

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	00-672-1
v.	:	
	:	CIVIL ACTION
ANDRE WILSON	:	NO. 02-8067

MEMORANDUM AND ORDER

McLaughlin, J.

December 1, 2004

Andre Wilson was convicted by a jury of conspiracy (in violation of 18 U.S.C. § 371), false statements (in violation of 18 U.S.C. § 924(a)(1)A and 18 U.S.C. § 2), and possession of a firearm after having been convicted of a crime punishable by imprisonment for more than one year (in violation of 18 U.S.C. § 922(g)(1)). He has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The Court appointed counsel to represent Mr. Wilson in connection with the petition and held an evidentiary hearing over three days: June 25, 2003; December 8, 2003; and, March 11, 2004. The Court will deny the petition.

In his § 2255 petition, Mr. Wilson argues that his counsel was ineffective in three ways: by failing to interview and call William Hill as a witness; by failing to effectively/thoroughly cross-examine witness Michael Adams; and by failing to thoroughly cross-examine witness Detective Brooks. The

petitioner raises five other issues that were presented on direct appeal and rejected by the Court of Appeals for the Third Circuit: 18 U.S.C. § 922(g)(1) is unconstitutional; the trial evidence was insufficient to support the verdict; the district court erred in denying the motion to suppress photographic identification; the district court erred in admitting the testimony of Michael Adams; and the district court imposed an illegal sentence. Because these five issues were presented and rejected on appeal, the petitioner may not relitigate them in this 2255 action. United States v. DeRewal, 10 F.3d 100, 105 note 4 (3d Cir. 1993). The Court, therefore, has considered only the three claims of ineffective assistance of counsel.

## I. Background

### A. Trial

On November 2, 2000, Andre Wilson was indicted on one count of conspiracy to make false statements with respect to the information required to be kept in the records of a licensed firearms dealer, eleven counts of making/aiding and abetting false statements to a licensed firearms dealer, and eleven counts of possession of a firearm after having been convicted of a crime punishable by imprisonment for more than one year.

At trial, codefendant Tyson Kint, who had pled guilty under a cooperation agreement, testified that the petitioner

asked him to purchase eleven separate guns for him because the petitioner was not able to purchase a gun because "he was convicted." Mr. Kint identified the documents that he filled out and that the firearm dealers fill out in order for him to purchase the firearms. He testified that he falsely answered "yes" to the question whether he was the actual buyer of the firearm. He was not purchasing them for himself but for Mr. Wilson. Mr. Kint testified that Mr. Wilson normally drove him to the gun stores, that Mr. Wilson gave him the money to purchase the firearms in the car before Mr. Kint went into the store, that Mr. Wilson did not go into the stores with him, and that Mr. Wilson went to the area of the gun stores because he wanted to be sure that Mr. Kint got the right gun and he did not trust Mr. Kint with the money. After Mr. Kint purchased the firearms, he gave the firearms to Mr. Wilson inside the car. Mr. Wilson decided how much money to pay Mr. Kint for purchasing the firearms.

Mr. Kint identified eleven separate firearms that he purchased for Mr. Wilson from the paperwork retrieved from the firearms dealers. The last firearm purchased by Mr. Kint for Mr. Wilson was a Llama Max 1.45 caliber pistol. He testified that he also purchased guns for other people. He said that the first gun that he purchased for Mr. Wilson was on August 3, 1998, and the last firearm was the Llama Max 1.45 caliber pistol.

Several gun dealers testified that they sold guns to Mr. Kint under the circumstances described by him. One gun dealer, Joseph Galiano, identified government exhibit 29A as a Llama Max 1.45 automatic pistol that he sold to Mr. Kint on December 9, 1998. He testified that it was manufactured in Spain.

Philadelphia Police Officer Michael Keenan testified that on January 20, 1999, he and his partner arrested William Hill, also known as, "Cadillac Hill," with a firearm, that is, the Llama firearm marked as government exhibit 29A. Philadelphia Police Department Detective Timothy Brooks testified that on January 20, 1999, police officers Wenger and Keenan brought William Hill, after he was arrested with the firearm, to Central Detectives and that Mr. Hill first gave the name of Michael Lawrence which, according to police records, was an alias for Mr. Hill. Detective Brooks testified that after approximately one hour in Central Detectives, Mr. Hill gave his true name of William Hill.

Michael Adams testified that he knew defendant Andre Wilson as "Dre." He said that they grew up together and were friends. Mr. Adams testified that around December 1998 or January 1999, Mr. Wilson told him that he had something to show him -- a firearm which Adams identified as government exhibit 29A. Mr. Adams testified that he held the firearm for a couple

of days and then returned it to Mr. Wilson. He said that about a month later he asked Mr. Wilson about the firearm and Mr. Wilson said that he gave it to someone named "Caddie" who got locked up with it. Mr. Adams testified that Mr. Wilson described the individual who got arrested with the gun as "Cadillac William." Mr. Adams identified government exhibit 29A as this firearm.

ATF Special Agent Conners testified that Mr. Kint identified the eleven firearms he bought for Mr. Wilson from the paperwork provided by the gun dealer. Special Agent Conners testified that Mr. Kint identified the photograph of Mr. Wilson from a series of eleven photos shown to Mr. Kint as the individual for whom he purchased the eleven firearms. Special Agent Conners testified that Mr. Kint also identified other people during the interview for whom he has purchased firearms.

The defendant was acquitted by the jury of all charges except the three charges related to the Llama firearm, exhibit 29A. The Court sentenced him to 115 months imprisonment to run consecutively with his five to ten year state sentence. He filed a direct appeal to the Third Circuit. His conviction was affirmed on May 23, 2002.

B. § 2255 Hearing

The Court conducted a hearing over three days on the petitioner's claim that his counsel, Andrew Erba, was ineffective

in failing to interview and call William Hill as a witness. Messrs. Erba, Hill, and Wilson, Detective Timothy Brooks, and Special Agent Michael Conners testified. Following is a summary of the evidence presented and the Court's findings of fact from the hearing.

William Hill was arrested on January 20, 1999 in possession of the Llama, model max-1, .45 caliber pistol purchased by Tyson Kint. Mr. Kint had testified at the trial of Andre Wilson that he had bought the firearm from Mr. Wilson. When Mr. Hill was arrested, he gave a statement to the police. When asked from whom he had gotten the gun, he said: "I bought it off a guy, I know as Dre, who sells guns at 12<sup>th</sup> & Parish on Friday night. I gave him \$400 for the gun." Mr. Hill said in his statement that Dre lives between 12<sup>th</sup> and 11<sup>th</sup> on Parish. He described Dre as "about 26, brown skin, no beard or mustache, he's about 5'8"." That description fits Andre Wilson.

Mr. Erba received this statement from the government in discovery. When Mr. Erba presented the statement to Mr. Wilson, Mr. Wilson told Mr. Erba: "Don't worry about it, Hill is going to back off that statement." Mr. Erba had concerns about this comment of Mr. Wilson because at the time Mr. Erba had been appointed to represent Mr. Wilson, he had been incarcerated for many months. Mr. Hill had also been in prison for many months. Mr. Erba's fear was that they had been talking in prison or

through others. Mr. Erba did not want to be part of a conspiracy either directly or indirectly to present testimony that was false.

The government listed Mr. Hill as a trial witness. Around the time the government closed its case-in-chief, the prosecutor told Mr. Erba that he was not going to call Mr. Hill because Mr. Hill was no longer willing to say that he received the gun from Dre. Mr. Hill's testimony would be that he got it from Michael McCray who may have gotten it from Dre.

Mr. Erba and Mr. Wilson differed in their testimony about what discussions they had about the defendant calling Mr. Hill as a witness. Mr. Erba testified that he discussed with Mr. Wilson the pros and cons of calling Mr. Hill. It was Mr. Erba's advice not to call Mr. Hill and Mr. Wilson agreed with that advice. Mr. Erba testified that he explained to Mr. Wilson that if Mr. Hill did not testify, the government could not use his statement. He explained that if the defendant called Mr. Hill, the prosecutor would be able to confront Mr. Hill with his prior statement. Mr. Erba gave the advice that that result would be "suicide" for Mr. Wilson. Mr. Wilson never asked him to call Mr. Hill as a witness.

Mr. Wilson testified that Mr. Erba told him that Mr. Hill now was saying that he received the gun from Michael McCray. Mr. Wilson told Mr. Erba that he always said that he never gave

the gun to Mr. Hill. He asked Mr. Erba to interview Mr. Hill, and, if possible, put him on the stand. He did not recall Mr. Erba telling him about the pros and cons of calling Mr. Hill.

I found Mr. Erba more credible than Mr. Wilson on this point. Mr. Wilson's memory was not very good on this conversation. He did not say that Mr. Erba did not tell him the pros and cons of calling Mr. Hill but that he did not recall his doing so. Also, Mr. Erba was sure of his recollection on this point because had Mr. Wilson decided that he should call Mr. Hill, Mr. Erba would have made a record of this because he believes that it would have been ineffective for him to have called Mr. Hill. Mr. Erba testified that another reason why he would have made a record is that he was concerned that Mr. Hill would not have testified truthfully if he denied that he got the gun from Dre.

Mr. Erba explained his reasons for advising Mr. Wilson not to call Mr. Hill. Mr. Erba's theory of the case was that Tyson Kint and Michael Adams were buyers of the guns and that Tyson Kint bought the gun for somebody else and Michael Adams was lying. He wanted to keep Mr. Hill as far away from the jury as possible. He did not believe that there was any way Mr. Hill could help Mr. Wilson. Mr. Hill was another person who could have led the jury to believe that Mr. Wilson was involved with the guns. Mr. Erba was also very concerned that the prosecutor



would do a very effective cross examination of Mr. Hill with his prior statement.

Mr. Hill was called to testify at the hearing by the petitioner. He testified that his original statement to the police was not true. He only told the police what they wanted to hear. He testified that he really got the gun from Michael McCray, a person with whom he committed other crimes. He denied that he told the prosecutor during the trial that Michael McCray may have gotten the gun from Dre.

On cross examination, Mr. Zittlau took Mr. Hill through the statement and very effectively called into question Mr. Hill's version of the taking of his statement. Mr. Zittlau demonstrated the kind of effective cross examination he would have done during the trial had Mr. Hill been called as a witness. Although Mr. Hill said that the police had given him the name Dre, that testimony made no sense in light of the statement and was not credible. Nor was his testimony about his second statement credible. I find that he did tell the prosecutor and police that he would not testify and that Michael McCray may have gotten the gun from Dre.

This was supported by the testimony at the hearing of Detective Timothy Brooks and Special Agent Michael Conners. Detective Brooks testified that he had no knowledge of Andre Wilson at the time he took the statement from Mr. Hill. After he

took the statement, he asked Mr. Hill to look through some photographs to see if he could find Dre. Mr. Hill did look at photographs on the photo imaging machine but did not identify anyone as Dre. Special Agent Connors interviewed Mr. Hill during the trial with Mr. Zittlau. Mr. Hill said that he would not testify. He said that he got the gun from Michael McCray who said that he got it from Dre.

## II. Discussion

Whether or not counsel will be considered "ineffective" for habeas purposes is governed by the two-part test articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant must prove that (1) counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 687-96; see also United States v. Nino, 878 F.2d 101 (3d Cir. 1989).

In evaluating the first prong, a Court must be "highly deferential" to counsel's decision and there is a "strong presumption" that counsel's performance was reasonable. United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997)(citing Strickland). Counsel must have wide latitude in making tactical decisions. Strickland, 466 U.S. at 689. The defendant must

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

United States v. Gray, 878 F.2d 702 (3d Cir. 1989).

The conduct of counsel should be evaluated on the facts of the particular case, viewed as of the time of the conduct. Strickland, 466 U.S. at 690. The Third Circuit, quoting Strickland, has cautioned that: the range of reasonable professional judgments is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. Gray, 878 F.2d at 711.

For the second prong, the courts have defined a "reasonable probability" as one which is sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. Put another way, whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial.

The defendant's showing that there was a reasonable probability that the verdict would have been different cannot be based on mere speculation about what the witness would have said. In the usual case, the defendant should present the testimony of the potential witness so that the Court can determine what

information and testimony would have been revealed had the witness testified. Id. The Court must then decide whether this evidence, when considered along with the rest of the evidence, would have led a conscientious and impartial jury to have a reasonable doubt about the defendant's guilt. Id.

The Court will not spend much time discussing two of the petitioner's claims - that Mr. Erba was ineffective in his cross-examination of Michael Adams and Detective Brooks. The Court has carefully reviewed the cross-examination of both witnesses and concludes that Mr. Erba questioned them effectively and thoroughly. The petitioner has not proved that his counsel's representation fell below an objective standard of reasonableness.

The failure to interview and call William Hill as a witness presents a more substantial issue. In the context of counsel's duty to investigate the availability and potential testimony of a witness, "strategic choices made after thorough investigation . . . are virtually unchallengeable; strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. (citing Strickland, 466 U.S. at 690-91.) Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

If there is evidence that counsel did have enough evidence to make a strategic decision, and that strategic decision was within the broad range of reasonable professional judgment, there is no ineffectiveness. If, however, there could be no reason for counsel's decision except lack of diligence, counsel was ineffective. Id. at 712.

As to counsel's decision not to call a witness, if this decision were made after full investigation of the potential testimony, it would be "virtually unchallengeable" under Strickland. The decision not to call the witness would be, therefore, a strategic choice and not ineffectiveness. If less than complete investigation was taken, the Court must determine whether the decision not to call the witness was based on strategy or mere lack of diligence.

The Court concludes that the recommendation by Mr. Erba not to call Mr. Hill as a witness was a legitimate, strategic choice. Mr. Zittlau demonstrated during the 2255 hearing the kind of effective cross-examination of Mr. Hill that he would have done at the trial. That alone validated Mr. Erba's recommendation. Mr. Hill had told the police initially that he got the gun from "Dre" whose description matched the defendant. Indeed, he acknowledged during the 2255 hearing that he recognized the defendant as Dre. For Mr. Hill to try to convince a jury that he did not say Dre gave him the gun or that the

police forced him to say that Dre gave him the gun was incredible. The police did not even know about the defendant when they questioned the defendant. If they wanted him to identify the defendant, they would have shown him a photograph of him and asked him to identify it.

It was not only the written statement that Mr. Zittlau could have used to cross-examine Mr. Hill at the trial. Mr. Hill also recanted his statement given to the police and the prosecutor during the trial that he got the gun from Michael McCray who may have gotten it from Dre. That would have been more fertile ground for cross-examination.

Nor do I think that Mr. Erba was ineffective in not interviewing Mr. Hill before recommending that he not be called as a witness. He already knew all he needed to know to make his recommendation. He knew that the government would be able to cross-examine Mr. Hill with the two prior statements that the police would testify he gave to them. He also knew that calling Mr. Hill might undercut his main defense in the case.

An appropriate order follows.

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ANDRE WILSON	:	NO. 02-8067

ORDER

AND NOW, this 1st day of December, 2004, upon consideration of petitioner's Motion to Vacate, Set Aside or Correct Sentence (Docket No. 93), the government's opposition thereto, and hearings held June 25, 2003, December 8, 2003, and March 11, 2004, and supplemental briefing by the petitioner and the government, IT IS HEREBY ORDERED that said motion is DENIED. IT IS FURTHER ORDERED that a certificate of appealability is denied because the petitioner has not made a substantial showing of the denial of a constitutional right.

BY THE COURT:

/s/ Mary A. McLaughlin  
MARY A. McLAUGHLIN, J.