

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MELISSA ROSS,

Petitioner,

v.

CASE NO. 6:03-cv-729-Orl-22GJK
(6:01-cr-194-Orl-22GJK)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case involves an amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 filed by Melissa Ross and a memorandum of law in support (Doc. Nos. 3 & 4). The Court initially denied relief on January 20, 2005, without holding an evidentiary hearing (Doc. No. 7). Petitioner sought reconsideration of the Order denying relief (Doc. No. 10); however, the Court denied that motion (Doc. No. 13).

On February 12, 2013, this Court granted Petitioner's second motion to reopen in order to correct the Court's previous failure to hold an evidentiary hearing (Doc. No. 28). The Court concluded that an evidentiary hearing was necessary prior to ruling on Petitioner's claim that trial counsel was ineffective for failing to properly advise Petitioner regarding the sentencing process and the benefits of entering a guilty to plea to a lesser charge. *Id.* On April 16, 2013, the Court conducted an evidentiary hearing on this issue (Doc. No. 37). The Court heard testimony and argument concerning whether trial counsel gave Petitioner erroneous advice regarding whether she should enter into a guilty plea and

the potential sentences Petitioner faced if she proceeded to trial. After consideration of the testimony, evidence presented, and the law, the Court concludes that Petitioner is not entitled to relief on her claim.

I. The Evidentiary Hearing Testimony¹

Petitioner testified that defense counsel Terrence Kehoe (“Kehoe”) represented her in this case. Kehoe informed Petitioner that the Government had made a plea offer shortly after Petitioner was arrested. Specifically, Kehoe told Petitioner that the Government offered a sentence of three years in prison if Petitioner entered a guilty plea to the charge of misprision of a felony. Kehoe stated that he could not advise her regarding whether she should accept this plea agreement because he first needed to receive discovery from the Government. According to Petitioner, Kehoe did not explain the charge, its elements, or that the maximum sentence for misprision of a felony was three years in prison.

Petitioner testified that after Kehoe received discovery and reviewed it with her, Kehoe did not raise the plea offer again because in Kehoe’s opinion, there was not enough evidence to convict Petitioner of the drug conspiracy. According to Petitioner, Kehoe never explained to her that there was a deadline to enter the plea. Petitioner decided to proceed to trial, and Kehoe advised her that she was facing ten years if she was convicted. Kehoe did not explain that Petitioner faced a ten-year minimum mandatory sentence. Further, Kehoe told her that the twenty-year minimum mandatory sentence enhancement pursuant

¹ The procedural history is fully set forth in this Court’s February 12, 2013, Order (Doc. No. 28).

to 21 U.S.C. § 851 would not apply.² Petitioner testified that she filed a motion seeking a new attorney after trial because she realized that Kehoe had not properly advised her prior to trial. Petitioner stated that had Kehoe explained to her the elements of the misprision of a felony charge and that the maximum sentence was three years, she would have accepted the plea offer.

Petitioner further testified that on the morning of trial, Kehoe informed her that the Government had now offered a plea agreement of ten years in prison in exchange for a guilty plea to the conspiracy charge. Petitioner did not accept that offer because she thought the maximum sentence she faced, if convicted, was ten years in prison. Petitioner testified that had she known she could be sentenced to a twenty-year minimum mandatory sentence, she would have accepted the Government's second plea offer.

On cross-examination, Petitioner admitted she had been present at her boyfriend's trial in this Court but denied knowing the nature of the evidence that was used against him could also be used against her.³ Petitioner also testified that neither Kehoe nor the case agent ever told her that she was facing a life sentence. Moreover, although Petitioner was

² Pursuant to 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851, any person who commits a drug offense listed in § 841(b)(1)(A) who also has a prior conviction for a felony drug offense "shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment. . . ."

³ Petitioner's boyfriend, Patrick Torrence ("Torrence"), was charged and convicted in case number 6:01-cr-89-Orl-28GJK of conspiracy to distribute cocaine hydrochloride and cocaine base and received a life sentence. It was alleged by the Government that after Torrence was arrested, Petitioner continued with activities that furthered Torrence's drug

present at her detention hearing on December 6, 2001, she testified she did not recall the Government stating what the maximum penalties were for the charge, nor did she remember the Government stating there was a twenty-year minimum mandatory sentence.

Kehoe also testified at the evidentiary hearing. Kehoe has been primarily practicing criminal law in the State of Florida since 1981. Kehoe was appointed to represent Petitioner in this case on December 4, 2001. Kehoe immediately spoke with Petitioner, and at that time, Petitioner told Kehoe that Mike Drake, a Drug Enforcement Administration agent, had informed her that she was facing a life sentence. Petitioner also informed Kehoe that she believed that the Government was retaliating against her for being involved with Torrence by filing the indictment in this case.

Petitioner's initial appearance with the Court was in the afternoon on December 4, 2001. Kehoe testified that at that hearing, Petitioner was advised that her sentence could be enhanced due to a prior felony drug conviction and therefore, she faced a potential twenty-year minimum mandatory sentence and a maximum life sentence. After the initial appearance hearing, Kehoe spoke with the Assistant United States Attorney, who made an offer of three years in prison in exchange for a guilty plea to the charge of misprision of a felony and Petitioner's cooperation with the Government. Kehoe then researched the applicable federal drug statute, the sentencing guidelines, and the misprision of a felony charge. Kehoe advised Petitioner regarding the Government's plea offer, explained the misprision of a felony charge and the maximum sentence, and explained to Petitioner the

conspiracy, such as housing fugitives, distributing cocaine, and collecting money.

minimum and maximum sentences she faced if convicted of the drug conspiracy charge. Kehoe felt that the Government's offer was very "opportune"; however, Petitioner refused the offer. Kehoe specifically recalled that Petitioner stated she would not "sell her soul" or agree to cooperate with the Government.

Kehoe further testified that at the December 6, 2001, detention hearing the Government presented the evidence it had against Petitioner and informed Petitioner of the minimum mandatory and maximum sentences she faced. After the detention hearing, Kehoe discussed with Petitioner the discovery in the case, *i.e.*, the witnesses and wiretap evidence against her. Kehoe testified that he never advised Petitioner that she would win at trial because the Government lacked evidence to prove the conspiracy charge. Additionally, Kehoe never advised Petitioner that the sentence enhancement pursuant to 21 U.S.C. § 851 was inapplicable. Kehoe testified that Petitioner never agreed to cooperate with the Government, and Petitioner always maintained her innocence. Kehoe also testified that Petitioner refused the Government's offer to plead on the morning of trial.

On cross-examination, Kehoe admitted that he did not document his file to show that he advised Petitioner of the maximum and minimum penalties she faced or that he advised Petitioner regarding the elements and maximum sentence for either plea offer made in this case. However, Kehoe explained that when he takes notes, it is to remember things that Petitioner has told him and not to document what he told Petitioner. Kehoe testified that he discussed the initial plea offer with Petitioner on every occasion that he met with her in order to determine whether she had changed her mind and wished to enter

a plea. Kehoe did not further discuss the misprision of a felony plea offer in his February letter to Petitioner because Petitioner had made it “abundantly clear” that she was not interested in accepting a plea in this case. At his February 26, 2002, meeting with Petitioner, Kehoe informed Petitioner that he told the Government she had refused the plea offer. Kehoe testified that he believed Petitioner understood the plea offers, the elements of the misprision of a felony charge, and its maximum sentence. Kehoe stated that he realized Petitioner would never accept the plea offer because she told him that she had no interest in entering a plea.

II. Analysis

A. Legal Standards

The Supreme Court of the United States, in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel’s performance was deficient and “fell below an objective standard of reasonableness”; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687-88. *See also Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004). A court must adhere to a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. “Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989). *Strickland* applies not only to counsel’s performance during trial, but also

to counsel's advice with respect to plea decisions. *Coulter v. Herring*, 60 F.3d 1499, 1503-04 (11th Cir. 1995) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

B. Findings of Fact and Conclusions of Law

Petitioner claims that trial counsel was ineffective for failing to properly advise her regarding the potential sentences she faced if she accepted a plea to the misprision of a felony charge or if she proceeded to trial on the conspiracy charge and was convicted. In support of this claim, Petitioner maintains that had she understood the elements of the misprision of a felony charge and known she faced a twenty-year minimum mandatory sentence for the conspiracy charge, she would have accepted the Government's plea offer instead of going to trial.

Petitioner's testimony conflicts with Kehoe's testimony. Petitioner testified that she was never advised that she qualified for the § 851 enhancement, that she faced a twenty-year minimum mandatory, or that she faced a maximum sentence of three years for the misprision of a felony charge. Kehoe testified that he advised Petitioner regarding all of these issues and stated Petitioner refused to accept the Government's plea under any circumstances.

Having carefully considered the testimony of the witnesses at the evidentiary hearing and the entire record in this case, the Court accepts as credible Kehoe's testimony. *Chavez-Garcia v. United States*, 255 F. App'x 375, 376 (11th Cir. 2007) ("Where there is directly conflicting testimony, the credibility determination should be left to the district judge.") (quoting *Green v. United States*, 880 F.2d 1299, 1306 (11th Cir. 1989)). In making

this assessment, the Court finds that Kehoe's testimony that Petitioner was aware of the minimum mandatory and maximum sentences she faced and had been properly advised regarding the Government's plea offer is supported by the detention hearing and sentencing transcripts (Doc. No. 39, Gov't Exs. 3 & 5).

At the December 6, 2001 detention hearing, at which Petitioner was present, the Government stated on the record that Petitioner had a prior drug conviction and therefore, was subject to a twenty-year minimum mandatory sentence and a maximum of life imprisonment (Doc. No. 39, Gov't Ex. 3 at 44). Additionally, at the June 11, 2002, sentencing hearing Petitioner admitted that she was offered a three-year sentence in exchange for a guilty plea to a lesser charge (Doc. No. 39, Gov't Ex. 5 at 9). Petitioner told the Court that she refused the plea offer because she was innocent and wanted to prove her innocence at trial. *Id.* In light of the testimony from those proceedings, the veracity of Petitioner's testimony at the evidentiary hearing is called into question, and therefore, the Court cannot accept it as credible.

The Court concludes that Kehoe satisfied his duties as counsel and properly advised Petitioner regarding the minimum mandatory sentence she faced if convicted of the drug conspiracy charge, the maximum sentence possible for that charge, the elements of the misprision of a felony charge, and the maximum sentence for that charge. Kehoe advised Petitioner of all the circumstances regarding sentencing and whether to accept the Government's plea offer, and Petitioner refused to enter a plea because she believed that she was innocent.

Although Kehoe's actions did not amount to deficient performance in this case, the Court notes that it is fundamentally unfair that Petitioner received a 292-month sentence,⁴ later reduced to a 240-month term, when the Government was initially willing to offer Petitioner a three-year sentence in exchange for a guilty plea to a lesser charge, recognizing that Petitioner was a minor participant in this conspiracy.⁵ The original prosecutor who handled this case from indictment through sentencing, vindictively filed the § 851 enhancement because Petitioner asserted her constitutional right to trial by jury. Prosecutorial discretion is a bedrock of the American criminal justice system. It takes on even greater importance when Congress limits judicial discretion through statutory minimum sentences. The § 851 enhancement should be used to protect the public from those defendants with a serious history of felony drug offenses, not as a cudgel to force minor participants like Petitioner to accept a plea.⁶

⁴ At the time of Petitioner's sentencing, the guidelines were mandatory.

⁵ Petitioner was enhanced based on an offense considered minor under Florida law. Petitioner pled no contest to possession of twenty grams of crack cocaine, an offense not considered under Florida Law to be a drug trafficking offense. Adjudication was withheld resulting in Petitioner not being convicted of the offense.

⁶ The undersigned recently participated in a conference of the chief judges of the various federal district courts in Washington, D.C. Attorney General Holder addressed the undersigned and her colleagues at that conference, stating that it was his objective to have fewer defendants serving shorter sentences in the federal system. The Government's decision to seek a § 851 enhancement in cases, like this, suggests that his prosecutors disagree.

Nevertheless, the Court is bound by § 851 and was required to impose a minimum mandatory sentence even though Petitioner had just one minor drug conviction wherein she entered a nolo contendere plea to possession of a controlled substance, adjudication was withheld, and Petitioner received a sentence of probation. See Presentence Investigation Report. It is a gross miscarriage of justice to require such an extreme sentence for a criminal defendant who wished to exercise her right to stand trial.⁷ Despite this Court's misgivings regarding mandatory enhanced sentences pursuant to §§ 841 and 851, this is an issue that only Congress or the United States Attorney can resolve. Because the Court finds that counsel did not provide deficient performance, Petitioner's claim that counsel rendered ineffective assistance of counsel in relation to the plea offer and sentencing is denied.

Accordingly it is **ORDERED AND ADJUDGED** as follows:

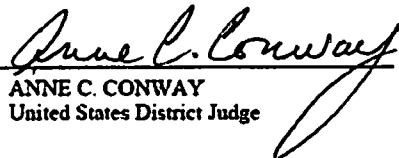
1. Petitioner's amended motion to vacate, set aside, or correct an illegal sentence pursuant to section 28 U.S.C. § 2255 filed by Melissa Ross (Doc. No. 3) is **DENIED**.
2. The Clerk of the Court shall enter judgment and close the case.
3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:01-cr-194-Orl-22GJK, and to the extent it is still pending, terminate the amended

⁷ See Sarah French Russell, *Rethinking Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, U.C. DAVIS L. REV. 1135, 1162-71 (2010) (discussing the § 851 enhancement and noting that the enhancement does not serve the purposes of sentencing because the degree of enhancement is greater than necessary to provide just punishment, longer sentences may possibly increase rather than reduce recidivism, and many federal district and circuit judges believe that the drug sentencing laws are too severe).

motion to vacate, set aside, or correct sentence in that case (Doc. No. 263).

4. This Court should grant an application for certificate of appealability only if the Petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). Petitioner has failed to make a substantial showing of the denial of a constitutional right. See Rule 11 of the *Rules Governing Section 2255 Cases for the United States District Courts* (“[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”).

DONE AND ORDERED at Orlando, Florida, this 11th day of July, 2013.


ANNE C. CONWAY
United States District Judge

Copies to:
OrIP-3 7/11
Melissa Ross
Counsel of Record