

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff/Respondent,)
)
 v.) Criminal Action No. 00-54-SLR
) Civil Action No. 02-1545-SLR
BOBBY WILSON,)
)
 Defendant/Petitioner.)

Colm F. Connolly, United States Attorney and Edmond Falgowski,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Plaintiff/Respondent.

Elayne C. Bryn, Esquire, Wilmington, Delaware. Counsel for
Defendant/Petitioner.

MEMORANDUM OPINION

Dated: August 13, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Currently before the court is petitioner Bobby Lee Wilson's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence.

(D.I. 269) At the time of his petition, petitioner was an inmate at the Federal Prison Camp in Cumberland, Maryland. The court conducted an evidentiary hearing on petitioner's claim on March 21, 2003. (D.I. 310) The following are the court's findings of facts and conclusions of law pursuant to 28 U.S.C. § 2255.

II. FINDINGS OF FACT

1. On July 25, 2000, petitioner was indicted for conspiracy to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii) and 846. (D.I. 15)

2. Christopher Koyste ("Koyste") was the Assistant Federal Public Defender appointed to represent petitioner in connection with those charges. (D.I. 310 at 4, 20) Koyste has been an Assistant Federal Public Defender in Delaware since December 1993. (Id. at 20)

3. As part of his representation of petitioner, Koyste engaged in plea negotiations with the government. (Id. at 24-25) The negotiations resulted in the government withdrawing its position that petitioner was a leader or organizer of the defendants charged with the conspiracy. (Id.)

4. Koyste also attempted to convince petitioner to cooperate with the government in order to receive additional point reductions with respect to sentencing. Petitioner refused to give any statements to the government and informed Koyste that he did not want to be perceived as someone who was cooperating with the government. (Id. at 24-25)

5. On April 25, 2001, petitioner entered a plea of guilty to a one-count information charging petitioner with conspiracy to distribute and possession with the intent to distribute marijuana, a violation of 21 U.S.C. § 846. (D.I. 264) A Memorandum of Plea Agreement was filed the same day. (D.I. 142) During the plea hearing, the court informed petitioner that the maximum sentence he could receive was five years of incarceration, a \$250,000 fine, three years of supervised release with a mandatory two year term of supervised release, if a term of imprisonment were imposed, and a \$100 special assessment. (D.I. 264 at 6) Petitioner stated that he understood and agreed to this. (Id. at 6-10) Petitioner was also informed that he and the government had the right to appeal his sentence after it was imposed. (Id. at 8)

6. Petitioner was sentenced on August 9, 2001 to 50 months of incarceration. (D.I. 297 at 11) The court also informed petitioner that he had a right to appeal his sentence within 10 days. (Id. at 12) Petitioner was permitted to self-report to prison. (Id. at 16-17)

7. At the sentencing, Koyste advised petitioner that he did not believe there were any appealable issues. (D.I. 310 at 27)

8. Petitioner expressed some concerns with respect to an appeal and Koyste suggested they discuss it within the next few days. (Id.)

9. On August 14, 2001, petitioner telephoned Koyste to discuss filing an appeal. Initially, petitioner requested Koyste to file an appeal based on the "safety valve" provision for sentence reduction. Petitioner and Koyste discussed the safety valve for several minutes. Koyste informed petitioner that he was not eligible for the safety valve because petitioner refused to meet with the government. Koyste again advised petitioner that he did not believe there were any appealable issues. At the conclusion of the conversation, petitioner agreed with Koyste that it was not necessary to file an appeal. (Id. at 27-30; GX 2)

10. In January and February 2002, petitioner telephoned Koyste from prison several times to discuss obtaining the safety valve sentencing reduction. (D.I. 310 at 30-31; GX 1)

III. CONCLUSIONS OF LAW

A. Applicable Legal Standards

1. The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, but rather simply to ensure that criminal

defendants receive a fair trial. See Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000).

2. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 686 (1984).

3. **Reasonableness.** "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe, 528 U.S. at 481. "Courts must judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential." Id. at 477 (quotations omitted).

4. A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is objectively unreasonable. See id.

5. Counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. See id. at 480.

6. "Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. The court must also consider "whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

7. **Prejudice.** Prejudice is presumed from an attorney's failure to perfect an appeal when a defendant has directed the attorney to do so. See Solis v. United States, 252 F.3d 289, 293-94 (3d Cir. 2001) (citing Kitchen v. United States, 227 F.3d 1014, 1020-21 (7th Cir. 2000)).

B. Application of Law to the Facts

8. Petitioner had ten days from the entry of judgment on the docket in which to file a notice of appeal. See Fed. R. App. P. 4(b)(1)(A)(i), 4(b)(6). The court finds that petitioner did not request Koyste to file an appeal on his behalf during this ten-day period.¹

9. The court also concludes that Koyste did not act unreasonably during his consultations with petitioner about the possibility of filing an appeal. Petitioner pled guilty and was

¹Although petitioner claims that he asked Koyste to file an appeal during their telephone conversation of August 14, 2001, the court finds that Koyste's version of the facts is more credible and is supported by the record.

sentenced within the applicable guideline range, creating no genuine issues for appeal. While petitioner may have initially indicated a desire to appeal during the August 14, 2001 telephone conversation, the court finds that petitioner subsequently recanted his desire to appeal during the conversation. Koyste's representation of petitioner was not constitutionally unreasonable and, therefore, does not qualify as ineffective assistance of counsel.²

IV. CONCLUSION

For the reasons stated, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence is denied.

²Petitioner also argues that he qualified for the safety valve sentencing reduction and that counsel failed to present this issue to the government or the court. (D.I. 269, brief in support of § 2255 motion at 9-13) Koyste testified that he reviewed the safety valve with petitioner several times before sentencing and the petitioner refused to cooperate with the government. (D.I. 310 at 24-26) The court finds Koyste's testimony to be credible and rejects petitioner's contention that Koyste failed to pursue the safety valve sentencing reduction.

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O R D E R

At Wilmington, this 13th day of August, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence (D.I. 269) is denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

3. Petitioner's motion to expedite to the District of Delaware and return to federal prison (D.I. 284) is denied as moot.

Sue L. Robinson
United States District Judge