

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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CARMELO SANTIAGO, :
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 : Movant, :
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 : v. : Crim. No. 3:98CR00196 (AWT)
 : Civ. No 3:02CV02314 (AWT)
 UNITED STATES OF AMERICA, :
 :
 : Respondent. :
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RULING ON MOTION PURSUANT TO 28 U.S.C. § 2255

Carmelo Santiago, proceeding pro se, has filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. Santiago claims that he is entitled to relief because his attorney provided ineffective assistance of counsel. The court held an evidentiary hearing on February 9, 2004, and Santiago's motion is being denied because there is no factual basis for any of his claims.

I. Procedural and Factual Background

Santiago was charged in a three-count indictment returned in October of 1998. Count One of the indictment charged him with being a felon in possession of a firearm, i.e., a Hi-Point, Model C, 9 millimeter, semi-automatic pistol, in violation of 18 U.S.C. § 922(g)(1). Count Two charged him with being a felon in possession of a firearm, i.e., an Intratec, Model TEC-22, .22 caliber semi-automatic pistol, with an obliterated serial number, in violation of 18 U.S.C. § 922(g)(1), and Count Three charged

him with possession of a firearm with an obliterated serial number, based on his possession of the firearm specified in Count Two, in violation of 18 U.S.C. § 922(k).

Santiago filed a motion to suppress certain inculpatory statements made by him to a federal agent shortly before his indictment; he also sought a Franks hearing. On April 11, 2000, the court held an evidentiary hearing in connection with Santiago's motion for a Franks hearing, and Santiago and others testified at the evidentiary hearing. The court found that Santiago's testimony was not credible and issued a written opinion denying Santiago's motion to suppress his statements and his motion for a Franks hearing.

Shortly before the scheduled trial date, Santiago pled guilty to Count Two of the indictment. On the day of sentencing, March 8, 2002, the court made findings with respect to the objections to the Presentence Report, which had been asserted on behalf of Santiago by his counsel, Attorney Norman A. Pattis. In determining Santiago's total offense level, the court found, over objection, that a four-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(5) was appropriate because the defendant used or possessed a firearm in connection with another felony offense. The court also gave Santiago a two-level enhancement, over objection, pursuant to U.S.S.G. § 3C1.1 for obstruction of justice. The court found, inter alia, that the defendant had

committed perjury on three occasions: (1) in submitting an affidavit dated August 11, 1999; (2) in submitting an affidavit dated March 14, 2000; and (3) in testifying at the evidentiary hearing on April 11, 2000. The court sentenced Santiago to a term of imprisonment of 120 months, to be followed by three years of supervised release. Santiago did not file a notice of appeal.

Santiago has filed a motion to vacate his sentence, claiming he was denied effective assistance of counsel. He identifies three specific grounds for relief: first, that his counsel failed to object to the enhancements pursuant to U.S.S.G. §§ 2K2.1(b)(5) and 3C1.1; second, that his counsel "failed to inform [him] of a conditional plea or to request [a] conditional plea to preserve his pre-trial motion to suppress"; and third, that his counsel failed to file a notice of appeal as requested.

(Movant's Mot. (Doc. #133) at 4.)

II. Legal Standard

There are four grounds upon which a federal prisoner may move to vacate or set aside a conviction and sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. Hill v. United States, 368 U.S. 424, 426-27 (1962) (citing 28 U.S.C.A. § 2255). Section 2255, however, does

not provide a remedy for "all claimed errors in conviction and sentencing." United States v. Addonizio, 442 U.S. 178, 185 (1979). Rather, it is intended to redress only "fundamental defect[s]" which result in a miscarriage of justice and "omission[s] inconsistent with the rudimentary demands of fair procedure." Hill, 368 U.S. at 428.

Section 2255 provides that the district court should grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C.A. § 2255 (West 2004). This language "does not strip the district courts of all discretion to exercise their common sense." Machibroda v. United States, 368 U.S. 487, 495 (1962). To be entitled to a hearing, the movant must allege specific facts to support his or her claim. "The petitioner must set forth specific facts which he is in a position to establish by competent evidence." Dalli v. United States, 491 F.2d 758, 761 (2d Cir. 1974).

A § 2255 motion may be dismissed without a hearing if, after a review of the record, the court determines that the motion is without merit because the allegations are insufficient as a matter of law. See Johnson v. Fogg, 653 F.2d 750 (2d Cir. 1981). In making its determination regarding the necessity of a hearing, the district court may draw upon its personal knowledge and recollection of the case. See United States v. Aiello, 900 F.2d

528, 534 (2d Cir. 1990); Machibroda, 368 U.S. at 495.

III. Discussion

The court concludes that there is no factual basis for any of Santiago's claims. As to Santiago's first two claims, the court was able to make this determination based solely on the papers and the prior proceedings in the case. With respect to Santiago's third claim, however, the court concluded that an evidentiary hearing was appropriate.

A. Enhancements Pursuant to U.S.S.G. §§ 2K2.1(b)(5) and 3C1.1.

Santiago claims that his counsel did not object to the sentencing enhancements pursuant to U.S.S.G. §§ 2K2.1(b)(5) and 3C1.1. Both of these enhancements were recommended by the United States Probation Office in the Presentence Report. Attorney Pattis filed written objections to the Presentence Report on January 22, 2002. (See Doc. #115.) Paragraph 2 of that document set forth the defendant's objection to an enhancement for obstruction of justice, and Paragraph 4 of that document set forth the defendant's objection to the four-level enhancement for possession of a firearm in connection with the commission of another felony offense. Thus, there is no factual basis for this claim by the defendant.

B. Conditional Plea Offer

Santiago appears to argue that his counsel failed to advise him of the "option" of entering a conditional guilty plea and failed to attempt to negotiate a plea agreement that would have expressly preserved Santiago's right to appeal the court's ruling denying his motion to suppress evidence. Federal Rule of Criminal Procedure 11(a)(2) provides that:

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

The language of Rule 11(a)(2) makes it clear that the defendant does not have an "option" to enter a conditional plea of guilty. Such a plea may be entered only with the consent of the court and the government. The government's response to Santiago's § 2255 motion makes it clear that it would not have consented to the entry of a conditional plea by Santiago. (See Gov't Mem. (Doc. #136) at 3-4.) Moreover, even if the government had consented to the entry of such a plea by Santiago, the court would not have consented to the entry of any such plea because, on the date the court accepted Santiago's plea, it had already concluded that Santiago had perjured himself in proceedings before the court. Thus, there is no factual basis for Santiago's second claim.

C. Notice of Appeal

_____In support of his § 2255 motion, Santiago filed an affidavit swearing that he had requested that Attorney Pattis file a notice of appeal so that he could appeal the court's findings at sentencing and that his counsel failed to do so. As part of its opposition to Santiago's motion, the government submitted an affidavit from Attorney Pattis, which included the following statement:

Following imposition of sentence, I reviewed Mr. Santiago's options with him. I asked him whether he wanted to take an appeal and told him that I did not see promising issues that he could appeal. He told me that he did not want a notice of appeal filed. Accordingly, I did not file a notice of appeal. If Mr. Santiago had expressed his desire to pursue an appeal, I would have filed a notice of appeal.

(Aff. of Norman A. Pattis, March 6, 2003, Gov't Mem. (Doc. #136), Ex. A. ¶ 5.)

In response to Attorney Pattis' affidavit, Santiago submitted an affidavit sworn to by Santiago's girlfriend, Ivelisse Rivera, wherein Ms. Rivera swore:

- 1) That I have reviewed the affidavit of Attorney Norman A. Pattis.
- 2) That after carefully reviewing Mr. Pattis' affidavit in regard to Carmelo Santiago's request to appeal his sentence, Mr. Pattis is incorrect.
- 3) That I was present during the meeting between Mr. Pattis and Santiago and I remember the request that an appeal be filed because of the two enhancements being given to Mr. Santiago.
- 4) Based on my understanding, it was understood, that counsel

would object to the sentence enhancements and appeal any rejections from the Court.

5) That it is true Mr. Pattis felt that an appeal would be meritless, but, Mr. Santiago never agreed to waive his appeal rights and did request counsel to file direct appeal.

6) That I would be willing to testify to the above statements in open court.

(Aff. of Ivelisse Rivera, April 3, 2003, Movant's Reply (Doc. #146), Ex. B.)

Based on Rivera's affidavit, the court concluded that an evidentiary hearing was necessary. A hearing was held on February 9, 2004, with Santiago present by telephone. Santiago contended that he had discussed appealing his sentence with Attorney Pattis on several occasions at Attorney Pattis' office in New Haven prior to the day of Santiago's guilty plea; Rivera supports him in this contention. Santiago also contended that he had discussed appealing his sentence with Attorney Pattis approximately one week prior to the day of sentencing, when Santiago, Rivera and Pattis were present at the courthouse for a bond revocation hearing where Santiago was remanded into custody; Rivera supports Santiago in this contention also.

In addition, Santiago contended that at the end of the sentencing hearing, while Santiago and Attorney Pattis were still at the defense counsel table, Santiago turned to Pattis and instructed him to file an appeal. Pattis testified that he had a conversation with Santiago immediately after sentence was imposed

concerning whether Santiago wanted to appeal. Pattis testified that he asked Santiago whether he understood that he had ten days within which to file an appeal, and that Santiago was very emotional but said that he understood. Pattis testified further that he asked Santiago whether Santiago wanted an appeal filed and that Santiago told him not to bother. Also, Pattis testified that he informed Santiago that he should call Pattis collect if he changed his mind. It is undisputed that the only two witnesses to this conversation are Santiago and Pattis.

Finally, Santiago contended that right after he was taken from the courtroom by the marshals, he had a meeting with Attorney Pattis in the lockup, and that he also instructed Pattis at this meeting to file an appeal. Pattis testified that he cannot recall having any conversation with Santiago in the lockup after the sentencing and testified further that he has no doubt that when he directly asked Santiago whether he wanted an appeal taken, Santiago informed Pattis that he did not want to pursue an appeal.

Rivera testified that the affidavit she signed was drafted by Santiago and that her understanding was that the meetings referred to in Paragraph 3 of her affidavit were meetings that took place in Attorney Pattis' office in New Haven prior to the day of sentencing. She also testified that she never was present during any conversation between Santiago and Pattis on or after

the day of sentencing.

At one point during her testimony, Rivera made reference to having a conversation with Attorney Pattis in the hallway after he had come from a meeting with Santiago held right after the sentencing hearing had ended and everyone had left the courtroom, thereby tending to suggest that Pattis met with Santiago in the lockup. However, it became clear later in Rivera's testimony that when she encountered Attorney Pattis in the hallway after the sentencing, he was not coming from the lockup. Rivera and Pattis were on the second floor of the building, which is the location of the courtroom in which Santiago was sentenced. Attorney Pattis was coming down a side hallway, from the side of the building on which that courtroom is located. The marshals had promptly taken Santiago to the lockup, which is on the third floor of the building. Because the second floor is a secured floor, Pattis could not have been coming from the lockup at the time he stopped to speak with Rivera after the sentencing hearing ended.

The court concludes that Santiago was untruthful when he contended that he had instructed Attorney Pattis to file an appeal on his behalf while the two of them were still at the defense counsel table at the end of the sentencing hearing, and it credits Attorney Pattis' version of the conversation. The court also concludes that Santiago was untruthful when he

contended that he had met with Attorney Pattis in the lockup right after the sentencing hearing and had again instructed Pattis to file an appeal; there was no meeting in the lockup after the sentencing hearing. Thus, the court concludes that the only instruction given by Santiago to his counsel after the sentence was imposed was to not bother pursuing an appeal. Accordingly, there is no factual basis for Santiago's third claim.

IV. Conclusion

For the reasons set forth above, Santiago's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. #133) is hereby DENIED. The court will not issue a certificate of appealability because Santiago has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2255(c) (2).

The Clerk shall close this case.

It is so ordered.

Dated this _____ day of February 2004, at Hartford,
Connecticut.

/s/
Alvin W. Thompson
United States District Judge