IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:11CR00033
	)	
v.	)	**OPINION**
	)	
	)	By: James P. Jones
TIMOTHY SHEPHERD,	)	United States District Judge
	)	
Defendant.	)	

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for United States; Timothy Shepherd, Pro Se Defendant.

The defendant, Timothy Shepherd, has elected to pursue this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2013), alleging several claims concerning the amount of restitution he has been ordered to pay. After review of the record, I conclude that Shepherd waived his right to bring a § 2255 motion as to his claims of prosecutorial misconduct and that his claims of ineffective assistance of counsel are without merit. Therefore, I will grant the United States' Motion to Dismiss.

I

Shepherd's offense conduct was related to the crimes of Shannon James Dunford.[1] Dunford, an employee of a cleaning service, stole checks and a credit card from Highlands Fellowship Church in Abingdon, Virginia. He also obtained a bank account number and a credit card from two employees of State Street United Methodist Church in Bristol, Virginia, another location where he cleaned. Dunford approached Shepherd and offered to pay his utility bills in full, using the stolen credit card, if Shepherd would give him half of the price of the bill in cash. Shepherd began recruiting family and friends to participate in this scheme, obtaining cash from individuals and arranging for Dunford to pay the bills in full with the credit card, and then the two men would split the cash.

Dunford submitted to an interview with authorities and gave a written statement admitting to his part of the bill paying scheme. Dunford also admitted to making fraudulent purchases with the stolen credit cards and told authorities that he had provided the stolen account numbers to Shepherd, who then used them to pay various bills.

Shepherd waived his right to indictment and pleaded guilty to a one-count Information charging that as a principal and aider and abettor, he had knowingly

[1] This summary of the investigation is taken from Shepherd's Presentence Investigation Report and from the facts offered by the government at the change-of-plea hearing.

effected transactions with intent to defraud using stolen checking account numbers and stolen credit cards to make purchases and fraudulent payments of utility bills totaling approximately $14,805.59.[2] As part of his Plea Agreement, among other things, Shepherd agreed to waive his right to an Indictment; to stipulate to a loss amount under the U.S. Sentencing Guideline Manual § 2B1.1 of between $10,000 and $30,000; and to "pay restitution for the entire scope of my criminal conduct . . . including but not limited to $14,805.59." (Plea Agreement 4.) Shepherd also agreed to waive his right to appeal and to file a collateral attack, with the exception of claims based on alleged ineffective assistance of counsel.

On December 16, 2011, I entered Judgment, sentencing Shepherd to 13 months in prison and ordering him to pay restitution, jointly and severally with Dunford, totaling $14,805.59. The restitution amounts were ordered payable to Highlands Fellowship Church, in the amount of $11,672.94, and to two individuals, in the amounts of $2,920.57 and $212.08, respectively. Shepherd did not appeal the Judgment.

In June 2012, Shepherd, proceeding pro se, filed a motion that he styled as a "MOTION TO MODIFY SENTENCE 18 U.S.C. § 3582(c)(B)." Because

[2] In January 2011, Dunford pleaded guilty to a nearly identical, one-count Information, and I sentenced him on June 17, 2011, to 27 months in prison and ordered him to pay $14,805.59 in restitution to the fraud victims. *See United States v. Dunford*, Case No. 1:11CR00001.

Shepherd sought to pursue allegations of ineffective assistance of counsel regarding the calculation of the restitution amount and to have the restitution order changed, I construed his submission as a § 2255 motion,[3] and granted him an opportunity to elect whether he wished to proceed with such a motion. Shepherd notified the court that he wished to have his claims addressed under § 2255. Liberally construed, Shepherd's motion asserts the following claims: (1) counsel was ineffective for failing to advise him properly about the restitution order; (2) counsel was ineffective in failing to investigate and present evidence at sentencing in support of an argument to reduce or eliminate the restitution order; (3) the United States failed to present mitigating evidence to show that Shepherd "had already paid for all losses claimed against him" and for failing to correct the Presentence Investigation Report ("PSR"); and (4) the United States is estopped from seeking the $14,805.59 in restitution as agreed in the Plea Agreement, because the United States "constructively amended" the charging Information.

[3] Section 2255 is not an appropriate remedy by which to seek a change in the payment schedule for the restitution amount. To ask for lower restitution payments, based on a change in his financial circumstances, Shepherd may file a separate motion under 18 U.S.C. § 3664(k), outside this § 2255 proceeding.

The court has no authority under § 3664(k) to vacate the restitution order itself, however. *See* 18 U.S.C. § 3664(o) (providing that order of restitution is final order); *United States v. McMahon*, No. 99-4239, 2000 WL 1039473, at *3 (4th Cir. July 28, 2000) (unpublished) (finding that § 3664(k) authorizes reduction of scheduled restitution payments, but not reduction of total restitution amount owed). Therefore, I construed Shepherd's claims seeking to revoke or alter the restitution order, based on allegations of ineffective assistance and prosecutorial misconduct, as a § 2255 motion.

(2255 Mot. 3-4.) The United States has submitted a Motion to Dismiss, and Shepherd has responded, making that motion ripe for disposition.

II

A. Plea Agreement Waiver of § 2255 Rights.

It is settled circuit law that a "criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary." *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005). Whether the waiver is intelligent and voluntary depends '"upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.'" *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). If the court concludes that the defendant's waiver of collateral-attack rights was knowing and voluntary, defendant "cannot challenge his conviction or sentence in a § 2255 motion," unless his claims fall outside the scope of the waiver. *Lemaster*, 403 F.3d at 220. Moreover, "in the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should . . . dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements." *Id.* at 221-22.

During the plea colloquy, Shepherd indicated that he was 38 years old and that he had graduated from high school. He also affirmed that he had never been treated for mental health issues, had not taken any drugs, medicine, or pills that day, was not under the influence of alcohol, and had no health problems. I read the charging Information to Shepherd, including the charge that as a principal or as an aider and abettor, he had fraudulently used others' account numbers or credit cards to obtain approximately $14,805.59 in cash or things of value. I then advised Shepherd of his right to be indicted by a grand jury and the procedures involved. He affirmed that he had discussed with counsel and understood this right and that no threats or promises had caused him to waive the right. Shepherd then waived, orally and in writing, his right to indictment by a grand jury.

Shepherd also advised the court that he had read, initialed each page, and signed the Plea Agreement and discussed its terms with counsel, and he was fully satisfied with counsel's representation. Counsel for the United States summarized the provisions of the Plea Agreement, including the charge to which Shepherd was pleading; the maximum penalties for that charge; the stipulation regarding the USSG provisions to which Shepherd would be subject; Shepherd's agreement to pay $14,805.59 in restitution; and his waiver of appeal and collateral attack rights.

I questioned Shepherd, and he affirmed his understanding of the proceedings, the charges against him, the terms of the Plea Agreement, the rights

he was waiving by pleading guilty under those terms, and the consequences of his plea. I expressly asked Shepherd about the provision waiving collateral attack rights: "Do you understand that under the plea agreement you waive or give up your right to later attack your sentence or conviction, meaning that you could not in the future try to set aside your conviction or sentence . . . ?" and Shepherd answered, "Yes, sir." (Plea Tr. 9-10.) Shepherd also denied that anyone had made any promise outside the Plea Agreement terms that made him want to plead guilty. He affirmed that he had had adequate opportunity to discuss the charge with counsel, that he understood the elements the government would be required to prove if the case went to trial, that he was pleading guilty because he was, in fact, guilty, and that he did not dispute the facts the prosecutor offered in support of the plea.

The United States argues that Shepherd's Claims (3) and (4), alleging prosecutorial misconduct, are waived under the Plea Agreement waiver of collateral attack rights as to any claim not alleging ineffective assistance of counsel. I agree. Shepherd's statements during the guilty plea colloquy offered no indication that he did not understand the proceedings or the waiver provisions in the agreement, or that he was not voluntarily pleading guilty under all terms of that agreement. I find from this record that Shepherd's guilty plea waiver of his right to bring this collateral attack under § 2255 was knowing and voluntary and

therefore, constitutes a valid bar to his pursuit of Claims (3) and (4), absent a showing of some extraordinary circumstance undermining confidence in the validity of his waiver.[4]

B. Ineffective Assistance of Counsel.

To prove that counsel's representation was so defective as to require reversal of the conviction or sentence, a defendant must meet a two-prong standard, showing that counsel's defective performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Second, to show prejudice, the defendant must demonstrate a "reasonable probability" that but for counsel's errors, the outcome would have been different. *Id.* at 694-95. When the defendant alleges that counsel's error led him to enter an invalid guilty plea, to show prejudice, he must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

I find that Shepherd's Claim (1), to the extent that it alleges ineffective assistance about the restitution issue before entry of the guilty plea, is based on

[4] Claims (3) and (4) are also procedurally barred from review under § 2255, because Shepherd could have raised these claims on direct appeal, failed to do so, and offers no ground on which he could circumvent this default. *See Bousley v. United States*, 523 U.S. 614, 621-22 (1998); *United States v. Frady*, 456 U.S. 152, 168 (1982).

assertions directly contradicted by Shepherd's sworn statements during the guilty plea hearing and, thus, is so "palpably incredible" as to warrant summary dismissal. *Lemaster*, 403 F.3d at 221-22. Shepherd affirmed during the plea colloquy his understanding that he was agreeing to pay $14,805.59 in restitution and that no one had promised him anything outside the Plea Agreement's terms that caused him to plead guilty. Because Shepherd's Claim (1) rests on allegations in direct contradiction of his plea hearing statements, the claim cannot constitute an extraordinary circumstance undermining the validity of his plea or his Plea Agreement waiver of § 2255 rights. Claims (3) and (4) bear no relationship to the validity of Shepherd's plea or his waiver of collateral attack rights. Accordingly, I find that these claims are waived under Shepherd's valid waiver of § 2255 rights. and will grant the Motion to Dismiss as to these claims.[5] *Id.* at 223.

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[5] Moreover, Shepherd's allegations in support of Claims (3) and (4) fail to state any ground for relief. Shepherd baldly alleges in support of Claim (3) that he paid for the losses he caused and the PSR information about the restitution is inaccurate, but he presents no facts in support of these assertions. He alleges vaguely that "the utilities provider[s] were paid back, in full, by the movant," which makes the restitution "double recovery." (2255 Mot. 2.) The utility providers were not the victims awarded restitution in Shepherd's case, however. The restitution amounts are payable to the victims whose account numbers and credit cards were misappropriated and will compensate them for their actual losses, which Shepherd does not dispute.

In support of Claim (4), Shepherd complains that the Information was "constructively amended," because it did not cite 18 U.S.C.A. § 2, although it charged him as "a principal and aider and abettor." (Information ¶ 1.) Aiding and abetting need not be charged in the indictment to support conviction on that theory, however. *See Pigford v. United States*, 518 F.2d 831, 834 (4th Cir. 1975).

Because Claim (1) alleges ineffective assistance, it falls outside the scope of Shepherd's waiver of collateral attack rights. The claim, however, to the extent that it alleges ineffective assistance before the guilty plea, is contradictory to Shepherd's sworn statements during the plea colloquy and is subject to summary dismissal. *Id.* at 221-22. I will grant the Motion to Dismiss as to the pre-plea element of Claim (1).[6]

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[6] I also find that Shepherd's claim of ineffective assistance before the Plea Agreement fails under *Strickland* and *Hill*. Shepherd does not dispute counsel's affidavit, stating that counsel asked the prosecutor to reduce the amount of restitution stipulated in the Plea Agreement to reflect the losses that Shepherd's personal conduct caused the victims, but the prosecutor would not agree to a reduction. Also undisputed is counsel's account that Shepherd decided to accept the Plea Agreement, despite the restitution stipulation, because the strength of the government's evidence, and the court's reputation for upwardly departing from the sentencing guideline range on fraud and theft offenses, made indictment and trial an even less attractive option than possibly having to pay the full $14,805.59. I cannot find this strategy to be deficient representation under the circumstances Shepherd faced.

Even assuming without finding that counsel advised Shepherd before the guilty plea that "there would be no restitution in this matter, and that he would take care of this issue," as Shepherd claims in his motion (2255 Mot. 2), Shepherd shows no prejudice caused by such a statement. The Plea Agreement itself stipulated the restitution amount, and the amount was also discussed during the plea colloquy. Thus, Shepherd was on notice of that amount from sources other than counsel. Moreover, he fails to show any reasonable probability that he would have rejected the multiple benefits of the Plea Agreement merely over a disagreement with the restitution amount he and Dunford would be ordered to pay. For these reasons, the pre-guilty plea aspect of Claim (1) fails on the merits.

Shepherd's claims of ineffective assistance at sentencing are also not waived, but fail on the merits. Once Shepherd pleaded guilty to the Information charge of being a principal or an aider or abettor in fraudulent conduct causing the stipulated loss of $14,805.59, under 18 U.S.C.A. § 2, he was subject to the same penalty as though he had been the principal actor in that charged conduct. Shepherd fails to offer any legal basis on which counsel could have argued at sentencing for a lower restitution amount, and I find none. Counsel did advise Shepherd to raise the matter, after his release, with his probation officer and to ask for leniency in the collection of the restitution, in light of Dunford's greater role in the offense conduct as a whole. Because Shepherd does not demonstrate that counsel's performance at sentencing was either deficient or prejudicial under *Strickland*, I will grant the Motion to Dismiss as to the sentencing aspect of Claim (1) and Claim (2).

III

For the stated reasons, I will grant the Motion to Dismiss and deny relief on Shepherd's § 2255 motion. Shepherd's Claims (1) and (2) are without merit, and Claims (3) and (4) are waived by his valid, Plea Agreement waiver of his right to bring a § 2255 motion for collateral relief.

A separate Final Order will be entered herewith.

DATED: April 25, 2013

/s/ James P. Jones
United States District Judge