

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GRANT CURTIS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
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MEMORANDUM & ORDER
98-CV-4245 (ILG)

GLASSER, United States District Judge:

In a motion dated June 9, 1998 and filed in this court on June 15, 1998, the petitioner, Grant Curtis ("Curtis"), seeks an order, pursuant to 28 U.S.C. § 2255, that would vacate, set aside or correct a sentence imposed on May 5, 1998. The primary assertion upon which his motion is based is that he was ineffectively assisted by counsel because she failed to realize that there was a legal ground on which to move for a dismissal of the charges.

Background

On June 23, 1993, Curtis pled guilty to a one-count information in the Northern District of Texas (Solis, J.) charging him with conspiracy to commit bank fraud in violation of 18 U.S.C. § 371. That plea was the result of a long-term investigation into bank fraud in the Texas "savings and loan" industry during the 1980's. Specifically, Curtis was discovered to have been involved in the issuance of dozens of invalid letters of credit as well as the receipt of several fraudulent loans, resulting in losses to the Federal Deposit Insurance Corporation of close to \$2 million.

In connection with his plea, Curtis entered into a cooperation agreement with the government (the "Plea Agreement"). That agreement specifically gave Curtis assurance that he

would not be prosecuted for any other financial crimes related to banking transactions in the Northern and Eastern Districts of Texas, the Eastern District of North Carolina, the Western District of Oklahoma, and the Central District of California. Plea Agreement at 4.

As a result of that cooperation agreement, Curtis began providing confidential information to the office of the U.S. Attorney for the Central District of California. At the time of Curtis' sentencing in Texas, the prosecutors there sought a term of incarceration for Curtis. Andrew Pitt ("Pitt"), Assistant U.S. Attorney for the Central District of California, appeared on Curtis' behalf and requested that the district court sentence Curtis to a term of probation based upon his statement regarding Curtis' cooperation with his office. On June 29, 1994, the district court sentenced Curtis to five years probation and ordered him to pay \$413,112 in restitution and a special assessment of \$50.

Pitt, who was purportedly investigating securities violations in the Central District of California, was actually providing confidential information to Curtis enabling him to perpetrate a fraudulent securities scheme in the Eastern District of New York ("EDNY").¹ The United States Attorney's office for the EDNY commenced its own investigation and indicted Curtis on securities fraud charges in September, 1996 (the "New York Indictment"). Curtis pled guilty to the New York Indictment on March 7, 1997, admitting to conspiring to engage in securities fraud with the other parties named in the indictment, as well as to two other counts in the indictment.

¹Pitt was subsequently indicted in the Central District of California and pled guilty to wire fraud and conflict of interest charges there in May of 1997. Pitt acknowledged receiving funds from someone on Curtis' behalf in connection with Pitt's appearance at Curtis' sentencing in Texas.

On May 5, 1998, this Court sentenced Curtis to 51 months imprisonment, three years supervised release and a \$300 special assessment. On September 9, 1998, while Curtis' § 2255 petition was pending in the EDNY, Judge Solis revoked Curtis' probation based on Curtis' plea to the New York Indictment and sentenced Curtis to an additional 45-month term of incarceration.

Discussion

Petitioner's claim of ineffective assistance of counsel at and prior to his plea of guilty here is that his counsel erred by failing to move for a dismissal of the New York Indictment. Curtis contends that the New York Indictment violated the Plea Agreement with the Northern District of Texas. Specifically, he claims that the EDNY was bound by the Plea Agreement, that the Plea Agreement immunized him from prosecution for the crimes to which he pled guilty in the EDNY, and that he relied upon such immunity from prosecution when he signed the Plea Agreement.

In challenging his conviction and sentence on the ground of ineffective assistance of counsel, the petitioner must successfully carry a heavy burden. First, he must show that counsel's performances "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). In making this evaluation, great deference must be given to counsel's judgment:

Because of the difficulties inherent in making an evaluation [of effectiveness], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; . . .

Strickland, 466 U.S. at 689.

Second, the petitioner “must show that there is a reasonable probability that, but for counsel’s alleged ineffectiveness, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. Both prongs of the Strickland test must be satisfied to establish ineffective assistance of counsel. See Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993).

In this case, petitioner is unable to satisfy either prong of Strickland, because his contention that his attorney should have moved to dismiss the indictment is wholly specious. Although Curtis claims that the Plea Agreement provided immunity for crimes committed and prosecuted in the EDNY, a cursory examination of that document reveals that it did not bind this district.

As a threshold matter, this Court notes that a “plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction.” United States v. Annabi, 771 F.2d 670, 673 (2d Cir. 1985) (per curiam) (citations omitted). The jurisdictional limits set forth in the Plea Agreement are precise:

This Plea Agreement *does not bind any United States Attorney outside* the Northern District of Texas, the Eastern District of North Carolina, the Western District of Oklahoma, and the Central District of California, nor does it bind any state or local prosecutor.

Plea Agreement at 2 (emphasis added). Petitioner argues that, despite the lucidity with which the jurisdictional limitations are delineated in the Plea Agreement, the EDNY was bound by that agreement. In support of this argument Curtis relies on several cases, a review of which is warranted.

Petitioner cites Santobello v. New York, 404 U.S. 257 (1971), for the proposition that an agreement in one district that forbids prosecution in another district is binding and enforceable. Pet. Mem. at 2. Curtis' reading of Santobello is flawed. In Santobello, a district attorney's office ignored the terms of a plea agreement by recommending a more severe sentence than the one promised by it at the time of the plea. 404 U.S. at 262. In "the interests of justice," the Court remanded the case to the state court to reconsider whether specific performance of the plea agreement was necessary. Id. at 262-63. Santobello did not address the inter-district binding force of a plea agreement. As such, it is distinguishable from the present case and does not assist Curtis' petition.

Likewise, Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), on which petitioner also relies, is equally unavailing. In Palermo, the defendants pled guilty in reliance on promises made by the prosecutor. When the prosecutor failed to carry out his promise, the defendants sued for specific performance. The Second Circuit, relying on Santobello, concluded that defendants who plead guilty based on prosecutorial promises have a right to have those promises fulfilled. 545 F.2d at 296. The Palermo Court did not address the factual situation of this case. Curtis was not promised that he would not be prosecuted in New York.

Finally, petitioner points to United States v. Lieber, 473 F.Supp. 884 (E.D.N.Y. 1979), in support of his claim that the EDNY was bound by the Plea Agreement. Lieber is similarly unhelpful to Curtis. In Lieber, the defendants sought specific performance of a plea agreement made prior to the formal offer and acceptance of the plea. Id. at 890. The indictment, which was initially brought in the District of New Jersey, was subsequently transferred to the

EDNY. The court found the New Jersey prosecutor's agreement binding because both parties erroneously believed the prosecutor had the authority to bind the EDNY to the terms of the agreement. In the present case, the Texas prosecutors were under no such illusion. Lieber, in making its fact-specific holding, was careful to point out that it still adhered to the general rule that "a promise of immunity made by a United States Attorney in one district cannot bind a United States Attorney in another district." 473 F.Supp. at 892 (citation omitted). Accordingly, Lieber is plainly inapplicable.

Curtis also argues that the New York Indictment was barred by the Plea Agreement because the securities fraud schemes underlying the New York Indictment were "related to" and "made known to" the parties at the time they entered into the agreement. Pet. Decl. at 2. Petitioner's representation of the facts is inaccurate. On its face, the Texas Agreement limits Curtis' immunity as follows:

[The government will] bring no prosecutions for any other financial crimes related to banking transactions in the Northern District of Texas, the Eastern District of Texas, the Eastern District of North Carolina, the Western District of Oklahoma, and the Central District of California, to the extent such activities have been disclosed to the Government or were known by the Government as of the date this agreement is signed

Plea Agreement at 4.

The Plea Agreement does not preclude prosecution for the crimes charged in the New York Indictment because those crimes continued to be committed after Curtis signed the Plea Agreement and are therefore not "related to" the Texas bank fraud crimes. See Annabi, 771 F.2d 670, 673 (2d Cir. 1985) (criminal activity engaged in by defendant after the date of the plea agreement was not related to initial conduct for the purposes of mounting double jeopardy claim). In addition, the Plea Agreement provided that if Curtis were to knowingly violate any

Federal, State or local laws, the immunity conferred by the Agreement would be revoked. Plea Agreement at 3, 6-7. Accordingly, even assuming *arguendo* a relationship between the New York and Texas conduct could be found, Curtis' immunity would have been revoked by his subsequent criminal conduct.

Based on this Court's review of the record and applicable case law, it is clear that Curtis' claim of ineffective assistance of counsel fails to satisfy the Strickland standard. It was objectively reasonable for petitioner's trial counsel not to move to dismiss the indictment, as such a motion would have been frivolous and would not have changed the outcome of the proceeding.

Finally, petitioner seeks a hearing to which he is not entitled. Pet. Mem. at 3. The language of § 2255 states that "[u]nless the motion and the files and records conclusively show that the prisoner is entitled to no relief, the court . . . shall grant a prompt hearing." 28 U.S.C. § 2255. As a result, this circuit looks "with disfavor on summary rejection of a habeas petition when it is supported by a 'sufficient affidavit.'" United States v. Aiello, 814 F.2d 109, 113 (2d Cir. 1987). However, the Second Circuit reminds us that:

Not every application that is supported by a set of facially meritorious allegations will survive a motion to deny the writ. To warrant plenary presentation of evidence, the application must contain assertions of fact that a petitioner is in position to establish by competent evidence. See Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Dalli v. United States, 491 F.2d 758, 761 (2d Cir. 1974). Whether there is a genuine issue of material fact depends upon the sufficiency of those factual allegations. *Airy generalities, conclusory assertions and hearsay statements* will not suffice because none of these would be admissible evidence at a hearing.

Aiello at 113-14 (emphasis added).

In this case, Curtis does not even make "facially meritorious allegations." With

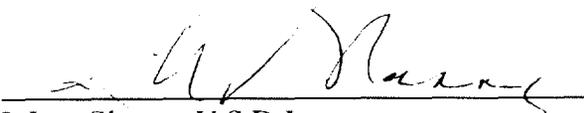
respect to his declaration, it is no “more than a bare, unsubstantiated, thoroughly self-serving, and not too plausible statement” United States v. Castillo, 14 F.3d 802, 805 (2d Cir. 1994) (quotation omitted). Accordingly, as petitioner has done no more than present “conclusory assertions” an evidentiary hearing is not required.

CONCLUSION

For the foregoing reasons, petitioner’s motion is denied.

SO ORDERED.

Dated: Brooklyn, New York
October 26, 1998


I. Leo Glasser, U.S.D.J.

Copies of the foregoing order were mailed to:

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