

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
v. ) Crim. No. 99-31-B-S  
)  
STEPHEN L. THOMPSON, )  
)  
Defendant )

**RECOMMENDED DECISION ON PETITIONER'S  
MOTION PURSUANT TO 28 U.S.C. § 2255**

Petitioner Steven L. Thompson pleaded guilty to a charge of being a felon in possession of a firearm and is serving a 188-month sentence under the Armed Career Criminal Act. He now seeks collateral review of his conviction pursuant 28 U.S.C. § 2255. Thompson's grounds included an allegation that his court appointed attorney failed to file an appeal as requested. I ordered an evidentiary hearing on this issue and appointed counsel to represent Thompson. I now recommend that the Court adopt the following findings of fact and further that the motion be **DENIED** in its entirety.

***Findings of Fact***

In Ground One of his motion Thompson asserts that “[a]fter sentencing I requested lawyer to file appeal but didn’t. [L]awyer ‘stated’ that it would[n]‘t do any good, [b]ut I still wanted him to.” I scheduled an evidentiary hearing on this allegation that was to be held on April 5, 2001. Kevin L. Barron, Esq. was appointed to represent Thompson at this hearing. On the afternoon of the scheduled hearing Thompson indicated that he wanted to withdraw Ground One of his petition and proceed only on the

two remaining grounds. Before allowing Thompson to withdraw this ground, I made inquiry of him in open court on the record.

Thompson is forty-three years old. He completed the eighth grade by way of formal education, but he obtained his General Equivalency Degree in 1982. Since June of 1999 he has maintained a regime of psychotropic medications including an anti-psychotic drug and Prozac. This medication does not in anyway interfere with Thompson's thought process and in fact he indicated to me that he felt that it helped him think more clearly. Thompson assured me that since he had been brought to Maine in preparation for the evidentiary hearing his course of medication had been properly maintained and that he knew of nothing that would interfere with his ability to think clearly. He confirmed to me that he had not ingested any alcohol or unlawful substances prior to the hearing and that any decision made about proceeding with the hearing had been made by him alone.

Thompson indicated that he wished to withdraw his allegation that his attorney failed to file a notice of appeal after being instructed to do so. He fully understood that he had the right to proceed with the evidentiary hearing on that issue and, in fact, trial counsel was present at the courthouse and could have been called to testify. Thompson insisted that he wished to abandon the claim set forth in his motion. He had the opportunity to consult with the attorney assigned for the evidentiary hearing. Counsel indicated to the Court his willingness to either proceed with the hearing or accede to Thompson's request to abandon the claim. Counsel further indicated that Thompson had spoken with him prior to the hearing, and that he had appeared at all times to be competent and to understand his rights. Counsel also indicated that he was fully satisfied

in his own mind that Thompson's decision to abandon the claim was legally justified and that there was no independent reason to pursue the allegation.

Based upon the foregoing facts I recommend that the Court find that Thompson has voluntarily, knowingly, competently, and intelligently chosen to abandon the claims contained within Ground One of his motion and that claim should accordingly be **DISMISSED.**

### *Discussion of Remaining Grounds*

Thompson raises two other grounds in his motion. He alleges that the Court erred in not awarding a downward departure because of his claimed mental illness. He also asserts ineffective assistance of counsel in that his attorney failed to raise the question of whether Thompson was competent to enter his guilty plea due to diminished mental capacity and alternatively failed to seek a downward departure based upon Thompson's asserted mental illness. For the reasons discussed below, both of these claims must fail.

#### *1. Downward Departure*

Any claim of error in the application of sentencing guidelines must be raised on direct appeal. Knigh t v. United States, 37 F.3d 769, 772-73 (1st Cir. 1994) ("The Supreme Court has repeatedly emphasized that § 2255 is not a substitute for direct appeal. A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances.") (citations omitted). Thompson never initiated a direct appeal. A claim, such as this one, which does not allege a constitutional or jurisdictional error can only first be raised in a collateral attack if the claimed error is "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with

the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). In the present case the record reveals that Thompson’s downward departure claim has sparse evidentiary support and that there are no exceptional circumstances that would warrant consideration of the claim by way of collateral attack.

Thompson argues that the Court should have granted a downward departure based upon his mental illness. The only evidence of mental illness before the Court at the time of sentencing was a paragraph in the Pre-Sentence Report which indicated that while defendant had been incarcerated at the state prison he “was treated with major tranquilizers for a mental illness manifested by both disturbed mood and thought. At that time, the operating diagnosis was Schizo-Affective Disorder.” In his materials submitted in support of this motion, Thompson does not offer any additional evidence of a history of mental illness or an acute episode of mental illness occurring at the time of the offense. His claim that he should have been awarded a downward departure based upon mental illness is simply not cognizable on collateral review under any known legal theory, but even if it were there is no evidentiary support for such a downward departure.

## ***2. Ineffective Assistance Claims***

Thompson’s claims of ineffective assistance of counsel are two-fold. He argues that his counsel should have raised the issue of whether or not he was competent to enter his guilty plea. Alternatively, he asserts that his counsel failed to perform adequately because he did not seek a downward departure based upon mental illness. His ineffective assistance claims must be analyzed under the familiar two-prong standard of Strickland v. Washington, 466 U.S. 668 (1984). He must show that trial counsel’s performance was “deficient,” in that he “made errors so serious that [he] was not functioning as the

‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. In addition, Thompson would have to prove that the deficient performance prejudiced him, that is, the “errors were so serious as to deprive [Thompson] of a fair [proceeding]” with a reliable result. Id. See also Knight, 37 F.3d at 774 -75 (First Circuit applying Strickland).

Thompson has satisfied neither prong of the inquiry.

Thompson does not furnish any evidentiary support for his contention that he was not competent to enter a guilty plea other than the previously mentioned reference to his medication and operating diagnosis contained within the pre-sentence report.

Significantly, Thompson does not point to any fact in the record that would have caused either counsel or the court to question his competence and he does not assert his

innocence, his lack of understanding of the nature of the proceedings, or that he would

not have pleaded guilty but for counsel’s alleged deficiencies. See United States v.

LaBonte, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d on other grounds*, 520 U.S. 751

(1997). While Thompson has submitted supporting documentation confirming that he

had complaints about his counsel’s alleged deficiencies, he has submitted nothing to

support the contention that he was prejudiced in any way by those claimed deficiencies.

Had counsel requested a judicial determination of competence and/or a downward

departure at sentencing, the record overwhelming supports the conclusion that it would

have made no difference in the outcome of this case.

The fact that Thompson was unhappy with trial counsel’s services, as reflected in the two letters he submitted with his motion, does not mean that counsel’s performance was deficient. Of course it would be a serious deficiency in performance for counsel to allow an incompetent defendant to enter a plea of guilty. Nothing in the record of the

proceedings suggests that counsel had any good faith basis upon which to file a competency motion. Thompson responded entirely appropriately to the Court's questions and expressed his clear understanding of the nature of the charges and the consequences of a guilty plea. Furthermore, other than Thompson's conclusory allegation in his petition, there is nothing in the materials filed in support of this motion to support the contention that there was any question ever of Thompson's competence to enter a plea of guilty.

### **Conclusion**

Based upon the foregoing, I recommend that the Court adopt the proposed findings of fact and **DISMISS** the allegations in Ground One because Thompson has chosen to abandon that claim. I further recommend that the motion be **DENIED** as to the other claims raised by Thompson.

### 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.

Dated April 26, 2001.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

CJACNS CLOSED

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 99-CR-31-ALL

USA v. THOMPSON

Filed: 05/21/99

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

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Pending Counts:

Disposition

18:922G.F UNLAWFUL TRANSPORT Imprisonment of 188 months;

OF FIREARMS, ETC. (Felon in Supervised Release of 60

Possession of a Firearm-Armed months; Special Assessment of

Career Criminal in violation \$100; Deft remanded to custody

of 18:922(g)(1), 924(a)(2) and of US Marshal.

924(e))

(1)

(1)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

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