

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 91-31-B-H
)	(Civil No. 96-266-P-H)
JOSE MIGUEL LORENZO-ARIAS,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Jose Miguel Lorenzo-Arias moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Lorenzo-Arias was convicted on a five-count indictment that included a charge of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)¹. His sole contention is that the decision of the Supreme Court in *United States v. Bailey*, 116 S.Ct. 501 (1995), compels this court to vacate the conviction on this charge and to resentence him accordingly.

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

¹ The other charges on which Lorenzo-Arias was convicted were one count of conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine, in violation of 21 U.S.C. § 846 (Count One), and three counts of possession with intent to distribute, aiding and abetting the possession with intent to distribute, and distribution and aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Counts Two through Four). The charge of using and carrying a firearm in relation to a drug trafficking crime was Count Five of the indictment, and related to the drug trafficking crimes charged in Counts One and Four. Indictment (Docket No. 1).

statements of fact.” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that the allegations of Lorenzo-Arias are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

The grand jury returned its five-count indictment of Lorenzo-Arias and a co-defendant on April 10, 1991. Indictment. On May 3, 1991 Lorenzo-Arias entered a plea of guilty on all five counts pursuant to Fed. R. Civ. P. 11. Transcript of Rule 11 Proceedings (“Rule 11 Tr.”) (Docket No. 32) at 3. The government presented a summary of its version of the case to the court, stating in relevant part that

the government’s evidence would demonstrate that the defendant would often carry a firearm while distributing cocaine during the time period specified in Count One of the indictment, that on at least one of the occasions specified in Counts Two, Three and Four, a firearm belonging to the defendant was in plain view on a table which the government cooperating witness was required to walk by in order to meet with the defendant and purchase cocaine and that incident to the defendant’s arrest and the execution of a valid State of Maine search warrant upon his residence in Auburn, Maine, a firearm was, in fact, seized from a dresser drawer also found to contain some of the defendant’s clothes and his Dominican Republic Passport.

Exh. 1 to Rule 11 Tr. at 2. Lorenzo-Arias indicated that the information contained in the government’s written version of the case was true to his personal knowledge. Rule 11 Tr. at 11.

The court conducted a sentencing hearing on November 8, 1991. Crediting the defendant’s remorse and significant cooperation with the government, the court sentenced Lorenzo-Arias to imprisonment for 57 months on the four drug charges, which was the low end of the applicable range pursuant to the Sentencing Guidelines. Transcript of Proceedings dated Nov. 8, 1991 (“Sentencing

Tr.”) (Docket No. 33) at 17-18; Judgment (Docket No. 20) at 2. However, the court also imposed a mandatory 60-month consecutive sentence in connection with the firearms charge, bringing the total sentence to 117 months. Sentencing Tr. at 18; Judgment at 2. On motion of the government in light of additional cooperation by Lorenzo-Arias, his sentence was subsequently amended to reduce the incarceration on the drug offenses to 21 months, bringing his total incarceration including the firearms charge to 81 months. Government Motion for Correction of Sentence (Docket No. 24); Second Amended Judgment (Docket No. 28) at 2.

II. Discussion

Section 924(c)(1) provides in relevant part: “Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years” 18 U.S.C. § 924(c)(1). The crime of using a firearm during and in relation to a drug trafficking offense, as defined by section 924(c)(1), “requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Bailey*, 116 S. Ct. at 505. The *Bailey* court therefore reversed the convictions of two defendants. *Id.* at 509. In one instance, the police stopped the defendant for a traffic offense, arrested him after finding cocaine in the passenger compartment of the car, and then discovered a firearm in a bag located in the car’s locked trunk. *Id.* In the other proceeding, the only evidence relative to a firearm was that police had found an unloaded, holstered firearm locked in a footlocker located in the defendant’s bedroom closet. *Id.* In neither case was there “use” of a firearm within the meaning of section 924(c)(1). *Id.*

Invoking *Bailey*, Lorenzo-Arias contends that the mere presence of a firearm on a table is not “use” of a firearm as that term is employed in section 924(c)(1). He further contends that his conviction on this count must be vacated because he did not “carry” a firearm, and because the indictment alleged that he both used and carried such a weapon. I reject both contentions.

Although “the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1),” and “[a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds,” the *Bailey* decision stresses that “the silent but obvious and forceful presence of a gun on a table can be a ‘use.’” *Bailey*, 116 S. Ct. at 508. *Bailey* requires circumstances that are “reasonably distinguishable from possession.” *Id.* The operate facts as alleged by the government and as admitted by Lorenzo-Arias -- that a firearm belonging to him was in plain view on a table that drug purchasers were required to walk by -- contrast significantly with the convictions reversed in *Bailey*, where the firearms in question were not in view and were simply found in the defendants’ vicinity.

The allegations that speak to the “use” prong of the statute are sufficient to sustain the conviction, the contention of Lorenzo-Arias to the contrary notwithstanding. Although section 924(c)(1) refers to using *or* carrying a firearm, the government was required in its indictment to refer to using *and* carrying a firearm so as to place the defendant on notice that the government would seek to prove each aspect of the offense at trial. *United States v. Bader*, 698 F.2d 553, 555 (1st Cir. 1983). In such circumstances, it is “well-established that the government need prove only one of the conjunctively connected offenses to warrant conviction.” *Id.* (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)). It is therefore not necessary to address the parties’ disagreement over whether the government’s version of the offense as introduced at the Rule 11 hearing was sufficient to

demonstrate that Lorenzo-Arias carried a firearm during and in relation to the drug trafficking offenses.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner'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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.

Dated this 25th day of November, 1996.

*David M. Cohen
United States Magistrate Judge*