

Exhibit F for Motion For Leave to Amend in CF-2007-3829

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Case No. 04-CR-127-TCK
)
BOBBY WAYNE HALEY, SR.,)
)
Defendant.)

ORDER

Before the Court is Defendant Bobby Wayne Haley, Sr.'s ("Defendant") *pro se* Motion Under 28 U.S.C. Section 2255 To Vacate, Set Aside, or Correct Sentence/Conviction (Doc. 214) ("2255 Motion"), and amendment thereto (Doc. 215).¹ On May 10, 2010, the United States, by and through Special Attorney Jane Duke,² filed a response to the Motion ("2255 Response"), in which it conceded that the 2255 Motion should be granted and that Defendant should be released from custody. On May 19, 2010, the Court conducted a sealed, *ex parte* hearing, during which the Court questioned the United States regarding representations made in the 2255 Response. On the same date, Defendant, by and through counsel Wesley Johnson, filed a Motion for Order ("Motion for Release") (Doc. 228), requesting that the Court vacate Defendant's convictions and immediately release him from custody based on representations made by the United States in the 2255 Response. The arguments raised in the Motion for Release are deemed incorporated into Defendant's *pro se* 2255 Motion.

¹ This amendment was docketed as a motion to amend (Doc. 215), and the Court grants such motion.

² Ms. Duke was appointed to oversee an investigation in the Northern District of Oklahoma concerning possible law enforcement corruption.

I. Background

Defendant was originally charged with one count of possession of fifty grams or more of cocaine base with intent to distribute, and one count of possession of cocaine with intent to distribute. Trial of these counts resulted in a hung jury. After trial, the Court had concerns about the relevant search warrants. Specifically, the Court had concerns regarding whether the reliable confidential information (“RCI”) identified in the affidavit for search warrants actually saw Defendant, and not Defendant’s son, Bobby Wayne Haley, Jr., selling drugs from the relevant location. Based on these concerns, the Court reopened Defendant’s Motion for Disclosure of Confidential Informants (“Motion for Disclosure”), which had been denied prior to trial, and ordered supplemental briefing thereon. In the supplemental briefing submitted February 25, 2005, the United States provided the affidavit of Tulsa Police Department Officer Jeff Henderson (“Henderson”), who was the affiant in support of the search warrants. Henderson stated that the RCI “told me that *he* had recently been to the business office of the referenced salvage yard, where *he* had personally seen Bobby Haley Senior conduct drug transactions.” (*See* Doc. 66, at Ex. 2 (emphasis added).)

Following receipt of the supplemental briefing, the Court referred the Motion for Disclosure to Magistrate Judge Paul Cleary for Report and Recommendation, ordered Judge Cleary to conduct an *ex parte, in camera* hearing, and ordered Judge Cleary to make specific inquiries of Henderson and the RCI. (*See* Doc. 68.) During this April 7, 2005 hearing, Henderson and his purported RCI,

Rochelle Martin (“Martin”),³ testified. (See Doc. 145.)⁴ After considering the testimony at the hearing, Judge Cleary recommended that Defendant’s Motion for Disclosure be denied. (See Doc. 75.) The Court adopted the Report and Recommendation and denied the Motion for Disclosure.

On July 8, 2005, the United States filed a Superseding Indictment (“SI”), adding a conspiracy charge (Count 1 of SI) to the two counts previously tried against Defendant (Counts 3 and 4 of SI) and adding Defendant Adrian Tobie (“Tobie”). The conspiracy count arose out of a transaction conducted in July 2003 between Tobie and an undercover agent. Tobie pleaded guilty to a conspiracy charge (Count 2 of SI) and testified at trial that Defendant supplied the drugs for the July 2003 transaction. After trial, Defendant was convicted of Counts 1, 3, and 4 of the SI. On January 25, 2006, the Court sentenced Defendant to 264 months for each count, each to run concurrently with the others. On October 10, 2007, Defendant’s conviction on all three counts was affirmed on appeal. (See Doc. 205.)

II. 2255 Motion and 2255 Response

On December 4, 2008, Defendant filed his *pro se* 2255 Motion, and an amendment thereto on January 26, 2009. In these filings, Defendant essentially argues that he received ineffective assistance of counsel and that Tobie offered false testimony. The Court did not order the United States to respond to the 2255 Motion pursuant to 28 U.S.C. § 2255(b), and the Court has not yet ruled on the 2255 Motion.

³ Although Henderson used the pronoun “he” in his 2/25/05 affidavit, the RCI brought to the April 7, 2005 hearing (Martin) was a female.

⁴ This transcript, and other relevant sealed documents, were unsealed at the United States’ request.

During the course of conducting a special investigation of certain Tulsa Police Department officers, including Henderson, the United States became aware of facts causing it to concede that Defendant's 2255 Motion should be granted and his convictions vacated. These facts are set forth in the 2255 Response.⁵ Specifically, the United States filed the affidavit of Martin, dated May 6, 2010, stating:

1. Today, I read a transcript of court proceedings relating to Bobby Wayne Haley, Sr. The transcript is marked "SEALED," and was filed in this case on April 15, 2005. My lawyer has informed me that the transcript was filed as Docket Number 145 in this case. This affidavit relates to testimony that is recorded in that transcript.
2. I am the person who is identified in the transcript as the "Confidential Informant."
3. The testimony I gave in that hearing was false.
4. I have never conducted any drug transactions with Bobby Haley, Sr. I have never been present with another person who conducted a drug transaction with Bobby Haley, Sr.
5. My false testimony was solicited by Jeff Henderson, who was at the time a Tulsa Police officer. Jeff Henderson and Bill Yelton (another Tulsa Police officer) coached me on what they wanted me to say to the judge. They drove me to the hearing together, and told me to testify that I had been to Bobby Haley's home and his salvage yard, and that I had been present during drug transactions at those places.
6. I did what they told me to do, although it was not truthful. My testimony was a lie, which I did because Jeff Henderson asked me to do it.
7. To the best of my memory, Jeff Henderson called me the night before the hearing and asked me to testify as a favor to him. Before that night, I had never purchased any drugs from Bobby Haley, Sr., nor had I ever witnessed Bobby Haley, Sr., selling drugs.
8. I never told Jeff Henderson that I bought drugs from Bobby Haley, Sr., or that I witnessed Bobby Haley, Sr., selling drugs. I falsely testified that I told Jeff Henderson those things, because he and Officer Yelton told me to say that.
9. I have never conducted any controlled drug purchases for Jeff Henderson or any other Tulsa Police officer.

⁵ During the May 19, 2010 hearing, the Court questioned the United States regarding its decision to concede the 2255 Motion rather than dismiss the charges, as it has done in other similar cases. The United States' response was that it questioned its ability to dismiss charges after the Tenth Circuit has affirmed a defendant's convictions on appeal.

(Doc. 226, at Ex. A.)

III. Constitutional Violation

Based on Martin's affidavit and other information gathered during its investigation, the United States has represented to the Court that Defendant's sentences on all counts of conviction were imposed in violation of the Constitution, *see* 28 U.S.C. § 2255, because the "search warrants for [Defendant's] properties were unconstitutionally obtained." (2255 Response at 2.) Based on Martin's affidavit and representations made by the United States during the *ex parte* hearing conducted May 19, 2010, the Court accepts this concession of the United States and finds that the search leading to discovery of the relevant drugs was unconstitutional. Therefore, Defendant's sentences for Counts 3 and 4 of the SI shall be vacated.

Based on representations made by the United States at the May 19, 2010 hearing, the Court also finds that Defendant's conviction on the conspiracy count must be vacated. Specifically, when questioned by the Court about the propriety of vacating the conspiracy conviction, the United States represented that the conspiracy charge was only brought to strengthen the original case against Defendant and would not have been brought as a stand-alone charge. Similarly, in the 2255 Response, the United States represented that "[t]he conspiracy charge was only added after a jury was unable to reach an unanimous verdict on the search warrant counts," and "the conspiracy count was only added to strengthen the search warrant case." (2255 Response at 3.) Under these circumstances, and based on the United States' request, the Court finds it proper to vacate the conspiracy conviction.

Pursuant to 28 U.S.C. § 2255, "[i]f the Court finds . . . that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to

collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” Under the circumstances presented, and based on the request of the United States, the Court finds it proper to vacate and set the judgment aside and discharge the prisoner.

IT IS THEREFORE ORDERED that Defendant Bobby Wayne Haley, Sr.’s *pro se* Motion Under 28 U.S.C. Section 2255 To Vacate, Set Aside, or Correct Sentence/Conviction (Doc. 214) is GRANTED;⁶ Defendant’s motion to amend (Doc. 215) is GRANTED; Defendant’s Motion for Release (Doc. 228) is GRANTED; and Defendant’s Motion for Transcripts (Doc. 213) is DENIED as moot.

Pursuant to 28 U.S.C. § 2255, Defendant’s convictions and sentences on Counts 1, 3, and 4 of the SI are VACATED, and the Judgment (Doc. 164) is VACATED. The Court orders that Defendant Bobby Wayne Haley, Sr. shall be RELEASED from custody.

DATED this 21st day of May, 2010.


TERENCE KERN
United States District Judge

⁶ The 2255 Motion is not granted for any of the reasons raised by Defendant in his *pro se* 2255 Motion, including Defendant’s claim of ineffective assistance of counsel.