

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHN WILLIAM GOOL, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 4:09-cv-00145-JAJ

ORDER

This matter comes before the court pursuant to petitioner John Gool's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, challenging his conviction in United States v. John William Gool, No. 3:06-cr-00544-JAJ-TJS (dkt. 1). Gool seeks to withdraw and reform his guilty plea on the basis of prosecutorial misconduct and ineffective assistance of counsel. He also seeks re-sentencing. This court issued an initial review order on May 18, 2009, directing the Government to file a response (dkt. 3). The Government filed a Motion to Dismiss Gool's motion on (dkt. 4). Gool responded on June 12, 2009 (dkt. 6). The court held a hearing on the matter on June 15, 2009, wherein Gary Hayward represented the Government and David Treimer represented Gool. For the reasons discussed below, the court denies Gool's § 2255 petition.

FACTUAL AND PROCEDURAL HISTORY

Gool was charged in a four-count indictment on July 11, 2006. Counts one and two charged exploitation of a minor in violation of 18 U.S.C. § 2251, count three charged receipt of child pornography, and count four charged possession of child pornography.

On February 9, 2007, Gool's trial counsel, David Treimer, filed a motion to dismiss count one on the basis that it was time-barred by the statute of limitations. He later informally amended that motion to include count two. On March 27, 2007, the Government responded, "According to Detective Brian Pohl, some of the videotapes made

by Gool depict AR when she was seventeen years of age which is within the statute of limitations.” (Gov. Resp. at 5). On March 28, 2007, the court ordered the Government to “identify precisely the videotape or videotapes that it intends to rely upon at the time of trial to support Count 1 of the Indictment.” (3:06-cr-544, dkt. 37 at 1). The order became moot when Gool agreed to plead guilty, dismissing counts one and two. According to an affidavit by Mr. Treimer, Assistant United States Attorney Clifford Cronk contacted him on March 28, 2008, offering the plea agreement. Mr. Treimer states that Mr. Cronk offered the plea agreement because Mr. Cronk “did not want to put the victims of the videotaping on the witness stand to ‘re-live’ their trauma in a hearing to defeat the Motion to Dismiss.” (4:09-cv-145, dkt. 1 at 4). On April 24, 2007, Gool entered a guilty plea and plea agreement. As agreed, the plea agreement dismissed counts one and two.

In December 2007, the first draft of the pre-sentence investigation report (“PSIR”) was disclosed. The PSIR discussed police interviews with the victims in which the victims indicated the age when the videos were taken. (PSIR at 6, ¶ 11). Specifically, victim AR stated the tape was taken before she turned seventeen. Victim KD indicated that the tape was taken while she had braces. According to the PSIR, KD wore braces between 1997 and 2000. A list of dental appointments included in the discovery materials shows that KD’s braces were removed on February 14, 2000. In his affidavit, Mr. Treimer stated this was the first he learned of this information when he received a draft of the presentence investigation report. In an email received following the hearing, Mr. Treimer now recalls seeing the list of dental appointments in the discovery materials.

Gool appealed his sentence to the Eighth Circuit Court of Appeals, filing a notice of appeal on April 28, 2008 (3:06-cr-544, dkt. 73). The Eighth Circuit Court of Appeals dismissed his claim without comment on August 6, 2008. United States v. Gool, No. 08-2135 (8th Cir. Aug. 6, 2008). Gool sought rehearing which was denied on September 17, 2008.

Gool brought the present § 2255 action on April 9, 2009, arguing that AUSA Cronk engaged in prosecutorial misconduct by failing to disclose the victims' statements to police. Gool also alleged ineffective assistance counsel because his counsel failed to object to the first draft of the PSIR and failed to withdraw Gool's guilty plea before sentencing. On May 19, 2009, this court issued an initial review order, directing the Government to file a response by June 1, 2009 (dkt. 3).

On June 1, 2009, the Government filed a motion to dismiss Gool's § 2255 Motion (dkt. 4). In its motion, the Government contends that (1) based on his own statements and representations, Mr. Treimer knew about the girls' statements to police; (2) the statements were included in the discovery file; and (3) regardless, the statute of limitations for sexual crimes against children is the life of the child or ten years after the crime, whichever is later.

CONCLUSIONS OF LAW

Standard Under 28 U.S.C. § 2255

Title 28 U.S.C. § 2255 states in pertinent part:

A prisoner under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. Section 2255 "replaced traditional habeas corpus for federal prisoners." Boumediene v. Bush, 128 S Ct. 2229, 2265 (2008); see also United States v. Hernandez, 436 F.3d 851, 857 (8th Cir. 2006). 2255 claims are the "statutory analogue of habeas corpus for persons in federal custody."). 2255 motions are "not the equivalent of a direct appeal. There are many claims of error sufficiently grave and prejudicial to

cause a reversal of conviction on direct appeal, but yet not fundamental enough to support a collateral attack” under § 2255. Thunder v. United States, 810 F.2d 817, 821 (1987). “Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). Gool alleges prosecutorial misconduct and ineffective assistance of counsel as the bases for his § 2255 claim.

Prosecutorial Misconduct

Gool originally alleged that AUSA Cronk failed to disclose information related to the victims’ ages in the discovery file. Mr. Treimer has informed the court that he now recalls seeing this information in the file. Given Mr. Treimer’s recent memory, it is now clear that there was no prosecutorial misconduct involved.

Ineffective Assistance of Counsel

Gool next claims that his trial counsel was ineffective by not objecting to the first draft of the PSIR. At the point he received the first draft, Gool argues that Mr. Treimer should have sought to withdraw and reform the guilty plea.

“To prevail on an ineffective assistance of counsel claim, a petitioner generally must show that his counsel’s performance fell below an objective standard of reasonableness and that he was prejudiced by this deficiency.” Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Gool’s ineffective-assistance claim fails because he is unable to show prejudice. If Mr. Treimer had sought revocation and reformation of the plea agreement when he received the first draft of the PSIR, it is unlikely that he would have been successful because the statute of limitations arguably had not run at that time.

Currently, the statute of limitations for crimes against children is for the life of the child or ten years after the crime, whichever is later.¹ 18 U.S.C. § 3283. The general statute of limitations for nearly all other non-capital federal offenses, is five years.² 18 U.S.C. § 3282. In 1990, Congress lengthened the statute of limitations for offenses against children, which was codified at 18 U.S.C. § 3283 in 1994. See United States v. Chief, 438 F.3d 920, 922 (9th Cir. 2006) (discussing how Congress has progressively lengthened the statute of limitations for crimes against children). At that time, the limitations ran until the child victim turned twenty-five. Id. Congress amended the statute of limitations in 2003, lengthening it to its current period of the life of the child or ten years after the crime. United States v. Jeffries, 405 F.3d 682, 684 (8th Cir. 2005).

Here, the offense conduct had concluded by the time the law changed in 2003, but the pre-2003 statute of limitations had not yet run because the victims had not yet turned twenty-five. Victim KR was born in July 1984 and Victim AR was born on in January 1982. (PSIR at 32). KR would have been nineteen when the law changed on April 30, 2003, and AR would have been twenty-one. Because the pre-2003 statute of limitations had not run, the post-2003 statute of limitations can be applied retroactively without violated the *ex post facto* clause. “The law is well settled that extending a limitations period before prosecution is barred does not violate the *ex post facto* clause.” Jeffries, 405 F.3d at 685 (8th Cir. 2005); see also Stogner v. California, 539 U.S. 607, 632 (2003) (statute of limitations may be amended and applied retroactively “for prosecutions not yet

¹ 18 U.S.C. § 3283 states, “No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.”

² 18 U.S.C. § 3282 states, “Except as otherwise expressly provided by law, no person shall be prosecute, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed..”

time barred.”). Thus, the applicable statute of limitations is for the life of the children since AR and KR are still living. 18 U.S.C. § 3283. But even if the pre-2003 amendment applies, the statute of limitations had not run when the indictment was returned against Gool on July 11, 2006. At that time, the victims would have been twenty-two and twenty-four.

While it is clear that Gool’s crime falls within either the pre- or post-2003 version of § 3283, the parties dispute whether his crime is covered by § 3283. Gool argues that child pornography is a form of child “exploitation,” which has been left out of the statute. The statute includes offenses “involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years.” 18 U.S.C. § 3283. Gool argues that “sexual abuse” does not include the production of child pornography.

Gool points to a different section of the United States Code which defines three types of crimes against children in the context of child victim and witness rights. In that section, a “child” is defined as someone who is under the age of eighteen and is “a victim of a crime of physical abuse, sexual abuse, or exploitation.” 18 U.S.C. § 3509(a)(2)(A). Exploitation, in turn, is defined as “child pornography or child prostitution.” 18 U.S.C. § 3509(a)(6). Gool argues that by not including “exploitation” in Section 3283, Congress did not intend for the extended statute of limitations to apply to child pornography (or child prostitution) crimes. However, Section 3509 also defines “sexual abuse” as “the employment, *use*, persuasion, inducement, enticement, or coercion *of a child to engage in*, or assist another person to engage in, *sexually explicit conduct* or the rape, molestation, prostitution, or other form of *sexual exploitation of children*, or incest with children.” 18 U.S.C. § 3509(a)(8) (emphasis added). As discussed above, sexual exploitation means child pornography. Therefore, the definition of “sexual abuse,” which encompasses sexual exploitation, includes child pornography. “Sexual abuse” is a category of crime covered under § 3283.

Further, taping AR and KD constituted “sexually explicit conduct,” also included in the definition of sexual abuse. 18 U.S.C. § 2256 defines sexual exploitation, in part, as “lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256(2)(A)(v). At the time of sentencing, the court found that Gool “engaged in a pattern of activity involving the sexual abuse or exploitation of the minor,” giving Gool a five-level enhancement. (PSIR at 11).

Despite the plain language discussed above, there is a lack of case law on whether § 3283 applies to child pornography crimes.³ The court recognizes that there is some question as to whether § 3283 applies to child pornography crimes. Nevertheless, because the statute of limitations likely had not run, Gool cannot show that his case would have been dismissed. “[A] criminal defendant alleging prejudice must show ‘that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (quoting Strickland, 466 U.S. at 687). Here, Mr. Treimer’s failure to object to the first draft of the PSIR did not result in any fundamental unfairness because the objection would most likely not have resulted in dismissal of the case.

Because Gool is unable to show prejudice, the court need not address Mr. Treimer’s performance. Id. at 699 (“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.”).

³ There is one unpublished Sixth Circuit case that applied the § 3283 statute of limitations to a child pornography crime. United States v. Borazanian, 148 Fed Appx. 352, 353 (6th Cir. 2005) (unpublished). However, the Sixth Circuit did not discuss § 3283’s applicability; they merely cited the statute: “Defendant, Donald Borazanian, received and sent a massive amount of child pornography over the internet. He was indicted on three counts of receiving child pornography and one count of interstate travel to engage in criminal sexual activity. 18 U.S.C. § 2252(a)(2), 18 U.S.C. §§ 2423 (b) and 3283.” Id. at 353.

Gool also argues that Mr. Treimer was ineffective by not withdrawing his guilty plea in light of three Supreme Court decisions affecting sentencing, United States v. Rita, 551 U.S. 338 (2007), United States v. Gall, 552 U.S. 38 (2007), and United States v. Kimbrough, 552 U.S. 85 (2007). The three cases were decided between the time of Gool's guilty plea on April 24, 2007, and his sentencing on April 18, 2008. Gool argues these decisions "created a vastly different landscape in federal sentencing law." (Pet. Brief at 6, dkt. 1). Gool contends that Mr. Treimer should have sought to withdraw the limited appeal waiver in light of these cases. The court was aware of those cases and applied them at the time of sentencing. Therefore, Gool cannot demonstrate prejudice.

Accordingly, Gool's ineffective assistance of counsel claims fail.

Upon the foregoing,

IT IS ORDERED that the petition in this matter (dkt. 1) is hereby dismissed. The clerk shall enter judgment in favor of the United States.

DATED this 17th day of June, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA