UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	NO. 3:91CR46(EBB) NO. 3:00CV772(EBB)
DOMINGO SANTANA-CORCINO	:	

RULING ON MOTION TO VACATE,
SET ASIDE OR CORRECT SENTENCE

Domingo Santana-Corcino has moved, pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct his sentence alleging that his guilty plea to the charge of failure to appear was not knowingly and intelligently entered because his counsel had not informed him that he had a viable defense of coercion and duress. Petitioner claims had he known of such a defense, he would have proceeded to trial. He further claims that counsel was ineffective at the sentencing stage because she failed to object to what petitioner claims is an illegal consecutive sentence imposed by the court and did not argue for a downward departure on the basis of the alleged coercion and duress.

Procedural History

On July 16, 1991, petitioner and a codefendant were indicted in a two-count indictment charging them with conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 and with attempting to possess with intent to distribute and to

distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Petitioner was released from pre-trial custody on October 22, 1991, upon the filing of a secured property bond and thereafter failed to appear for jury selection on January 21, 1992. A bench warrant was issued on January 22, 1992, and on December 16, 1992, a second indictment was returned against petitioner, charging him with the failure to appear for jury selection in violation of 18 U.S.C. § 3146(a)(1).

Petitioner was arrested on January 8, 1998, by deputies of the United States Marshal Service in New York City and was at that time in possession of two drivers' licenses bearing his picture but under a different name.

Following this arrest, his original counsel moved to withdraw because of the potential need for his testimony if petitioner were to go to trial on the failure to appear charge and an attorney from the office of the Federal Public Defender was appointed to represent him.

On July 1, 1998, petitioner pled guilty to the conspiracy count in the first indictment and to the failure to appear charge in the second indictment. In his presentence investigation report petitioner's guideline range was calculated at 97 to 121 months, as follows: the two counts to which petitioner had pled were grouped pursuant to USSG §3D1.2(c). The offense level from USSG §2D.1 was used because it was higher

than the level for the obstruction offense. Petitioner having been responsible for nine kilograms of cocaine, his base offense level was thirty-two in accordance with USSG §2D1.1(c)(4). Having determined petitioner met the criteria under USSG 5C1.2, the so-called Safety Valve,[1] a two-level deduction was accorded pursuant to USSG §2D1.1(b)(6). A two-level increase was applied for obstruction of justice pursuant to USSG §2J1.6, comment. (n.3) and §3C1.1, comment. (n.7) and a two-level deduction was made for acceptance of responsibility under USSG §3E1.1(a),, resulting in an adjusted offense level of 30. Petitioner, having no prior convictions, was placed in criminal history category 1. The court accepted the calculations in the presentence report and on September 18, 1998, sentenced petitioner to a term of 108 months.

Petitioner appealed his sentence alleging error in the court's denial of a two-level reduction in his offense level for a minor role in the drug conspiracy. On June 23, 1999, the Court of Appeals for the Second Circuit affirmed this court's judgment.

Validity of Guilty Plea

Petitioner alleges that, prior to the date of jury selection, he and his family were threatened in anonymous

[1]Ironically, had petitioner been convicted on the drug charge and sentenced in 1992, he would not have been afforded safety valve consideration and would have faced a mandatory minimum penalty of ten years.

telephone calls received by his sister, which demanded petitioner's silence with respect to his codefendant. The government was apparently aware of this claim as indicated by the remarks of the Assistant United States Attorney at the sentencing of petitioner's codefendant on February 7, 1992.[2]

Petitioner claims had his attorney told him he had a viable coercion and duress defense to the failure to appear charge, he would not have pleaded guilty to that charge but would have proceeded to trial.[3]

"Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)

Counsel's performance is subject to evaluation under the familiar standards of Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must show that counsel's assistance was deficient in failing to inform him of a potential coercion and duress defense and, thus fell below an objective standard of reasonableness and that petitioner was prejudiced as a result.

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[2]"Mr. Santana has also indicated he has received threats and he also asked to be removed from the same facility." Transcript of Estrada sentencing, p. 12.

[3]Petitioner makes no claim that his guilty plea to the drug charge was not voluntarily and knowingly entered.

The prejudice inquiry resolution will "depend largely on whether the affirmative defense likely would have succeeded at trial." Hill, 474 U.S. at 59.

Petitioner was charged with failure to appear under 18 U.S.C. § 3146. Subsection (c) of section 3146 sets forth the affirmative defense to that charge as follows: "It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist."

Assuming the truthfulness of petitioner's claim of threats to his family if he did not remain silent about his codefendant (Transcript of petitioner's sentencing, p. 7, 17-19) he apparently sought no assistance from the government except for a transfer to a different institution when he was being held prior to posting bond nor did he seek protection for his family. After his release he left the United States and spent an unspecified time in the Dominican Republic. He then returned to this country using a false name to avoid arrest (Id. p. 15) and evaded rearrest until he was found by the United States Marshal Service in New York City almost six years after his scheduled court appearance. Petitioner did not take reasonable steps to avoid his illegal conduct such as seeking government protection

for himself and his family and it is patently clear he had no intention of surrendering to the authorities although the case against his codefendant had been resolved in February, 1992. To be entitled to the assertion of the defense, petitioner would have to offer evidence justifying not only his initial failure to appear but also evidence of "a bona fide effort to surrender...to custody as soon as the claimed duress or necessity had lost its coercive force." United States v. Bailey, 444 U.S. 394, 412-413 (1980)

On these facts petitioner's evidence would be legally insufficient to entitle him to assert a coercion and duress defense for submission to a jury and his counsel's decision not to suggest such a defense was objectively eminently reasonable and caused petitioner no prejudice.

Sentencing Issues

Petitioner maintains his sentence is illegal because his offense level was increased by two points for obstruction of justice based on his failure to appear and the court also imposed a consecutive sentence for the same failure to appear. He alleges his counsel's assistance was ineffective in conceding the propriety of the court's sentencing rationale and not raising the issue in the course of petitioner's appeal.

Petitioner's sentence was imposed in accordance with the directives of Application Note 3 to USSG § 2J1.6 which calls for grouping of the underlying offense and the failure to appear.

The note explains "The combined sentences will then be constructed to provide a 'total punishment' that satisfies the requirements of both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive failure to appear count has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)"

Here, the court determined that a total punishment of 108 months was appropriate and indicated this reflected a term of 97 months for the drug conviction and 11 months consecutive for the failure to appear conviction. Sentencing Transcript, Santana-Corcino, at 32-33

Petitioner's motion [Doc. No. 29] is denied. A certificate of appealability will not issue, petitioner having failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

SO ORDERED.

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ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, CT, this _____ day of April, 2001.