IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIE TYLER,

Defendant.

OPINION AND ORDER

00-C-0400-C
97-CR-0074-C-07

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Defendant Willie Tyler has filed a timely motion pursuant to 28 U.S.C § 2255, contending that his conviction and sentence are unconstitutional for a number of reasons. 1) His appointed counsel provided ineffective assistance in three respects: a) by failing to challenge the legality of his arrest; had she done so, she could have shown that defendant was arrested without probable cause and also could have had the pretrial statements of co-defendants Christopher Bell and Nicholas Martinez entered into the record so that they could have been used for impeachment purposes; b) by failing to challenge the racial makeup of the jury that convicted him; and c) by failing to raise the issue of selective prosecution before trial; 2) the court abused its discretion by denying the jurors' request to have the court reporter read

back the testimony of co-defendant Bell; 3) the government never proved the amount of drugs attributable to defendant by a preponderance of the evidence; 4) the court erred in admitting a narrative account of a telephone conversation between co-defendants Bell and Martinez; and 5) defendant was denied his right to an impartial jury by inadequate questioning of the panel members to determine bias. I conclude that none of defendant's contentions can be sustained and that his motion must be denied.

OPINION

1. Alleged ineffectiveness of counsel

a. Failure to challenge legality of defendant's arrest

The test for ineffectiveness of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984). It requires a defendant to show that his counsel's representation fell below an objective standard of reasonableness, see id. at 688, and that, as a result, his defense was prejudiced. See id. The showing of prejudice is made if the defendant can establish that there is a reasonable probability that the result of the proceeding would have been different were it not for counsel's unprofessional errors. See id. at 694. In many instances, the two prongs of the Strickland test collapse into one, as they do in this case.

It was not ineffective for defendant's trial counsel to fail to challenge defendant's arrest

as not supported by probable cause. Defendant could not have been prejudiced by this failure because such a challenge could never have succeeded. Defendant was arrested after the grand jury had returned an indictment against him. This indictment was evidence that the grand jury had found probable cause to believe he had committed the crime for which he was indicted. See Fed. R. Crim. P. 6. (Defendant is not contending that his counsel should have moved to suppress evidence that was seized from him when he was arrested. His motion goes only to her failure to challenge the arrest itself.)

Defendant does not explain the basis for his allegation that if his attorney had asked for a hearing on probable cause she could have obtained statements for use as impeachment. Defendant's counsel had full access to all witness statements through discovery and did not need a hearing in order to obtain them. In any event, defendant has made no showing that any impeaching statements existed.

b. Failure to object to racial composition of jury

Defendant contends that it was ineffective assistance for his counsel not to object to the composition of the jury panel from which his trial jury was selected but he has not shown that there was any basis for raising such a challenge, other than his allegation that the particular jury panel from which his jury was selected included no minorities. It is irrelevant whether

minorities are underrepresented on a particular panel of prospective jurors or trial jury. A defendant alleging a violation of his Sixth Amendment right to be tried by a jury of his peers, that is, by jurors drawn from a fair cross-section of the community, must show "that the group allegedly excluded is a distinctive part of the community; that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and that this unnderrepresentation is due to systematic exclusion of the group in the jury selection process." United States v. Ashley, 54 F.3d 311, 313 (7th Cir. 1995). In other words, the fact that one particular jury or jury panel does not include minorities does not demonstrate a Sixth Amendment violation. A defendant must show that the larger group of all prospective jurors is not a fair and reasonable cross-section of the community. Defendant has made no such showing. His "mere observation that there were no African-Americans on a panel that was drawn from a population containing African-Americans simply is not sufficient to demonstrate any systemic exclusion." United States v. Guy, 924 F.2d 702, 706 (7th Cir. 1991).

c. Failure to challenge selective prosecution

Defendant contends that his counsel should have challenged the government's decision to charge only the black members of the conspiracy. In support of his contention, he has

submitted purported copies of pages from grand jury transcript describing letters of immunity as exhibits. It is impossible to tell from this exhibit the race of the subjects of the letters, their relative culpability, if any, or any of the other facts that would be necessary to know in order to determine whether defendant had made a prima facie showing that there were white persons situated similarly to defendant and his charged co-defendants who were not prosecuted. (In fact, at least one white person was charged and convicted of participation in this conspiracy.) In short, defendant has supplied no evidence that would suggest that there is any merit to his claim of selective prosecution and therefore, that there is any factual basis on which his defense counsel might have moved to challenge the prosecution.

2. Claims 2 - 5

Defendant's remaining claims cannot go forward because defendant never raised them on appeal and has not alleged cause and prejudice for his failure to do so. See Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (no collateral review absent showing of both good cause for failure to raise claims on direct appeal and actual prejudice from failure to raise claims or if refusal to consider issue would lead to fundamental miscarriage of justice) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)).

Even if defendant could show cause for his failure to raise his claims on appeal, he could

never show the requisite prejudice, because there is no merit to his claims. I denied the jury's request to have the court reporter read back Christopher Bell's trial testimony (defendant's claim #2) because Bell was almost the only government witness and he was on the stand for many hours. Reading back his testimony would have been the equivalent of trying the whole case again. I saw no reason to engage in such an exercise when the trial itself had been relatively short and there seemed no good reason why the jury could not collectively remember Bell's testimony. Whether the denial of this request was right or wrong, it does not amount to a constitutional violation that a court can entertain on a collateral motion attacking conviction. See Young v. United States, 124 F.3d 794 (7th Cir. 1997) (non-constitutional error will not support collateral relief unless it is so fundamental that complete miscarriage of justice has occurred).

Defendant's claim #3 concerns the government's alleged failure to prove the amount of drugs attributable to him by a preponderance of the evidence. No such proof was necessary because defendant admitted in a written statement supplied to the court that he had dealt in at least 737 to 794 grams of crack cocaine. This amount of crack cocaine supports his placement in offense level 36. He has no basis for a claim that he was prejudiced by his counsel's failure to put the government to its proof at sentencing.

Defendant's claim #4 is a little hard to make out. In part, he is objecting to an allegedly

erroneous evidentiary ruling in allowing into evidence two taped telephone calls between defendant's co-conspirators Bell and Martinez in which they referred to him briefly as owing them money. Defendant says it was improper to admit this evidence because a "narrative account of one co-conspirator about another's past activities [is] not admissible. See United States v. Hernemann, 810 F.2d 86, 95 (2nd Cir. 1986) [sic; should be Heinemann, 801 U.S. 86]." Defendant is correct that the only statements of co-conspirators that constitute exceptions to the hearsay rule are those made "during the course and in furtherance of the conspiracy" Fed. R. Evid. 801(d)(2)(E), and that the exception does not encompass statements about criminal activity engaged in by a co-conspirator before the conspiracy began. However, this does not help him because the statements made by Bell and Martinez were made during the course of the conspiracy and in furtherance of it. The statements were part of the two men's efforts to straighten our their accounts and collect money from persons who had been buying crack cocaine from them. The statements fit both requirements of the exception. There was no impropriety in admitting them.

The second part of defendant's objection seems to be directed to the government's use of the statements to indict and arrest him. Even if the statements would have been inadmissible at trial as hearsay they could have been used before the grand jury. There is no merit to this claim.

Defendant's final claim (#5) is that he was denied his right to an impartial jury when the court did not engage in more prolonged questioning of jurors who said that they had seen or heard some media accounts of the conspiracy. The prospective jurors answered promptly and without equivocation that they had not made up their minds about the guilt of the defendants when they were exposed to the media accounts, making it unnecessary to undertake a more searching examination of any possible bias from the media accounts.

ORDER

IT IS ORDERED that defendant Willie Tyler's motion for post-conviction relief, filed pursuant to 28 U.S.C. § 2255, is DENIED for defendant's failure to show that his conviction or sentence is unconstitutional or otherwise vulnerable to collateral attack.

Entered this 31st day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge