IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STEVEN MICHAEL HERRERA,#71728-080	§	
VS.	§	CIVIL ACTION NO. 4:13CV228 CRIMINAL ACTION NO. 4:11CR45(1)
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant, a federal prisoner, filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

I. BACKGROUND

On March 20, 2007, Movant was convicted of theft of $20,00 - $100,000 in the 204th Judicial District Court of Dallas, Texas. He was sentenced to ten years' confinement, which was probated for ten years. On May 7, 2009, a motion to revoke his state probation was filed, alleging four violations, including the commission of two new offenses – unauthorized use of a motor vehicle and failure to identify.

On February 16, 2011, Movant was charged by a grand jury in the underlying criminal case. On May 5, 2011, pursuant to a plea agreement, Movant pleaded guilty to mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, respectively. Prior to sentencing, the Presentence Report was prepared. Movant's offense level was determined to be 14 with no points added as relevant

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conduct for any of his state convictions. One criminal history point was added for Movant's conviction for the unauthorized use of a motor vehicle. The court sentenced Movant to 33 months' imprisonment on each count, to be served concurrently. He did not file a notice of appeal. However, on November 19, 2012, Movant filed a motion to amend or correct sentence. In that motion, Movant argued that the court should amend his sentence to run concurrently with his state sentence for theft in the third degree, claiming that it was taken into account during the calculation of federal sentencing guideline range as part of his criminal history.

In Movant's § 2255 motion, he argues he is entitled to relief because counsel was ineffective for failing to raise the issue of his federal sentence running concurrently with his state sentence at the federal sentencing. He also claims counsel was ineffective for failing to make "clarifications to Defendant's sentence pursuant to Rule 35(a)." The Government filed a Response, asserting that Movant's claims are barred by the waiver in his plea agreement. Movant filed a Reply.

II. § 2255 PROCEEDINGS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-01 (5th Cir. 1992). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

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III. MOVANT'S GUILTY PLEA

Movant pleaded guilty pursuant to a written plea agreement. He also pleaded guilty at his change of plea hearing, and affirmed his guilt in various other documents.

PLEA AGREEMENT

Movant signed a plea agreement containing the following waiver provision:

> Except as otherwise provided herein, the defendant expressly waives the right to appeal the conviction, sentence, fine and/or order of restitution or forfeiture in this case on all grounds. The defendant further agrees not to contest the conviction, sentence, fine and/or order of restitution or forfeiture in any post-conviction proceeding, including, but not limited to a proceeding under 28 U.S.C. § 2255. The defendant, however, reserves the right to appeal the following: (a) any punishment imposed in excess of the statutory maximum and (b) a claim of ineffective assistance of counsel that affects the validity of the waiver or plea itself.

See Cause No. 4:11cr45 (dkt #20).

The Fifth Circuit has upheld the informed and voluntary waiver of post-conviction relief in *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). In *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995), the Fifth Circuit held that a waiver may not be enforced against a § 2255 movant who claims that ineffective assistance of counsel rendered that waiver unknowing or involuntary. In *United States v. White*, 307 F.3d 336 (5th Cir. 2002), the Fifth Circuit held that an ineffective assistance of counsel claim raised in a § 2255 proceeding survives a waiver only when the claimed assistance directly affected the validity of that waiver or the plea itself. More recently, the Fifth Circuit noted that it has upheld § 2255 waivers except for when there is an ineffective assistance of counsel claim that affects the validity of that waiver or the plea itself or when the sentence exceeds the statutory maximum. *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004).

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In Movant's plea agreement, Movant states:

> I have read or had read to me this plea agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

The plea agreement also states:

> The defendant has thoroughly reviewed all legal and factual aspects of this case with defense counsel and is fully satisfied with defense counsel's legal representation. The defendant has received satisfactory explanations from defense counsel concerning each paragraph of this Agreement, each of the defendant's rights affected thereby, and the alternatives to entering a guilty plea. After conferring with counsel, the defendant concedes guilt and has concluded that it is in the defendant's best interest to enter this Agreement rather than proceeding to trial.

Finally, Movant states in his plea agreement that the "plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises other than those set forth in this Agreement." Consequently, Movant's signed plea agreement shows that his guilty plea was knowingly and voluntarily made.

PLEA HEARING

At Movant's change of plea hearing, held on May 19, 2011, Movant states:

1. He understood the Consent form and discussed it fully with counsel;
2. He was satisfied with his counsel and his legal representation;
3. He understood the charges against him;
4. He understood the elements of the crime charged;
5. He understood the sentencing maximum was twenty years and that he is forfeiting a 2002 Maserati vehicle and cash proceeds greater than $100,000.00;
6. He discussed the sentencing guidelines with counsel;
7. He understood how the sentencing guidelines may apply to his case;

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8. He understood that the court would be unable to determine his sentencing guideline range until after the presentence report had been completed;

9. He understood that the sentence imposed could be different from any estimate his counsel, the Government, or the probation office may have given him;

10. There were no promises, force, or threats by anyone to induce him to plead guilty;

11. He understood that if the sentence is more severe than what he expected, he is still bound by his guilty plea; and

12. His guilty plea was freely and voluntarily given.

Formal declarations in open court carry a strong presumption of truth. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed.2d 136 (1977).

At the plea hearing, Movant affirmed that everything in the Factual Statement was true and correct. The court admonished Movant as to the charges against him and further explained the rights Movant was giving up by pleading guilty to a felony. Movant states that:

1. He understood the rights that he was waiving;

2. There were no promises made to him leading him to plead guilty; and

3. He was pleading guilty voluntarily, of his own free will, because he is guilty of the crime charged.

Formal declarations in open court carry a strong presumption of truth. *Allison*, 431 U.S. at 74, 97 S. Ct. at 1629. Although a defendant's attestation of voluntariness at the time of the plea is not an absolute bar to later contrary contentions, it places a heavy burden upon him. *United States v. Diaz*, 733 F.2d 371, 373-74 (5th Cir. 1984). Movant's plea hearing shows that his plea was knowing and voluntary.

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