IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 10-524-1
	:	
v.	:	
	:	
SHACOY McNISH	:	CIVIL NO. 13-892

REPORT AND RECOMMENDATION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: December 9, 2013

This is a motion to vacate, set aside, or correct sentence by Shacoy McNish, a person currently in federal custody, under 28 U.S.C. § 2255. For the following reason, I recommend that McNish's motion be denied.

I. Factual and Procedural Background

On March 24, 2011, a federal grand jury returned a third superseding indictment against Shacoy McNish, charging him with three counts of conspiracy, three counts of bank fraud, six counts of access device fraud, two counts of possessing and uttering counterfeit checks, one count of passing counterfeit U.S. currency, one count of fraud in connection with identification information, one count of providing false information to a federal firearms licensee, one count of being a felon in possession of a firearm, and seven counts of aggravated identity theft. Third Superseding Indictment, filed as Document No. 60. All of these counts except for the conspiracy counts were also accompanied by charges of aiding and abetting. Id.

The Honorable Berle M. Schiller bifurcated the case for trial. On April 7, 2011, a jury sitting in this Court convicted McNish of a number of the charges. Jury Verdict Form, April 7, 2011, filed as Document 82. On April 27, 2011, a second jury convicted McNish of all of the other charges, except for Charge 15, which pertained to being a felon in possession of a firearm.

Jury Verdict Form, April 27, 2011, filed as Document No. 101. The jury was not able to reach a verdict on this charge. Accordingly, Judge Schiller scheduled a third trial for August 9, 2011.

On that day, however, instead of proceeding to trial, McNish and the Government presented the Court with an agreement, executed on July 13, 2011. Agreement, attached to Government's Response as Exhibit 1. Pursuant to this agreement, the Government agreed to dismiss Count 15 at the time of sentencing. Id. at ¶ 1. In return, McNish waived his right to appeal or collaterally attack his convictions or sentencing on the other charges, "or any other matter relating to this prosecution." Id. at ¶ 2. The Agreement also provided that, if the Government appealed from the sentences imposed, McNish was free to file a direct appeal of his sentence. Id. at ¶ 2a. If the government did not appeal, McNish could directly appeal only a sentencing error or an unreasonable sentence. Id. at ¶ 2b.

On November 9, 2011, the Court sentenced McNish to a total of 156 months imprisonment. Judgment, filed as Document No. 121. On November 15, 2011, McNish filed a *pro* se direct appeal of his conviction and sentence in the Court of Appeals for the Third Circuit. Notice of Appeal, filed as Document 122. The Government, however, filed a motion to enforce the appellate waiver in the July 13, 2011 agreement, and for summary affirmance. This motion was granted by the Court of Appeals on February 1, 2012. USA v. McNish, No. 11-4178, Order of February 1, 2012, attached to Government's Response as Exhibit 3.

McNish filed this petition for § 2255 relief on February 21, 2013. In it, he raises 20 claims of ineffective assistance of counsel, arguing that his attorney was ineffective in: (1) failing to negotiate a binding plea agreement and in violating his Rule 11 Proceedings; and in failing to (2) represent him adequately in trial and appeal proceedings; (3) raise his defective arrest warrant; (4) produce rebuttal witnesses; (5) request a jury instruction on the admission of

testimony from an unrelated crime; (6) seek the exclusion of certain testimony; (7) file preliminary instructions "to protect petitioner from government witnesses post-trial and custodial statements"; (8) "raise that Petitioner was not in [a] conspiracy with the government witnesses"; (9) interview witnesses; (10) raise a speedy trial violation; (11) impeach witnesses; (12) raise prosecutorial misconduct; (13) challenge the grand jury information; (14) request a James hearing; (15) raise a confrontation clause claim with respect to the testimony of the bank's employees; (16) object to the introduction of Petitioner's criminal history points in sentencing; (17) raise Petitioner's 3553(a) factors, and argue that his criminal history category substantially overrepresented the seriousness of his crimes; (18) object to the victim enhancement for the bank; (19) refute "enhancements of victims and money loss"; and (20) contest his "leadership role" enhancement.

II. Discussion

McNish's claims may not be considered here because, in the written agreement he entered with the Government on July 13, 2011, he waived his right to any appeal, including collateral review such as a § 2255 petition. Such a waiver is upheld where it is found to be knowing and voluntary, and where its enforcement does not result in a miscarriage of justice. U.S. v. Mabry, 536 F.3d 231, 237 (3d Cir. 2008), U.S. v. Khattak, 273 F.3d 557 (3d Cir. 2001).

A defendant bears the burden of presenting an argument that his waiver was unknowing or involuntary. Mabry at 238-9. Nevertheless, the court has an affirmative duty both to examine the knowing and voluntary nature of the waiver and to assure itself that its enforcement would not work a miscarriage of justice. Id.

A. Knowing and Voluntary

In his argument in support of his first claim, McNish has argued that the judge "did not engage the petitioner regarding the basis and voluntariness of the plea." McNish's Memorandum of Law at 16. He also seems to assert that he was wrongly told that he could appeal his sentence if enhancements were applied. Finally, he claims that his counsel told him that "we can have you plea to Count 15 ... if you sign this plea you will only be sentence[d] to 5 years." Id.

First, it should be emphasized that this case does not concern a plea of guilty to any charge. On the contrary, pursuant to the July 13, 2011, agreement, the Government agreed to *drop* Count 15, in exchange for McNish's waiver of his appellate rights. Nor did McNish plead guilty to any other count: he was convicted by a jury on every count except Count 15. What is more, the Court granted McNish's motion for acquittal under Fed. R. Cr. Pr. 29, regarding his conviction for passing counterfeit U.S. currency. Transcript of August 9, 2011, Hearing, attached to Government's Response as Exhibit 2 at 5-20. Accordingly, the law pertaining specifically to the requirements for guilty plea negotiations, or a guilty plea colloquy, does not apply here.

Nevertheless, it is undisputed that Mabry and Khattak set forth the law concerning a waiver of appellate rights, even in circumstances which do not concern a guilty plea, such as this. It is appropriate, therefore, to look to the August 9, 2011, transcript to determine whether McNish's waiver (not his non-existent guilty plea) was knowing and intelligent.

Review of the transcript reveals that Judge Schiller recited the conditions of the Agreement on the record, and asked McNish if his recital accorded with McNish's understanding:

> THE COURT: All right. And as part of that agreement that at the time of sentencing on the remaining counts on which Mr. McNish was convicted the Government will move to

dismiss Count 15 alleging that Mr. McNish was a felon in possession of a firearm. Is that correct?

MR. DUBNOFF (the prosecuting government attorney): That's correct your Honor.

MR. ISENBERG (defense counsel): It is, Judge.

THE COURT: And in exchange for that Mr. McNish voluntarily and expressly waives all rights to appeal or collaterally attack his convictions on these remaining counts of which he's been convicted. Is that correct?

MR. DUBNOFF: It is, your Honor.

MR. ISENBERG: That is my understanding, your Honor.

THE COURT: Is that your understanding Mr. McNish?

THE DEFENDANT: Yes.

THE COURT: **You also**, defendant also agrees to waive, that means give up, any right to an appeal or collaterally attack any sentence he receives for his convictions except if the Government appeals from the sentences imposed the defendant may file a direct appeal of his sentence and if the Government does not appeal the defendant may only raise claims that his sentence exceeded the statutory maximum penalty or the judge improperly departed upward or granted an upward variance from the sentencing range as determined by the Sentencing Guidelines.

Is that correct?

MR. DUBNOFF: It is, your Honor.

THE COURT: Mr. Isenberg?

MR. ISENBERG: Judge, it is. … .

THE COURT: All right, is that your understanding, Mr. McNish?

THE DEFENDANT: Yes.

Transcript of August 9, 2011, Hearing, attached to Government's Response as Exhibit 2, at 3-4.

McNish's counsel also clarified that the waiver pertained only to post-sentencing appeals. It did not preclude the defense from raising any arguments at sentencing:

> MR. ISENBERG: The only thing, Judge, that I want to just state as a proviso is this **so that Mr. McNish understands**. Sentencing has not taken place as of yet and I want the Court to be clear **and Mr. McNish to be clear**, and of course Mr. Dubnoff, to understand our position that we at the time of sentencing can raise any arguments that we wish with respect to the issue of sentencing, any variances, any … departures of any kind that we're not barred from doing any of that.
>
> THE COURT: **You can raise them with me**.
>
> MR. ISENBERG: That's right.
>
> THE COURT: This agreement only deals with post-me.
>
> MR. ISENBERG: That is correct, Judge.

Id. at 5. Counsel asked: "**Mr. McNish, do you understand that**?", and McNish responded: "**Yes**." Id. at 5. (Bold supplied).

Clearly, McNish is wrong in arguing that the Court failed to engage him in determining whether he understood the agreement into which he entered. It is equally clear that McNish was not told that he could appeal sentence enhancements to a higher court. Rather, he was told that he retained the right to argue against such enhancements at the time of sentencing. Upon questioning from his counsel, McNish stated that he understood this. Further, it was clear from this interchange that McNish knew he had not yet been sentenced, and that there was likely to be argument at sentencing concerning "variances and departures." He therefore knew at that point, if not before the hearing, that his counsel was not in a position to guarantee him a five-year total sentence on his fourteen convictions.

In the absence of any apparent reason why McNish did not or could not understand what he was told on August 9, 2011, and any other specific argument as to how McNish might have been misled, the foregoing is sufficient to demonstrate that McNish's agreement to waive his appellate rights in exchange for the Government's agreement to dismiss Count 15 was knowing and voluntary.

B. Miscarriage of Justice

The Court of Appeals for the Third Circuit has said that a "miscarriage of justice" exception to a waiver is applied sparingly, without undue generosity. United States v. Wilson, 429 F.3d 455, 458 (3d Cir. 2005), quoting United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001). It is not sufficient that the petitioner has given up the right to appeal arguably meritorious issues:

> A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues – indeed, it includes a waiver of the right to appeal blatant error. Waiver would be nearly meaningless if it included only those appeals that border on the frivolous.

United States v. Khattak, 273 F.3d 557, 561-2 (3d Cir. 2001), quoting United States v. Howle, 166 F.3d 1166, 1169 (11th Cir. 1999).

The Khattak court declined to "earmark specific situations" in which the enforcement of an appellate waiver would work a miscarriage of justice. Khattak, supra, at 563. However, it cited cases from other circuits which identified several circumstances: (1) where the sentence imposed exceeded the maximum penalty provided by law; (2) where the sentence was based on a constitutionally impermissible factor such as race; and (3) where the plea agreement itself (here, the agreement to waive appeal in exchange for the dropping of a charge) was the product of ineffective assistance of counsel. Khattak at 562, citing United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000), and United States v. Joiner, 183 F.3d 635, 645 (7th Cir. 1999). Further, a waiver will not be enforced where it would bar an appeal to which the right is expressly preserved in the waiver agreement. Mabry, supra, at 536 F.3d 243.

A few of McNish's claims of ineffective assistance of counsel criticize his attorney's conduct during sentencing. However, McNish has not argued that his sentence was illegal or constitutionally impermissible, and it does not appear that such was the case. Nor is any of the

issues McNish seeks to appeal one in which the right to appeal was preserved by the July 13, 2011, agreement. See Mabry, supra, at 536 F.3d 243.

Further, to the extent that counsel urged McNish to waive his appellate rights in exchange for the Government's promise to drop Count 15, his assistance was not ineffective. As the Government has explained, if McNish had been convicted of being a felon in possession of a firearm, his combined adjusted offense level and total offense level would have been 31, rather than the 28 he received without the conviction. This could have led to a substantially longer sentence. Thus, enforcement of the July 13, 2011, agreement would not result in a miscarriage of justice.

The petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

IV. Conclusion

Based on the foregoing, I make the following:

R E C O M M E N D A T I O N

AND NOW, this 9th day of December, 2013, IT IS RESPECTFULLY RECOMMENDED that the motion to vacate, set aside, or correct sentence be DENIED. There is no basis for the issuance of a certificate of appealabilty.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE