

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. CV 12-02352 DDP ✓
)	[CR 06-00466 DDP]
Plaintiff,)	
)	ORDER DENYING PETITIONER'S MOTION
v.)	FOR RELIEF PURSUANT TO 28 U.S.C.
)	§ 2255
JAMAR DWAYNE GREER,)	
)	[Docket No. 1]
Defendant.)	
_____)	

I. BACKGROUND

After a jury trial, Petitioner Jamar Dewayne Greer ("Greer" or "Petitioner") was convicted of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), 846. (06-CR-00466-DDP-5 ("CR") Dkt. No. 341.) Greer timely appealed his conviction (CR Dkt. No. 401), and the Ninth Circuit affirmed the conviction (the Ninth Circuit Court of Appeals Case No. 09-50120 (the "9th CCA") Dkt. No. 51). Greer petitioned for rehearing en banc and that petition was denied. (9th CCA Dkt. Nos. 58, 59.) Greer filed a petition for certiorari with the Supreme Court and that petition was denied as well. (9th CCA Dkt. No. 62.)

1 On March 20, 2012, Greer filed the instant motion under 28
2 U.S.C. § 2255. Greer claims that (1) the indictment against him
3 failed to allege all elements of the crime because it did not
4 allege an effect on commerce; (2) 21 U.S.C. §§ 841, 846 were
5 unconstitutional as applied him because "his conduct was purely
6 local in nature and should be left to the states to punish"; (3)
7 the court failed to conduct a sufficient inquiry into the contact
8 between jurors and a co-defendant's family member; and (4) his
9 attorneys provided ineffective assistance of counsel (I) by failing
10 to request the court to inquire the jurors about contact, (ii) by
11 failing to object when the court did not conduct the inquiry, (iii)
12 by failing to request a mistrial, and (iv) by failing to raise
13 these issues on appeal. (Dkt. No. 1.)

14 **II. LEGAL STANDARD**

15 A petitioner may move to vacate, set aside, or correct his/her
16 sentence "upon the ground that the sentence was imposed in
17 violation of the Constitution or laws of the United States, or that
18 the court was without jurisdiction to impose such sentence, or that
19 the sentence was in excess of the maximum authorized by law, or is
20 otherwise subject to collateral attack." 28 U.S.C. § 2255(a). If
21 any of these grounds exist, the court "shall vacate and set the
22 judgment aside and shall discharge the prisoner or resentence him
23 or grant a new trial or correct the sentence as may appear
24 appropriate." 28 U.S.C. § 2255(b).

25 Under section 2255, "a district court must grant a hearing to
26 determine the validity of a petition brought under that section,
27 '[u]nless the motions and the files and records of the case
28 *conclusively show* that the prisoner is entitled to no relief."

1 United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994)
2 (quoting 28 U.S.C. § 2255) (emphasis and alternation in original).
3 "The district court may deny a section 2255 motion without an
4 evidentiary hearing only if the movant's allegations, viewed
5 against the record, either do not state a claim for relief or are
6 so palpably incredible or patently frivolous as to warrant summary
7 dismissal." United States v. Mejia-Mesa, 153 F.3d 925, 931 (9th
8 Cir. 1998) (quoting United States v. Burrows, 872 F.2d 915, 917
9 (9th Cir.1989)).

10 **III. DISCUSSION**

11 **A. Indictment need not allege an effect on commerce.**

12 Elements of an offense must be charged in the indictment.
13 Jones v. United States, 526 U.S. 227, 232 (1999). However, when
14 Congress enacts a statute under its commerce power, "it is not
15 constitutionally obligated to require proof beyond a reasonable
16 doubt that each individual act in the class of activities regulated
17 had an effect on interstate commerce." United States v. Lane, 883
18 F.2d 1484, 1492 (10th Cir. 1989). Indeed, contrary to Greer's
19 assertion, an effect on commerce is not an element for the crime of
20 possession with intent to distribute cocaine or conspiracy to
21 distribute under 21 U.S.C. §§ 841, 846. See United States v.
22 Magallon-Jimenez, 219 F.3d 1109, 1112 (9th Cir. 2000) ("To sustain
23 a conviction for possession with intent to distribute cocaine, the
24 government must prove that the defendant (1) knowingly, (2)
25 possessed the cocaine, (3) with intent to distribute it."); United
26 States v. Hall, 551 F.3d 257, 268 n. 13 (4th Cir. 2009) (holding
27 that the elements of a § 846 conspiracy are "(1) an agreement
28 between two or more persons to violate federal law relating to

1 controlled substances; (2) knowledge of the essential objectives of
2 the conspiracy; (3) knowing and voluntary involvement therein; and
3 (4) interdependence among the conspirators"). Therefore, the
4 indictment does not require an allegation of the effect on
5 commerce.

6 **B. 21 U.S.C. §§ 841, 846 are constitutional as applied to**
7 **Greer.**

8 Greer also argues that the federal government has no
9 jurisdiction to prosecute him for his "purely local conduct."
10 (Request for Leave to Amend 28 U.S.C. § 2255 Motion, p. 3; Rebuttal
11 to Opposition, p. 2.) This argument is without merit. It is well
12 established that Congress may constitutionally regulate intrastate
13 drug activity under 21 U.S.C. §§ 801 et seq (the "Controlled
14 Substances Act"). United States v. Visman, 919 F.2d 1390, 1393
15 (9th Cir. 1990). In the instant context, "Congress may regulate
16 those wholly intrastate activities which have an effect upon
17 interstate commerce." Id. at 1392. Congress has made explicit
18 findings that conducts regulated by the Controlled Substances Act
19 have "substantial and direct effect upon interstate commerce."
20 United States v. Wacker, 72 F.3d 1453, 1475 (10th Cir. 1995)
21 (citing 21 U.S.C. § 801(3)-(6)). Therefore, "no proof of
22 interstate nexus is required in order to establish jurisdiction."
23 United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir.
24 1977).

25 **C. The brief contact between the Jurors and a co-defendant's**
26 **family member was not prejudicial.**

27 On August 14, 2008, the government reported to the court that
28 a contact occurred between Alternate Juror No. 1 and the mother of

1 a co-defendant Deon Lopez ("Mrs. Lopez") after the jury had begun
2 its deliberations. (Reporter's Partial Transcript of Proceedings
3 on August 14, 2008 ("Tr.") at 4:3-19.) The government reported
4 that it heard Mrs. Lopez say to Alternate Juror No. 1 that "I'm
5 sure you'd rather be going home now" while Mrs. Lopez and Alternate
6 Juror No. 1 were standing at an elevator outside the courtroom.
7 (Tr. at 4:16-17, 6:2-17.) The government vigorously requested that
8 Alternate Juror No. 1 be excused. (Tr. at 5:18-20, 7:6-20, 8:8-
9 17.) In response to the government's concern, the court questioned
10 the Alternate Juror. (Tr. at 9:9-12:17.) Alternate Juror No. 1
11 stated that, although she did not remember exactly what was said,
12 Mrs. Lopez "made some comment about [Alternate Juror No. 1] having
13 to stay" while she was waiting for the elevator. (Tr. at 9:9-25.)
14 Upon the court's further inquiry, the Alternate Juror revealed that
15 Mrs. Lopez had said something along the lines of "can you guess
16 whose mothers we are" to her and Jurors Nos. 5 and 6 in the
17 lunchroom on an earlier date. (Tr. at 10:4-11:16.) Alternate
18 Juror No. 1 stated that the conversation in the lunchroom was very
19 brief and "[n]othing about . . . the case." (Tr. at 10:20-11:1.)
20 Neither counsel for the defense nor the government made any other
21 inquiry concerning the contact between the jurors and Mrs. Lopez.
22 (Tr. at 11:17-23.)

23 The government argued that the contact between Mrs. Lopez and
24 jurors negatively affected the government's ability to receive a
25 fair trial. Specifically, the government argued that contact
26 between a defendant's family members and jurors personalized the
27 deliberative process because the jurors would be likelier to
28 consider the impact of a conviction not only on the defendant, but

1 on his family members as well. (Tr. at 7:6-20, 8:8-17, 13:2-11,
2 19:11-21, 28:17-29:25.) As such, the government requested that the
3 court excuse Jurors Nos. 5 and 6 and Alternate Juror No. 1 and
4 substitute alternate jurors to whom no communications had been
5 made. (Tr. at 13:19-23.) Greer's counsel conferred with the
6 Public Defender's Officer concerning the situation and expressly
7 objected to the government's request, stating that the jurors
8 should not be replaced, but instead, an admonition should be given
9 to the jury. (Tr. at 5:23-25, 15:10-22, 17:23-18:7, 25:21-26:4.)

10 The court acknowledged the impropriety of the contact between
11 Alternate Juror No. 1 and Mrs. Lopez at the elevator, but the court
12 found the communication to be "spontaneous," "friendly," and
13 "unplanned." (Tr. at 4:20-21, 7:5.) Furthermore, concerning Mrs.
14 Lopez's contact with the jurors in the lunchroom, although the
15 court agreed that personalization with a family member of a
16 defendant might make it tougher for a jury to convict (Tr. 19:22-
17 20:1, 27:12-15), the court found the conversation in the lunchroom
18 was less problematic because Mrs. Lopez was present throughout the
19 entire trial and the jurors had already known that she was the
20 mother of a defendant. (Tr. at 7:21-22, 22:9-12.) Therefore, the
21 court found that an admonition to the jury would be sufficient to
22 remedy the issue. (Tr. at 31:6-32:2.) Greer's counsel was in
23 agreement and stated: "I think that's a good suggestion. . . . It's
24 a good resolution." (Tr. at 32:11,15.)

25 The exact language of the admonition was discussed and debated
26 at length until all parties reached an agreement. (Tr. at 39:8-
27 53:19.) Ultimately the court gave the following instruction to the
28 jury:

1 It's come to my attention that there may have been some
2 brief communication between some member of the
3 defendants' families and some jurors. There should be
4 [sic] no contact between the jury and members of the
5 defendants's [sic] families or law enforcement officers.
6 And I know sometimes it's difficult, but you've got to
7 try to avoid that.

8 And I am going to reiterate to you what I told you
9 previously. You must not be influenced by any personal
10 likes or dislikes, opinions, prejudices or sympathy.
11 That means you must decide the case solely on the
12 evidence before you. You will recall that you took an
13 oath promising to do so at the beginning of the case.
14 The punishment provided by law for these crimes is for
15 the Court to decide and you may not consider punishment
16 in deciding whether the government has proven its case
17 against the defendants beyond a reasonable doubt. In
18 following my instructions, you must follow all of them
19 and not single out some and ignore others. They're all
20 equally important.

21 (Tr. at 67:18-68:12.)

22 Greer now argues that the court should have asked Alternate
23 Juror No. 1 whether she relayed to other jurors her private
24 conversation with Mrs. Lopez and whether the communications
25 affected her ability to be fair and impartial. (Motion to Vacate
26 pp. 7-8.) Greer also argues that the court should have questioned
27 Jurors Nos. 5 and 6 concerning their contact with Mrs. Lopez in the
28 lunchroom. (Id. p. 8.)

"Generally speaking, '[p]rivate communications, possibly
prejudicial, between jurors and third persons, or witnesses, or the
officer in charge, are absolutely forbidden, and invalidate the
verdict, at least unless their harmlessness is made to appear.'"
Tong Xiong v. Felker, 681 F.3d 1067, 1076 (9th Cir. 2012) (quoting
Mattox v. United States, 146 U.S. 140, 142 (1892)). "However, this
does not mean that all extraneous information is per se
prejudicial." Id. The Supreme Court has recognized that "it is
virtually impossible to shield jurors from every contact or

1 influence that might theoretically affect their vote." United
2 States v. Olano, 507 U.S. 725, 738 (1993) (quoting Smith v.
3 Phillips, 455 U.S. 209, 217 (1982)). Indeed, "certain chance
4 contacts between witnesses and jury members—while passing in the
5 hall or crowded together in an elevator—may be inevitable."
6 Caliendo v. Warden of California Men's Colony, 365 F.3d 691, 696
7 (9th Cir. 2004) (citation omitted). Thus, when an unauthorized
8 communication with a juror was "de minimis," "the defendant must
9 show that the communication could have influenced the verdict
10 before the burden of proof shifts to the prosecution." Id.
11 (emphasis added). "A defendant must offer sufficient evidence to
12 trigger the presumption of prejudice." Id. (citation omitted). "A
13 trial court has considerable discretion in determining whether to
14 hold an investigative hearing on allegations of jury misconduct or
15 bias and in defining its nature and extent." United States v.
16 Olano, 62 F.3d 1180, 1192 (9th Cir. 1995).

17 A "casual, time-of-the-day greeting" in the men's room between
18 a juror and a federal agent for the prosecution was found to be de
19 minimis communication. United States v. Day, 830 F.2d 1099, 1103-
20 04 (10th Cir. 1987). An investigating officer's entering the jury
21 room during deliberations without the court's permission to set up
22 a video machine to replay a videotape of a witness' interrogation
23 was also found to be "innocuous." Lee v. Marshall, 42 F.3d 1296,
24 1297, 1299 (9th Cir. 1994). For example, in Olano, one juror
25 encountered a defendant and his wife as the juror left a courthouse
26 elevator. 62 F.3d at 1192. The defendant's wife told the juror
27 that she had a brother by the same name as the juror. Id. The
28 juror acknowledged that, although he had never met her brother,

1 their mail occasionally was mixed up. Id. When the conversation
2 was brought to the district court's attention, the district court
3 re-admonished the jury not to speak with the parties and did not
4 excuse the juror or entertain a motion for mistrial sua sponte.
5 Id. The Ninth Circuit held that the district court did not abuse
6 its discretion in not entertaining sua sponte a motion for mistrial
7 because, although inappropriate, the juror's conversation with the
8 defendant's wife was brief, and it did not relate to the trial.

9 Id.

10 Indeed, "mere contact or association between a witness . . .
11 and a member or members of the jury [does not render] the trial
12 unfair in the constitutional sense; more must appear to affect the
13 validity of a conviction." Helmick v. Cupp, 437 F.2d 321, 322 (9th
14 Cir. 1971). The "more" was found in Turner v. State of Louisiana,
15 379 U.S. 466 (1965). In Turner, the defendant was convicted of
16 murder after a three-day jury trial. Id. at 466. Two deputy
17 sheriffs who gave key testimony leading to the defendant's
18 conviction were in close and continual association with the jurors
19 in and out of the courthouse during the three-day trial: the
20 deputies ate with the jurors, freely conversed with them, did
21 errands for them, and drove them to their lodgings each night. Id.
22 at 467-68. The Supreme Court found that the close and continual
23 relationship between the deputies and the jurors was prejudicial
24 because the contact was not a "brief encounter, but [] a continuous
25 and intimate association" "which could not but foster the jurors'
26 confidence in those who were their official guardians during the
27 entire period of the trial. And Turner's fate depended upon how
28 much confidence the jury placed in these two witnesses." Id. at

1 473-74. Thus, the Court held that Turner had been denied right to
2 fair trial by an impartial jury.

3 Here, the contact between the Jurors and Mrs. Lopez should be
4 characterized as merely a chance encounter and nothing more.
5 Similar to the conversation between the juror and the defendant's
6 wife in Olano, 62 F.3d at 1192, the conversation between the Jurors
7 here and Mrs. Lopez was also brief. Unlike Olano, the statements
8 made at lunch and by the elevator had some relationship to the
9 case, but they were tangentially related and, as the Court stated,
10 innocuous. Such spontaneous and friendly comments are de minimis
11 and insufficient to trigger the presumption of prejudice. See Day,
12 830 F.2d at 1103-04; Caliendo, 365 F.3d at 696. In addition, Greer
13 offers no explanation as to how Mrs. Lopez's contact with the
14 jurors prejudiced him. Unlike the continuous and intimate
15 association among the deputies and jurors in Turner that helped
16 build up the jurors' confidence in the deputies' testimony, 379
17 U.S. at 473-74, Mrs. Lopez's brief encounter with the Jurors did
18 not have an effect on the credibility of any witness. Mrs. Lopez
19 did not testify at Greer's trial; therefore, her credibility would
20 not have an impact on Greer's conviction. Greer provides no
21 evidence tending to show that there existed a continuous and
22 intimate association between the Jurors and his co-defendant's
23 mother that would unfairly prejudice him in receiving a fair trial.
24 Greer does not claim that he would have been acquitted if the court
25 had conducted a more extensive inquiry into the contact between the
26 jurors and Mrs. Lopez. As Greer has failed to offer any evidence
27 that would show how the communication influenced his guilty

28

1 verdict, there is no presumption of prejudice. See Caliendo, 365
2 F.3d at 696.

3 **D. Greer's claim of ineffective assistance of counsel must**
4 **fail.**

5 Greer asserts that both his trial and appellate counsel should
6 have raised the issues he is arguing in the instant motion and
7 their failure to do so constituted ineffective assistance of
8 counsel.

9 To prevail on a claim of ineffective assistance of counsel, a
10 convicted defendant must show both (1) that counsel's performance
11 was deficient; and (2) that "the deficient performance prejudiced
12 the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).
13 The defendant bears the burden of establishing both prongs of the
14 claim of ineffective assistance of counsel. United States v.
15 Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995). If the
16 defendant fails to satisfy either prong, the claim of ineffective
17 assistance of counsel must fail. Strickland, 466 U.S. at 687. In
18 order to show prejudice, a defendant must show that "there is a
19 reasonable probability that, but for counsel's unprofessional
20 errors, the result of the proceeding would have been different."
21 Id. at 694; Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998). A
22 reasonable probability is less than a preponderance of the evidence
23 and is a probability sufficient to undermine confidence in the
24 outcome. See Kyles v. Whitley, 514 U.S. 419, 434 (1995);
25 Strickland, 466 U.S. at 694.

26 "[A] court need not determine whether counsel's performance
27 was deficient before examining the prejudice suffered by the
28 defendant as a result of the alleged deficiencies." Id. at 697.

1 Here, Greer argues that counsel was ineffective for not making
2 the arguments the Court rejected above. For the reasons discussed,
3 Greer has not shown prejudice, and his ineffective assistance of
4 counsel claim fails as a result.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the 2255 motion is DENIED.

7

8 IT IS SO ORDERED.

9

10

11 Dated: August 27, 2013

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28


DEAN D. PREGERSON
United States District Judge