

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 98-60-JJF
	:	
	:	Civil Action No. 99-687-JJF
GARY MITCHELL,	:	
	:	
Defendant.	:	
	:	

Judith M. Kinney, Esquire, Assistant United States Attorney, of
the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Plaintiff.

Gary Mitchell, Pro Se Defendant.

MEMORANDUM OPINION

June 20, 2001

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 21) filed by Defendant, Gary A. Mitchell. For the reasons set forth below, Defendant's Section 2255 Motion will be denied.

BACKGROUND

On May 12, 1998, Defendant was indicted on charges of Bank Robbery in violation of 18 U.S.C. § 2113(a). Defendant was subsequently arrested. Pursuant to a plea agreement, Defendant pled guilty to the charge as stated in the Indictment. Thereafter, the Court sentenced Defendant to 77 months imprisonment, three years of supervised release, restitution in the amount of \$2,058.25 and a special assessment of \$100.00.

By his Section 2255 Motion, Defendant contends that he improperly received a two point enhancement in his criminal history score under the Sentencing Guidelines for being on probation at the time of the offense. According to Defendant, he had actually been released from probation four days prior to committing the bank robbery. Thus, Defendant contends that his sentence should be corrected.

The Government has filed a Response To Petition Under 28 U.S.C. § 2255 (D.I. 24) conceding the truth of Defendant's factual allegation that he was released from probation on April

23, 1998. However, the Government contends that Defendant is not entitled to the relief he requests. Because the Motion is ripe for the Court's review, the Court will proceed to the merits of Defendant's claim.

DISCUSSION

Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings, the Court should consider whether an evidentiary hearing is required in this case. After a review of the Motion, Answer Brief, and 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. The Government does not dispute Defendant's factual allegation, and therefore, the Court concludes that it can fully evaluate the issues presented by Defendant on the record before it. 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 Defendant's claims.

By his Motion, Defendant contends that his sentence should be corrected, because he received a two point enhancement in his criminal history score under the Sentencing Guidelines for being on probation during the commission of the bank robbery, when Defendant had actually been released from probation prior to the commission of the offense. Defendant has provided a letter dated June 23, 1999, from the Department of Corrections indicating that he was released from probation on April 23, 1998.

The Government does not dispute that Defendant was released from probation prior to the commission of the bank robbery; however, the Government contends that Defendant is not entitled to a correction of his sentence. Specifically, the Government contends that (1) Defendant's claim is not cognizable absent a complete miscarriage of justice, because it is not a constitutional or jurisdictional claim; and (2) Defendant procedurally defaulted his claim by failing to raise it on direct appeal, and Defendant cannot show cause and prejudice to overcome his default.

It is well-established that Section 2255 does not afford relief for all errors that occur at trial or sentencing. United States v. Essig, 10 F.3d 968, 977 n.25 (3d Cir. 1994). Rather, the alleged error must raise a "fundamental defect which inherently results in a complete miscarriage of justice." Id. (citations omitted). As a general matter, claims involving

errors under the Sentencing Guidelines are not considered to be fundamental defects, and thus, such claims are not cognizable in a Section 2255 Motion, unless the error causes a complete miscarriage of justice. See Graziano v. United States, 83 F.3d 587, 589-590 (2d Cir. 1996); Grant v. United States, 72 F.3d 503, 505-506 (6th Cir.), cert. denied, 116 S. Ct. 1701 (1996); Knight v. United States, 37 F.3d 769, 773 (1st Cir. 1994).

In this case, the two point enhancement for being on probation at the time of the offense gave Defendant a criminal history score of 13, which placed Defendant in Criminal History Category VI. With Defendant's offense level of 21, a Criminal History Category of VI, placed Defendant's sentence in the guideline range of 77 to 96 months. Without the two point enhancement, Defendant would have had a criminal history score of 11, placing Defendant in Criminal History Category V. With Defendant's offense level at 21, a Criminal History of Category V, would have placed Defendant's sentence in the guideline range of 70 to 87 months. Because Defendant's sentence of 77 months was well below the statutory maximum of twenty years for the offense and well within the Guideline range for either a Criminal History Category of V or VI, the Court concludes that Defendant cannot establish that the error in his criminal history score amounts to a complete miscarriage of justice.

Moreover, Defendant did not file a direct appeal to his conviction or sentence in this case, and therefore, Defendant

procedurally defaulted his claim. To overcome this procedural default, Defendant must show both "cause" excusing his procedural default and "actual prejudice." United States v. Frady, 456 U.S. 152, 167-170 (1982); United States v. Essig, 10 F.3d 968, 976-979 (3d Cir. 1994).

In this case, Defendant has not explained why he failed to object to the two point enhancement at his sentencing or why he failed to raise the claim on direct appeal. Accordingly, the Court concludes that Defendant has not established cause excusing his procedural default.

However, even if Defendant could establish cause for his default, the Court concludes that Defendant cannot establish prejudice. Defendant was sentenced at the lowest end of Category VI and in the low to mid range of Category V. As the Sentencing Commission recognized in establishing the Sentencing Guidelines:

By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes.

U.S.S.G., Ch. 1, Pt. A, § 4(h) (emphasis added). Indeed, numerous courts have recognized that where a sentencing calculation error places a defendant in a lower sentencing range, but the sentence that was actually imposed is within that lower range as a result of the overlapping ranges of the Sentencing Guidelines, the defendant cannot establish prejudice within the meaning of Frady. Clark v. United States, 1993 WL 413441, *2

(6th Cir. Oct. 15, 1993) (holding that where sentence defendant received is within either range, defendant's allegations of prejudice are "speculative at best"); see also United States v. Ibanez, 924 F.2d 427, 429 n.1 (2d Cir. 1991) (holding that defendant cannot establish prejudice where sentence falls within two overlapping guideline ranges and same sentence would have been imposed under either range). Because Defendant's sentence would not have changed even if he had received a lower criminal history score, and because Defendant's sentence was well within either Guideline range and well-under the statutory maximum for the offense, the Court concludes that Defendant cannot establish prejudice to overcome his procedural default. Accordingly, the Court will deny Defendant's Section 2255 Motion to correct his sentence.

CONCLUSION

For the reasons discussed, the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody filed by Defendant, Gary A. Mitchell, will be denied.

An appropriate Order will be entered.

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GARY MITCHELL,	:	
	:	
Defendant.	:	
	:	

O R D E R

At Wilmington, this 20 day of June 2001, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 21) is DENIED.

2. Because the Court finds that Defendant has failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.

UNITED STATES DISTRICT JUDGE