road, Bar Harbor. To the extent that Sullivan seeks to challenge the government's search of the dock where two of the pistols eventually were found, this argument is unsupportable, as well. At the trial, Sullivan testified that the dock did not belong to him and was located one-hundred feet or more off of his property. Having no reasonable expectation of privacy therein, Sullivan has no standing to challenge a search conducted off of his property. *United States v. Cruz Jimenez*, 894 F.2d 1, 5 (1st Cir. 1990) (citations omitted). In light of the implausibility of succeeding in such an effort, it was not error for his attorney to forego moving to suppress the pistols recovered from the dock. *Isabel*, 980 F.2d at 65.

C. *Cornelius discovery*

Sullivan further contends that his attorney was deficient in failing to object to the lack of discovery provided by the government concerning a witness, William Cornelius. Sullivan appears to contend that the government failed to provide pursuant to Federal Rule of Criminal Procedure 16 "required discovery material," and thereby violated its discovery obligations.

Because Sullivan fails to point to any specific evidence or factual allegations in support of his contention, however, this claim must fail, as well. Sullivan fails to state with any specificity what material or interview evidence he was entitled to receive. This claim thus should be denied without an evidentiary hearing because it states conclusions rather than facts. *Dziurgot*, 897 F.2d at 1225.

D. *"Disproportionate" treatment*

Sullivan also avers that his attorney performed deficiently because he failed to seek a dismissal or a downward departure from the Sentencing Guideline range based on Sullivan's "disproportionate" or disparate treatment as compared to others involved in the crimes. Because, however, Sullivan fails to offer specific facts or evidence in support of the argument, the claim should be denied without an evidentiary hearing.

It is well settled that the Sentencing Guidelines provide for different treatment of defendants who, although involved in the same crime, are viewed by the law as being in different circumstances. *United States v. Wogan*, 938 F.2d 1446, 1448-1449 (1st Cir.), *cert. denied*, 502 U.S. 969 (1991) (perceived need to equalize sentencing outcomes for similarly situated co-defendants, without more, will not permit departure from Sentencing Guideline range); *see also United States v. Romolo*, 937 F.2d 20, 25 n.5 (1st Cir. 1991) ("discrepancies in comparative outcomes cannot justify downward

departures"). Sullivan's claim is conclusory and should be denied without a hearing. *Dziurgot*, 897 F.2d at 1225.

E. Predicate offenses

Finally, Sullivan claims that his lawyer should have challenged the enhancement of his sentence pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) (Pamph. 1997). He contends that because his civil rights had been restored after his prior convictions, they cannot serve as predicate offenses pursuant to 18 U.S.C. § 921(a)(20) (1976 & Pamph. 1997). This same claim was rejected by the First Circuit on Sullivan's direct appeal, however, *Sullivan*, 98 F.3d at 689, and thus cannot be raised again through a section 2255 motion. *Murchu v. United States*, 926 F.2d 50, 55 (1st Cir.), *cert. denied*, 502 U.S. 828 (1991) (citations omitted).

Even if the Court were to reach the claim, it is clear that Sullivan's prior convictions satisfy section 921(a)(20)'s requirement concerning predicate offenses because Maine places restrictions on the possession of firearms by convicted felons even though one's civil rights have been restored. *Sullivan*, 98 F.3d at 689 & n.2 (citing 15 M.R.S.A. § 393 (1980 & Supp. 1996)). Sullivan's prior convictions thus may be viewed as predicate offenses for purposes of the Act. *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997). His attorney's failure to advance such a position was not deficient, and the claim should be dismissed without an evidentiary hearing. *Dziurgot*, 897 F.2d at 1225.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

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 on October 17, 1997.