

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. :
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THOMAS GIBISON, :
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 Defendant. :
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Criminal Action No. 96-63-JJF
Civil Action No. 98-458

Robert J. Prettyman, Esquire, Assistant United States Attorney,
of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Plaintiff.

Thomas Gibison, Pro Se Defendant.

MEMORANDUM OPINION

June 20, 2001
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion To Vacate, Set Aside, Or Correct Sentence Pursuant To 28 U.S.C. Sect. 2255 With Attached Memorandum Of Law In Support ("Section 2255 Motion") (D.I. 92) and a Motion For Leave To File The Attached Supplemental Issue(s) To Pending 28 U.S.C. § 2255 Motion And Request For Order Directing The Government To Respond To Said Supplemental Issue(s) In A Timely Manner ("Motion For Leave To Amend") (D.I. 98) filed by Defendant Thomas Gibison seeking relief from his federal conviction and sentence for Being a Felon in Possession of Firearms, in violation of 18 U.S.C. § 922 (g)(1). For the reasons set forth below, Defendant's Section 2255 Motion and his Motion For Leave To Amend will be denied.

BACKGROUND

According to information contained in the Pre-Sentence Report in this case, between September 1994 and August 1995, Defendant possessed two firearms manufactured in Germany and 15 additional firearms, including a Street Sweeper destructive device. (Pre-Sentence Report at ¶ 7, 12-16, 8, 33, 35-36, 45). In November 1995, Defendant asked Craig Peterson to store 14 firearms, including the Street Sweeper device. Defendant's girlfriend, Patricia Miller, delivered the firearms to Peterson for storage at Peterson's residence. (Pre-Sentence Report at ¶ 36). Between the Fall of 1995 and January 4, 1996, Defendant and

Peterson cleaned the guns and handled the guns in a manner so as to avoid leaving new fingerprints. (Pre-Sentence Report at ¶ 27, 35-36).

On January 4, 1996, law enforcement officers seized the 14 firearms from Peterson's residence. On July 23, 1996, a grand jury indicted Defendant for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and a warrant was issued for Defendant's arrest. (D.I. 96 at 1, 4). Two days later, Defendant was arrested.

On September 10, 1996, a grand jury returned a three count Superseding Indictment charging Defendant with Being a Felon in Possession of Firearms in violation of 18 U.S.C. § 922(g)(1), Being a Felon in Possession of Separate Firearms and on Subsequent Dates in violation of 18 U.S.C. § 922(g)(1), and Conspiracy to Obstruct Justice in violation of 18 U.S.C. §§ 371 and 1503. Defendant was arraigned on the charges in the Superseding Indictment, and the Court dismissed the July 23, 1996 Indictment.

Pursuant to a plea agreement, Defendant pled guilty to Being a Felon in Possession of Firearms as stated in Count I of the Superseding Indictment. A Pre-Sentence Report was subsequently filed assessing Defendant's criminal history.

According to the Pre-Sentence Report, Defendant's base offense level was set at 22. However, the Pre-Sentence Report also added four offense levels for Defendant's possession of at

least 13 but less than 25 firearms, two offense levels for Defendant's possession of the Street Sweeper device, two offense levels for Defendant's possession of the German firearms which were stolen, and two offense levels for obstruction of justice. (Pre-Sentence Report ¶ 43-46). However, Defendant received a two level downward adjustment for acceptance of responsibility under U.S.S.G. §3E1.1. (Pre-Sentence Report at ¶ 39-41, 52).

The Pre-Sentence report also outlined several prior juvenile convictions against Defendant including: (1) a 1985 Adjudication of Delinquency for Burglary of a Dwelling in which the victim's loss exceeded \$1,600.00; (2) a 1985 Adjudication of Delinquency for Conspiracy Second Degree to burglarize a residence with two co-defendants and take 2 shotguns; (3) a 1987 Adjudication of Delinquency for Menacing, Criminal Mischief and Assault Third Degree; (4) a 1987 Adjudication of Delinquency for Conspiracy Second Degree to commit burglary of a dwelling at night while armed; and (5) a 1988 Adjudication of Delinquency for Unlawful Imprisonment Second Degree and Harassment for assaulting his former girlfriend and keeping her locked in his residence overnight. In addition, as an adult in 1990, Defendant was convicted of five counts of Felony Reckless Endangering First Degree and one count of Felony Possession of a Deadly Weapon During the Commission of a Felony. (Pre-Sentence Report at ¶ 5, 62).

In sentencing Defendant, the Court noted Defendant's

extensive criminal history and agreed with defense counsel's statement regarding Defendant's long-time fascination with firearms. The Court also considered the issue of whether Defendant could be sentenced as an Armed Career Criminal because of his prior convictions. However, the Court concluded that Defendant was not subject to the Armed Career Criminal provisions. The Court dismissed the remaining counts of the Superseding Indictment against Defendant and sentenced Defendant to 120 months imprisonment, a \$2,000.00 fine, three years of supervised release and a \$50.00 special assessment.

On February 12, 1997, the Court docketed a letter written by Defendant on February 9, 1997 as a "Notice of Appeal." (AA-13, 75-78). On June 3, 1998, the Court of Appeals for the Third Circuit affirmed the Judgment entered by the Court.

Thereafter, Defendant filed the instant Section 2255 Motion alleging ineffective assistance of counsel. Specifically, Defendant contends that his counsel failed to object at sentencing and failed to raise on appeal (1) the addition of two offense levels in the calculation of Defendant's sentencing range for Defendant's possession of the Street Sweeper device under U.S.S.G. § 2K2.1(a)(3), because Defendant had already received a two offense level increase for possession of that device under U.S.S.G. § 2K2.1(b)(3); and (2) the calculation of Defendant's cumulative offense level under U.S.S.G. § 2K2.1, because it exceeded the maximum score under that section. In addition,

Defendant filed a Motion For Leave To Amend in which Defendant contends that his conviction and sentence should be vacated because the predicate felony underlying his 18 U.S.C. § 922(g)(1) conviction is invalid. Specifically, Defendant contends that he was found guilty of the predicate felony based on prejudicial comments by the prosecutor and factual information introduced into evidence by the prosecutor that Defendant was a "skin head." (D.I. 98 at 2-6). The Government has responded to the claims raised by Defendant in his initial Section 2255 Motion and in his supplemental filing. Accordingly, the Petition is ripe for the Court's review.

DISCUSSION

By his Section 2255 Motion, Defendant requests the Court to conduct an evidentiary hearing in this case. Accordingly, as a threshold matter, the Court will consider whether an evidentiary hearing is required to adjudicate Defendant's claims.

After a review of the Section 2255 Motion, Answer, transcripts and other records submitted by the parties, the Court finds that an evidentiary hearing is not required. See Rule 8(a) of the Rules Governing Section 2255 Proceedings. On the record before it, the Court concludes that it can fully evaluate the issues presented by Petitioner. Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989) (holding that evidentiary hearing not required where motion and record

conclusively show movant is not entitled to relief and that decision to order hearing is committed to sound discretion of district court), appeal after remand, 904 F.2d 694 (3d Cir. 1990), cert denied, 111 S. Ct. 2262 (1991); Soto v. United States, 369 F. Supp. 232, 241-42 (E.D. Pa. 1973), (holding that crucial inquiry in determining whether to hold a hearing is whether additional facts are required for fair adjudication), aff'd, 504 F.2d 1339. Accordingly, the Court will proceed to resolve Petitioner's claims.

I. Defendant's Ineffective Assistance of Counsel Claims

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). The first prong of the Strickland test requires a defendant to show that his or her counsel's errors were so egregious as to fall below an "objective standard of reasonableness." Id. at 687-88. In determining whether counsel's representation was objectively reasonable, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In turn, the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound . . . strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Under the second

prong of Strickland, the defendant must demonstrate that he or she was actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 692-94; Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993). To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). Thus, a purely outcome determinative perspective is inappropriate. Id.; Flamer v. State, 68 F.3d 710, 729 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996). With this standard in mind, the Court will examine Defendant's ineffective assistance of counsel claims.

A. Defendant's Claim That Counsel Failed To Object To The Double Counting Of The Street Sweeper Device

By his Section 2255 Motion, Defendant contends that his counsel was ineffective because he failed to object to the "double counting" of the Street Sweeper destructive device in the calculation of the Sentencing Guideline range set forth in Defendant's Pre-Sentence Report. Specifically, Defendant contends that he should not have received an addition of two offense levels for his possession of the Street Sweeper device under U.S.S.G. § 2K2.1(a)(3), because he had already received a two offense level increase for possession of that device under

U.S.S.G. § 2K2.1(b)(3).

Section 2K2.1(b)(3) of the United States Sentencing Guidelines provides for a two level increase if the offense involves a destructive device. Defendant does not dispute the counting of the Street Sweeper device as a destructive device under this section. However, Defendant contends that it was inappropriate for that device to be counted in determining his base offense level.

In this case, Defendant pled guilty to Being A Felon In Possession Of A Firearm in violation of 18 U.S.C. § 922(g)(1). For purposes of the Sentencing Guidelines, violations of Section 922(g) are governed by Section 2K2.1 of the United States Sentencing Guidelines, entitled Unlawful Receipt, Possession, Or Transportation Of Firearms Or Ammunition; Prohibited Transaction Involving Firearms Or Ammunition.

Section 2K2.1(a) sets the base offense level for firearms crimes. As used in the Sentencing Guidelines, the term "offense" means "the offense of conviction and all relevant conduct under §1B1.3." U.S.S.G. §1B1.1, comment (n.1(1)). Section 1B1.3 explains the manner in which the base offense level and any adjustments should be calculated. According to Section 1B1.3 offenses for which Section 3D1.2 would require grouping of multiple counts includes conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction. In turn, Section 3D1.2 requires grouping for firearms offenses

governed by Section 2K2.1. Thus, because Defendant pled guilty to a firearms offense governed by Section 2K2.1, the sentencing calculation for Defendant's base offense level may take into consideration conduct that was part of the same course of conduct as Defendant's offense of conviction, i.e., Being A Felon In Possession Of A Firearm In Violation of 18 U.S.C. § 922(g).

A defendant's conduct is considered part of the "same course of conduct," if the offenses are "sufficiently connected or related to each other so as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3, comment (n.9(B)); United States v. Wilson, 106 F.3d 1140, 1143 (3d Cir. 1997). To determine whether offenses are part of the same course of conduct, the commentary to the Sentencing Guidelines provides a three-prong test which includes (1) the degree of similarity of the offenses, (2) the regularity or repetition of the offenses, and (3) the time interval between offenses. Wilson, 106 F.3d at 1143 (citing U.S.S.G. §1B1.3, comment (n.9(B))). All factors need not be present under this test, and "the stronger presence" of at least one other factor may be sufficient to permit a conclusion that the offense is part of the same course of conduct. In other words the court may consider the relative strengths of the factors present in each case in reaching its conclusion about whether the conduct is part of the same course of conduct. Insofar as temporal proximity is concerned, court have considered

offenses that precede the offense of conviction by as much as 17 months to be offenses that are part of the same course of conduct. Wilson, 106 F.3d at 1144.

In this case, Defendant's offense of conviction was Being A Felon In Possession Of A Firearm in September 1994. During and after September 1994, but before August 13, 1995, Defendant also possessed the Street Sweeper destructive device. In November 1995, Defendant had his girlfriend bring the Street Sweeper to Peterson for storage. Between the Fall of 1995 and January 4, 1996, Defendant and Peterson cleaned and handled several firearms, including the Street Sweeper. Thus, Defendant's possession of the Street Sweeper device was an offense similar to the offense of being in possession of other firearms, repetitive and ongoing in nature, and temporally proximate, if not simultaneously with his offense of conviction, the possession of firearms by a felon in September 1994. Accordingly, the Court concludes that Defendant's possession of the Street Sweeper device was relevant conduct to his offense of conviction. Because this conduct is relevant to Defendant's offense of conviction, the Court concludes that it was appropriately considered as part of the "offense" for purposes of calculating Defendant's base offense level under Section 2K2.1.

Because Defendant's offense for purposes of the Section 2K2.1 calculation involved the possession of the Street Sweeper device as discussed above, this device is prohibited under both

18 U.S.C. § 921(a)(3) and 26 U.S.C. § 5845(a), and Defendant had a prior felony conviction of a crime of violence, the Court concludes that the appropriate range for Defendant's base offense level was determined by Section 2K2.1(a)(3). Indeed, the commentary to the Sentencing Guidelines expressly recognizes that the possession of a destructive device may be counted both in the base offense level under Section 2K2.1(a)(3) and as an enhancement under 2K2.1(b)(3), and several courts interpreting the Sentencing Guidelines have concluded that such a calculation is permissible.¹ See U.S.S.G. § 2K2.1, comment. (n. 11); United States v. Rohwedder, 243 F.3d 423, 426-427 (8th Cir. 2001); United States v. Crabtree, 1997 WL 259365, *1 (6th Cir. May 15, 1997); United States v. Justice, 56 F.3d 1329, 1329-1330 (11th Cir. 1995). Because Defendant's base offense level was appropriately calculated, the Court concludes that Defendant's counsel was not ineffective for failing to object to the "double counting" of the Street Sweeper device. Accordingly, the Court

¹ In pertinent part, the commentary to the Sentencing Guidelines provides:

A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

U.S.S.G. § 2K2.1, comment. (n. 11) (emphasis added).

will dismiss Defendant's claim of ineffective assistance of counsel based on the alleged double counting of the Street Sweeper device.²

B. Defendant's Claim That Counsel Failed To Object To The Calculation Of Defendant's Cumulative Offense Level

Defendant next contends that his counsel was ineffective because he failed to object to the calculation of Defendant's cumulative offense level under Section 2K2.1 of the Sentencing Guidelines. Specifically, Defendant contends that his cumulative offense level was calculated to equal 30, but Section 2K2.1 provides that the cumulative offense level shall not exceed level 29.

In response to Defendant's claim, the Government recognizes that the calculation of Defendant's cumulative offense level was an error in the Pre-Sentence report to which Defendant's attorney did not object. (D.I. 95 at 19). However, the Government contends that Defendant cannot establish ineffective assistance of counsel, because he cannot demonstrate that he was prejudiced by his attorney's error.

In this case, even if Defendant's cumulative offense level under Section 2K2.1 was set at 29, Defendant's Criminal History

² Because the Court concludes that Defendant's counsel had no basis to object to the counting of the Street Sweeper device, the Court likewise concludes that Defendant cannot establish that counsel was ineffective for failing to raise this issue on appeal.

Category would have remained a Category III. An offense level of 29 with Criminal History Category III carries a range of imprisonment of 108-135 months. A conviction under 18 U.S.C. § 922 (g) carries a penalty of not more than ten years imprisonment. 18 U.S.C. § 924(a)(2).

In sentencing Defendant, the Court found that the maximum sentence was warranted given the seriousness of Defendant's prior conviction and his fascination with firearms. (D.I. 96 at AA-45). The Court's sentence was within the Guideline range, even if his offense level was calculated at 29, and the Court's sentence did not exceed the statutory maximum for the crime. Because Defendant cannot show that the error in his cumulative offense level calculation impacted his sentence, the Court concludes that Defendant cannot establish that his counsel's failure to object to the error prejudiced him within the meaning of Strickland. Accordingly, the Court will dismiss Defendant's claim that his counsel was ineffective for failing to object to the calculation of his cumulative offense level.³

II. Defendant's Claim That His Conviction And Sentence Should Be Vacated Because The Predicate Felony Underlying His Section 922(g)(1) Was Invalid

Subsequent to the filing of his Section 2255 Motion and the

³ Because Defendant cannot establish prejudice under Strickland, the Court likewise concludes that Defendant cannot establish that his counsel was ineffective for failing to raise this issue on direct appeal.

Government's response, Defendant filed a Motion For Leave To Amend seeking to add a claim to his pending Section 2255 Motion. By his supplemental pleading, Defendant contends that his conviction and sentence under Section 922(g)(1) should be vacated, because the predicate felony underlying his conviction is invalid. Specifically, Defendant contends that the predicate felony is invalid because he was found guilty based on prejudicial comments by the prosecutor and factual information introduced into evidence by the prosecutor that Defendant was a "skin head."

Whether Defendant may amend his Section 2255 Motion is governed by Federal Rule of Civil Procedure 15(a). United States v. Duffus, 174 F.3d 333, 336 (3d Cir. 1999), cert. denied, 528 U.S. 866 (1999). Where, as here, the Government has filed its responsive pleading prior to Defendant's motion to amend, Defendant is required to obtain leave of court to amend his Section 2255 Motion. Fed. R. Civ. P. 15(a). Although leave to amend should ordinarily be freely given, the Court is not required to give leave to amend if the amendment is futile or there is evidence of undue delay, bad faith, or undue prejudice to the opposing party. Duffus, 174 F.3d at 337.

In this case, Defendant requests leave to add a claim which raises the validity of the predicate felony underlying his Section 922(g)(1) conviction. However, it is well-established in the Third Circuit that Section 922(g)(1) "prohibits a felon from

possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds.”⁴ Lewis v. United States, 445 U.S. 55, 65 (1980); United States v. Graves, 554 F.2d 65, 67-68 (3d Cir. 1977) (holding that conviction for felon in possession of firearms under 18 U.S.C. § 1202 is valid even though defendant challenges constitutionality of predicate conviction, where defendant failed to contest predicate conviction prior to being charged under 18 U.S.C. § 1202).⁵ In this case, Defendant’s prior felony conviction was in effect at the time of Defendant’s Section 922(g)(1) conviction, and Defendant has not offered any evidence that the conviction was ever vacated. Accordingly, the Court concludes that Defendant cannot establish that his Section 922(g)(1) conviction is invalid, and thus, the claim Defendant seeks to add to his

⁴ See also Rice v. U.S. Dep’t of ATF, 68 F.3d 702, 705, 710 (3d Cir. 1995) (recognizing that pardon and expungement of predicate felony for 18 U.S.C. § 922(g)(1) conviction after defendant possessed firearms and was convicted under § 922(g)(1) did not nullify § 922(g)(1) conviction); United States v. MacGregor, 617 F.2d 348, 348-349 (3d Cir. 1980) (holding that conviction for felon in possession of firearms under predecessor statute to § 922(g) is valid even though predicate felony for conviction was reversed on appeal, as long as predicate conviction was in effect when defendant possessed firearm and was convicted of that charge); United States v. Julian, 974 F. Supp. 809, 815, 817 (M.D. Pa. 1997), aff’d, 168 F.3d 480 (3d Cir. 1998).

⁵ The Lewis and Graves cases were decided under 18 U.S.C. § 1202, the predecessor statute to 18 U.S.C. § 922(g). However, the Third Circuit does not distinguish between cases decided under 18 U.S.C. § 1202 and 18 U.S.C. § 922(g). United States v. Paolello, 951 F.2d 537, 541 n.4 (3d Cir. 1991).

Section 2255 Motion is meritless. Because Defendant's amendment challenging his Section 922(g)(1) conviction would be futile, the Court will deny Defendant's request to amend his Section 2255 Motion.

CONCLUSION

For the reasons discussed, Defendant's Motion To Vacate, Set Aside, Or Correct Sentence Pursuant To 28 U.S.C. Sect. 2255 With Attached Memorandum Of Law In Support and Defendant's Motion For Leave To File The Attached Supplemental Issue(s) To Pending 28 U.S.C. § 2255 Motion And Request For Order Directing The Government To Respond To Said Supplemental Issue(s) In A Timely Manner will be denied.

An appropriate Order will be entered.

