IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

00-CR-0006-C-01
03-C-0067-C

v.

TERRY E. SCHAFFNER,

Defendant.

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Defendant Terry Schaffner has filed a motion for vacation of his conviction and sentence, pursuant to 28 U.S.C. § 2255. He contends that his conviction was illegal in two respects: 1) he was denied his constitutional right to the effective assistance of counsel at trial when his attorney failed to investigate witnesses that would have provided exculpatory evidence, refused to allow certain witnesses to testify and coerced defendant into pleading guilty and 2) the court erred in denying suppression of illegally seized evidence. In addition to his § 2255 motion, defendant has moved for release on bail pending the disposition of the motion and for an order barring the government from interfering with his prospective witnesses. The government opposes all of the motions. I conclude that defendant has failed

to show that his trial counsel was ineffective in any respect and that he is barred from challenging the suppression ruling on this motion for postconviction relief. Therefore, his § 2255 motion will be denied.

RECORD FACTS

Defendant was indicted on January 12, 2000, for the criminal acts of knowingly using and inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct and transporting the visual depiction in interstate commerce. Defendant moved to suppress the photograph that was the basis for the indictment, contending that it had been seized in the course of an illegal search. The magistrate judge held an evidentiary hearing and then recommended denial of the motion. I adopted the recommendation and denied the motion to suppress, along with several other motions.

Defendant pleaded guilty to the one-count indictment against him on May 15, 2000, after having signed a written plea agreement on May 11. As part of the plea agreement, he preserved his right to appeal the court's denial of his motion to dismiss the indictment against him. He did not preserve his right to appeal the denial of his suppression motion. At a sentencing hearing held on July 17, 2000, I sentenced defendant to a term of 140 months' imprisonment. He appealed, lost and filed a petition for a writ of certiorari, which was denied on February 26, 2002. He filed this motion for postconviction relief on February

6, 2003.

OPINION

I. JURISDICTION

The initial question is whether defendant's motion is a second or successive motion that this court could not entertain in the absence of certification by the court of appeals. The question arises because defendant filed a motion on November 22, 2001, seeking a reduction in his sentence based on his "extraordinary post-conviction rehabilitative efforts." 28 U.S.C. § 2255 limits prisoners to one collateral attack on their sentences, unless they can persuade a panel of the appropriate court of appeals that they have newly discovered evidence or that a new rule of constitutional law applies to their case. Defendant's earlier motion was an effort to win a reduction of sentence but it cannot be characterized as an attack on his sentence. The entire motion was devoted to a summary of the classes defendant had taken while in prison and other efforts he had made to rehabilitate himself since he had been sentenced. There is no reason to consider it a § 2255 motion in another guise, so as to bar this court from considering defendant's present motion. Ruth v. United States, 266 F.3d 658 (7th Cir. 2001) (non-§ 2255 motion considered collateral attack "when the substance of the motion falls within the scope of § 2255 ¶ 1"); Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000).

II. FAILURE TO RAISE CLAIMS ON DIRECT APPEAL

The government concedes that defendant's appeal from his conviction does not preclude him from raising claims of ineffective assistance in this proceeding because the bases for the claims include facts that would not have been part of the record before the court of appeals. Galbraith v. United States, 313 F.3d 1001, 1007-08 (7th Cir. 2002) (ordinarily, failure to raise claim on appeal prevents defendant from raising claim in a collateral proceeding; exception exists for claims of ineffective assistance of counsel when such claims involve evidence outside the record). The government contends, however, that defendant cannot contest the use of the photograph against him both because he waived his right to challenge the suppression of evidence once he pleaded guilty and because he cannot raise a Fourth Amendment claim in a collateral attack on his conviction. The contention is correct.

Once defendant pleaded guilty, he waived his right to contest any nonjurisdictional defects, including any Fourth Amendment claims that he might have. United States v. Adams, 125 F.3d 586, 588 (7th Cir. 1997). Defendant maintains that he can raise the suppression issue because any waiver that occurred was the result of an illegally coerced guilty plea, but he misunderstands the law. Even if he had preserved his right to challenge the denial of his motion to suppress, he is barred from raising his claims in a federal habeas action. This is because the exclusionary rule is not calculated to redress injuries to the

privacy of victims of illegal searches or seizures. Rather, its purpose is to deter illegality on the part of law enforcement officers. Holman v. Page, 95 F.3d 481, 489 (7th Cir. 1996). Evidence is suppressed not because it is considered unreliable but in order to enforce constitutional norms. Because the constitutional right to suppress illegally seized evidence is not a personal one, defendants may assert it before trial and on appeal but not in the course of a postconviction attack. The courts take the position that the harm suffered by defendant whose counsel was ineffective in suppressing reliable evidence is "'not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.'" Id. (quoting Kimmelman v. Morrison, 477 U.S. 365, 396 (1986) (Powell, J., concurring)); see also United States v. Williams, 106 F.3d 1362, 1367 (7th Cir. 1997) (damage done by ineffective counsel at suppression hearing does not constitute prejudice under Strickland).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Strickland Standard

The test for determining the ineffectiveness of counsel is set out in Strickland v. Washington, 466 U.S. 680 (1984). To prevail, a criminal defendant must show that his trial counsel's performance was objectively deficient ("not reasonable considering all the circumstances," id. at 692) and he must show also that the deficient representation caused him prejudice. Courts need not address the inquiry in any particular order or even consider

both components of the test, if the defendant is unable to satisfy one part of the test. Id. at 697.

B. Failure to Investigate

Defendant alleges that his trial counsel failed to investigate the claim that Calvin Flodquist was the person who took the photograph of the minor and transported the photograph across state lines. For the purpose of evaluating trial counsel's performance, I will assume that she did not undertake any investigation, so that the only question is whether her failure caused defendant any prejudice. Because defendant never took his case to trial and thus never had a reason or opportunity to try to convince a jury that Flodquist, not he, was the photographer, it is difficult to conceive of any prejudice defendant might have suffered. Defendant does not contend that the investigative failure was the reason he entered his plea of guilty; he argues consistently that he entered his plea because his attorney coerced him into doing so by making him promises that were not kept. If defendant has some other reason for thinking he was prejudiced by the failure to look into Flodquist's involvement, he has not identified it.

Defendant seems to think that a full investigation into Flodquist's role in the offense would have led to the quashing of the indictment against him, but he is misinformed. No mechanism exists for making a pretrial determination of the validity of the government's

charges against an individual; that determination can be made only at trial.

Defendant's assertion of prejudice makes little sense in light of his own admissions of guilt. According to his attorney, defendant told her the truth at the outset of her representation of him and from then on, the plan was that he would plead guilty if he lost on his motions, because "[h]e did not want to lie in court." Tr. of sentencing hrg., dkt. #74, at 8. At his plea hearing, defendant told the court that he had been in a motel, that the victim had wanted a picture of herself and he had "snapped a photograph or two." Tr. of plea hrg., dkt. #75, at 14. He agreed on the record that the government would have been able to prove at a trial that defendant took the picture of the victim through the testimony of the victim and two other witnesses who would testify that defendant had taken the nude photograph of the victim. Id. at 13. Defendant read the probation officer's description of the crime and his role in it in the presentence report and told the court that he had no objection to anything in the presentence report. Tr. of sentencing hrg., dkt. #74, at 3.

Even if defendant's counsel misrepresented his statements to her when she spoke at his sentencing hearing and even if defendant had made his admissions in court solely for the purpose of pleading guilty, in his November 2001 motion to reduce his sentence, which he signed under penalty of perjury, he stated that he had taken "one or two Polaroid photographs of one of his companions, a 15 year old girl, in the nude when she emerged from the shower." Motion to Reduce Sent., dkt. #78, at 1. There was no necessity for

defendant to make this statement. Having made it, however, he is in no position to deny his guilt, maintain that he was forced into making incriminating statements or argue that his trial counsel prejudiced his case by not undertaking an investigation to prove that Calvin Flodquist was the person who took the pictures of the nude victim.

B. Failure to Allow Witnesses to Testify at Defendant's Suppression Hearing

As explained above, defendant cannot establish any prejudice arising out of his counsel's alleged ineffectiveness in handling his suppression hearing. United States v. Williams, 106 F.3d 1362, 1367 (7th Cir. 1997). Even if the subject were not off limits, defendant could not prevail on it. He seems to be arguing that his trial counsel was ineffective because she did not allow certain witnesses to testify at the suppression hearing to Calvin Flodquist's responsibility for the photograph or to describe the manner in which law enforcement authorities obtained the photograph. The record of the hearing refutes any argument that the witnesses were not allowed to describe the circumstances in which the photograph was seized. The witnesses testified at length about these matters. It is true that they did not testify about Flodquist, but any such testimony was irrelevant to the question of the constitutionality of the search. The magistrate judge did not need to know the identity of the photographer; he needed to know what had happened at defendant's home.

Counsel's efforts to keep the witnesses on track was wise, not ineffective.

C. Coercion of Guilty Plea

Defendant alleges that his counsel forced him to plead guilty by telling him that his case would be reversed on appeal. He provides no support for this allegation, not even an affidavit of his own. On that basis alone, his claim can be denied without an evidentiary hearing. Galbraith, 313 F.3d at 1009 (hearing not necessary in absence of "'detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions'") (quoting Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996)).

Not only has defendant failed to adduce any evidence in support of his allegations, he has not explained the effect on his claim of his statements to the court during his plea hearing. In response to questions from the court, he stated that no one had made any promises to him other than those covered in the written plea agreement, that no one had forced him to plead guilty and that there was a factual basis for the plea, namely that he had taken a photograph of a 15 year old girl when she was nude. The presumption is that a defendant's statements to the court are true. This presumption is not overcome by mere allegations. Key v. United States, 806 F.2d 133 (7th Cir. 1986) (allegation that counsel made promises to defendant must be supported by allegations specifying terms of alleged

promises, when, where and by whom such promises were made and precise identity of any witnesses to promise and even these allegations may not be sufficient to warrant evidentiary hearing if they do not overcome presumption of record).

Moreover, to prevail on a claim of prejudice arising out of a guilty plea, a defendant must show that his counsel's ineffective performance affected the outcome of the plea process. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is 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, 59 (1970), and he must show a strong likelihood that he would have been found not guilty. United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991) (defendant must show more than that he would not have pleaded guilty if he had received correct advice but must show likelihood that he would not have been convicted and given sentence at least as severe as he received as result of plea agreement); Gargano v. United States, 852 F.2d 886, 891 (7th Cir. 1988) (same). Defendant has alleged that he would not have pleaded guilty had his trial counsel not told him that the court of appeals would reverse the denial of his suppression motion, but he has never said that he would have insisted on going to trial or made any effort to show how he would have fared better had he done so. Given the many admissions of guilt that he made, this omission is not surprising.

In summary, I conclude that defendant has failed to show any reason to vacate his

sentence. Therefore, his motion for relief pursuant to § 2255 will be denied, along with his motions for bail and for an order restraining the government from interfering with his witnesses. The last two motions are moot now that I have decided that there is no merit to defendant's § 2255 motion.

ORDER

IT IS ORDERED that defendant Terry E. Schaffner's motion to vacate his sentence, brought pursuant to 28 U.S.C. § 2255, is DENIED, as are his motions for bail pending disposition of the motion and for an order restraining the government from interfering with his witnesses.

Entered this 3rd day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge