98CV04252-LL-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NESTOR MANUEL CANCEL-HERNANDEZ,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

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CV 98-4252 (RR)

Memorandum and
ORDER

APPEARANCES

NESTOR CANCEL-HERNANDEZ
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Petitioner Pro Se

HONORABLE ZACHARY W. CARTER
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EASTERN DISTRICT OF NEW YORK
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By: Michael Tarbutton
Assistant U.S. Attorney
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c/m

P-049

RAGGI, District Judge:

Nelson Manuel Cancel-Hernandez was convicted after a jury trial in this district of two counts of conspiring to traffic in drugs. Because of the high volume of his drug trafficking and his extensive criminal history, Cancel-Hernandez's guidelines provided for a severe sentence of 360 months to life imprisonment. On January 19, 1996, this court sentenced Cancel-Hernandez to two concurrent terms of 360 months in prison, the sentence to run consecutively to a 99-year term that he was already serving for the murder of a federal witness. The Second Circuit upheld this conviction in an unpublished order. See United States v. Cancel-Hernandez, 116 F.3d 466 (2d Cir. 1997) (table). Cancel-Hernandez now presents this court with a pro se petition to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. He submits that the government's use of an accomplice witness with whom it had reached a cooperation agreement violated 18 U.S.C. § 201(c)(2). He further contends that both his trial and appellate counsel were constitutionally ineffective for failing to challenge the use of this witness. In his initial filing, Cancel-Hernandez also complained that trial

counsel was ineffective in preventing him from testifying in his own behalf. He has now withdrawn that claim.[1]

This court has reviewed the submissions of both sides as well as the relevant parts of the trial record. It finds no merit to petitioner's claims. Accordingly, the § 2255 petition is denied.

Discussion

Cancel-Hernandez contends that his conviction must be vacated because it was based, in part, on the testimony of an accomplice witness with whom the government had entered into a cooperation agreement in violation of 18 U.S.C. § 201(c)(2). Since this argument was not raised on direct appeal, this court cannot address its merits unless petitioner can show both good cause to

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[1]In its response, the government cited those portions of the trial record that demonstrate that when, after summations were concluded, Cancel-Hernandez advised the court that he wished to testify, the court indicated that it would reopen the case to allow him to do so. (Trial Tr. 966-77.) After consulting with counsel, petitioner chose not to testify (id. at 979), a decision he confirmed to the court in an independent colloquy (id. at 982-83).

excuse his procedural default of the issue and ensuing prejudice. See United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1997).

Cancel-Hernandez endeavors to establish the requisite cause for his default by citing the ineffective assistance of his appellate counsel. See id. at 261. Indeed, he asserts that both trial and appellate counsel were constitutionally ineffective for failing to challenge the government's use of a witness with a cooperation agreement. To establish ineffective assistance of counsel, a petitioner must demonstrate both that counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," Strickland v. Washington, 466 U.S. 668, 687 (1984); and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. Accord Bethea v. Artuz, 126 F.3d 124, 126-27 (2d Cir. 1997) (per curiam) (same); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir.) (applying Strickland test to a challenge to appellate counsel), cert. denied, 513 U.S. 820 (1994). Petitioner cannot satisfy either

prong of the Strickland test. It was not objectively unreasonable for his attorneys not to challenge the government's use of a cooperating witness since no court had held such conduct violative of 18 U.S.C. § 201 until this year. See United States v. Singleton, 144 F.3d 1343 (10th Cir.), vacated and rehearing en banc granted, 144 F.3d 1361 (10th Cir. 1998); see also Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (counsel's omission must be viewed in light of law applicable at the time). In any event, he cannot demonstrate prejudice from his attorneys' omission since his § 201 claim is without merit.

Section 201 makes it a federal crime for any person to give, offer, or promise "anything of value to any person, for or because of the testimony under oath . . . given or to be given by such person as a witness upon a trial . . . before any court . . . authorized by the laws of the United States to hear evidence or take testimony. . . ." 18 U.S.C. § 201(c)(2) (1969 & Supp. 1998). Although a panel of the Tenth Circuit recently held that the statute was violated whenever prosecutors entered into cooperation agreements with potential witnesses holding out the possibility of a more lenient sentence in exchange for truthful testimony

at trial, see United States v. Singleton, 144 F.3d at 1343, this court declines to follow that holding.

Preliminarily, the court notes that Singleton is no longer controlling law even in the courts of the Tenth Circuit. That Court of Appeals vacated the original panel decision and has set the case down for rehearing en banc. See United States v. Singleton, 144 F.3d 1361 (10th Cir. 1998). In any event, this court is not bound to follow the rulings of any circuit other than the Second, except to the extent it finds their reasoning persuasive. This court is not persuaded by the reasoning in the original Singleton opinion.

Cooperation agreements, such as the one at issue in this case, are not mere contracts between private parties. They are entered into on behalf of and binding on the sovereign, the United States of America. As Judge Koeltl of the Southern District of New York recently observed in refusing to apply Singleton to a case before him, the United States is not generally bound by a federal statute such as § 201 "unless the Government is expressly included within its scope." United States v. Mejia, No. 98-CR-4, 1998 WL 598098

(S.D.N.Y. Sept. 8, 1998). To the extent that it is individual prosecutors, not the United States government, who are alleged to have violated § 201, this court rejects Singleton's conclusion that suppression of the cooperating witness's testimony is a necessary deterrent. If Singleton's interpretation of § 201 is correct, this court is confident that the threat of criminal prosecution is adequate to deter any misconduct by federal prosecutors.

In fact, this court does not think that the conduct here at issue violates the criminal prohibition of § 201. While the statute must be given its plain meaning, it cannot be read out of its historical and statutory context. This includes the established tradition of affording leniency to cooperating accomplices, which, as Judge Keenan of the Southern District of New York has noted in another case rejecting Singleton, "dates back to the common law of England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission." United States v. Barbaro, No. 98-CR-412, 1998 WL 556152 (S.D.N.Y. Sept. 1, 1998). Indeed, the practice is recognized and approved in a variety of federal statutes, including 18 U.S.C. §§ 6001-6005, which authorizes immunity in return for the

testimony of individuals who would otherwise have the right to invoke the protections of the Fifth Amendment; 18 U.S.C. § 3553(e), which authorizes sentences below mandatory minimums in return for a defendant's substantial assistance in the investigation or prosecution of another person; and 28 U.S.C. § 994(n), which directs the United States Sentencing Commission to take substantial assistance into account in framing sentencing guidelines. See also U.S.S.G. § 5K1.1 (allowing prosecutor to move for downward departure from guideline sentencing range for a defendant who has provided substantial assistance in the investigation or prosecution of another person); Fed. R. Crim. P. 35(b) (giving prosecutor one year after imposition of sentence to move for reduction of sentence to reflect a defendant's subsequent substantial assistance).[2]

The Singleton panel sought to reconcile its interpretation of § 201 with this body of law by holding that the "substantial assistance" referred to in these statutes did not include witness testimony: "a defendant can substantially

[2]The court further recognizes that Congress sanctions law enforcement authorities giving "things of value" to cooperating witnesses by appropriating moneys for the Witness Protection Program and a host of reward and compensation programs administered by law enforcement agencies.

assist an investigation or prosecution in myriad ways other than by testifying." United States v. Singleton, 144 F.3d at 1355. This conclusion does not comport with common sense. Under Singleton's interpretation of the relevant statutes, government attorneys could hold out the possibility of a sentencing reduction to a person who provided intelligence behind closed doors and without any public scrutiny of his information. It would be a crime, however, to enter into the same agreement with someone who provided assistance publicly, under oath, and subject to cross-examination and jury scrutiny. The court declines to interpret § 201 to yield a result so plainly at odds with the larger public interest.

In declining to find the government's use of a cooperating witness violative of § 201, the court follows the vast majority of district courts who have been presented with and rejected Singleton-based challenges. See United States v. Mejia, 1998 WL 598098 at *1; United States v. Barbaro, 1998 WL 556152 at *3; United States v. McGuire, No. 98-40047-01-DES, 1998 WL 564234 (D. Kan. Aug. 19, 1998); United States v. Gabourel, 9 F. Supp.2d 1246, 1246-47 (D. Col. 1998); United States v. Pungitore, Nos. CIV. A. 97-2972, CR. 88-

00003-09, 1998 WL 470136, at *4 n.2 (E.D. Pa. Aug. 5, 1998); United States v. Guillaume, No. 97-6007-CR, 1998 WL 462199 (S.D. Fla. Aug. 3, 1998); United States v. Eisenhardt, 10 F. Supp.2d 521, 521-22 (D. Md. 1998); United States v. Reid, No. Crim. A. 3:98CR64, 1998 WL 481459 (E.D. Va. July 28, 1998); United States v. Arana, No. 95-CR-80272, 1998 WL 420673 (E.D. Mich. July 24, 1998); United States v. Duncan, No. Crim. A. 97-217, 1998 WL 419503 (E.D. La. July 15, 1998). But see United States v. Lowery, No. 97-368-CR-ZLOCH, 1998 WL 493818 (S.D. Fla. Aug.4, 1998) (adopting Singleton and excluding testimony of cooperating witness).

This part of Cancel-Hernandez's challenge to his conviction is rejected on the merits.

Conclusion

Because the court finds no merit in Cancel-Hernandez's claim that it was unlawful for the government to call a witness at trial with whom it had

entered into a cooperation agreement, the court hereby rejects petitioner's § 201 and Sixth Amendment challenges to this conduct. The petition for a writ of habeas corpus is denied. The court grants a certificate of appealability on petitioner's § 201 claim.

SO ORDERED.

Dated: Brooklyn, New York
October 5, 1998

REENA RAGGI
UNITED STATES DISTRICT JUDGE