IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

04-C-0918-C
01-CR-0032-C-03

v.

ROBERT D. SUTTON,

Defendant.

- -

Defendant Robert D. Sutton has moved pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence. He contends that both his trial counsel and appellate counsel were ineffective in a number of respects and that the prosecution engaged in misconduct. After evaluating defendant's contentions, I conclude that he has not shown any ineffectiveness on the part of either his trial counsel or his appellate counsel or any evidence of misconduct by the prosecution. Accordingly, I will deny his motion for postconviction relief.

BACKGROUND

Defendant was charged together with James H. Fleming and Michael Brown in a 21-count indictment returned on March 15, 2001. Defendant was named in seven of the

counts, including one for conspiracy to affect interstate commerce by robbery, two counts of affecting commerce by robbery, one count of bank robbery and three counts of use of a gun in connection with a crime of violence.

The charges arose out of a series of armed robberies that took place in Madison, Wisconsin, during 1997 and 1998. Other individuals involved in the robberies were charged and prosecuted separately and entered entered pleas of guilty in return for promises of senencing benefits if they testified against their confederates. They provided much of the evidence against defendant and his co-defendants. Defendant was found guilty of all seven counts and sentenced to 52 years and 3 months in federal prison.

Defendant appealed his conviction to the Court of Appeals for the Seventh Circuit, where appellate counsel was appointed to represent him. Defendant challenged the district court's exclusion of the government's fingerprint reports, which showed that the fingerprints collected were not those of defendants; the district court's decision to allow Detective Dondurant to testify about co-defendant James Fleming's confession; and the alleged lack of sufficient evidence to show an effect on interstate commerce under the Hobbs Act. The court of appeals denied defendant's appeal and the Supreme Court denied his petition for a writ of certiorari on December 1, 2003. Defendant filed this § 2255 motion on December 3, 2004. Under the "mailbox" rule, it is timely. Houston v. Lack, 487 U.S. 266 (1988).

OPINION

A. Section 2255 Motions

Section 2255 motions are vehicles for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect resulting in a complete miscarriage of justice. Reed v. Farley, 512 U.S. 339, 353-54 (1994). They are not intended to be substitutes for direct appeals or a means of appealing the same issues a second time. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). In the absence of changed circumstances, they cannot be used for issues that were raised on direct appeal, for non-constitutional issues that could have been raised on direct appeal or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996).

B. Alleged Ineffectiveness of Trial Counsel

Defendant has alleged that his trial counsel was ineffective in a number of respects. He is free to raise this claim at this time. The United States Supreme Court has held that a defendant may raise a claim of ineffectiveness of counsel in a § 2255 motion even if he could have raised the issue on direct appeal. Massaro v. United States, 123 S. Ct. 1690

(2003). As a general rule, it is not an issue that should be raised on direct appeal because it usually involves evidence of matters that would not be part of the trial record.

The standard for assessing the effectiveness of counsel was established in Strickland v. Washington, 466 U.S. 688 (1984). To show constitutionally ineffective assistance, a defendant must prove that counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that but for counsel's objectively unreasonable performance the result of the proceeding would have been different. Id. If it is clear that prejudice did not result from counsel's act or omission, a court may deny a claim of ineffective representation without determining whether the representation was constitutionally ineffective in fact. Counsel are presumed effective. Id. at 688-89 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Against this background, I will take up defendant's allegations.

1. Failure to move to suppress defendant's statement

The evidence at trial showed that defendant bought a .25 caliber handgun from a gun shop in Madison in 1996, before the commission of the robberies charged in this case. In June 1998, less than a year after the last of the charged Madison robberies, he was stopped by a Milwaukee police officer, who searched the car in which defendant had been riding and

seized the gun defendant had bought two years earlier. During questioning, defendant admitted to a Milwaukee police detective that he had participated in a robbery of a tavern in Milwaukee, that his partner in the robbery had used his gun and that Angela Cramer had acted as the getaway driver. The state charged defendant with robbery; he was convicted on his plea of no contest long before he was indicted in this court.

Before trial in this court, defendant's counsel moved to exclude evidence of the gun but his motion was denied and the gun was received with a limiting instruction on the ground that it was integrally related to the charged crimes. Counsel did not move to exclude defendant's statement about robbing the tavern. Defendant attacks that omission, alleging that the statement he made in Milwaukee was not voluntary and he was not given his Miranda warnings. As defendant points out, his trial counsel had moved in the state court action to exclude the statement. Defendant does not say what the result of the motion was. In light of his subsequent no-contest plea, it must be presumed that the motion was either denied or abandoned. In either instance, it is hard to imagine that defendant's motion was one that would have succeeded in this trial.

Even if the motion to suppress the statement had been successful and the statement kept out of this trial, the weight of the remaining evidence against defendant was so overwhelming that he would have been convicted anyway. Therefore, he was not prejudiced by the admission of the statement.

2. Counsel's failure to object to prosecutorial misconduct

Defendant has a laundry list of acts and statements by the government's attorneys that he alleges constituted misconduct at trial. He starts with an allegation of improper vouching for the credibility of the government's witnesses. A review of the transcript shows that the government's statements in that regard were limited to "'reasonable inferences from the evidence adduced at trial rather personal opinion.'" United States v. Morgan, 113 F.3d 85, 90 (7th Cir. 1997) (quoting United States v. Goodapple, 958 F.2d 1402, 1409-10 (7th Cir. 1992)). The prosecutor focused his arguments on explaining to the jury how they should evaluate the evidence, including the testimony of persons involved in the same criminal conduct, who were hoping for leniency in their sentencings. The arguments did not cross over the line from properly identifying the inferences that the jury could draw from the evidence to vouching improperly for their witnesses.

Defendant objects to the prosecution's references in its opening statement to the plea agreements signed by a number of its witnesses, calling such references improper bolstering of the witnesses. Those references were not improper. In fact, they alerted the jury to the possibility that the witnesses' testimony might be biased in light of their personal incentive to win reductions of their sentences through testimony favorable to the government.

It appears that defendant is arguing that the government's questioning of the witnesses who had signed plea agreements gave the jury the erroneous impression that the

witnesses could still be prosecuted for crimes despite having signed plea agreements, if they did not tell the truth on the witness stand. If this is his argument, he is mistaken in arguing that the impression was a mistaken one. To the contrary, the plea agreements did specify that they would be upheld only if the signer told the truth on the stand. Testifying truthfully was one of the quid pro quos of the agreement; if the defendant failed to give truthful testimony, the government would consider his plea agreement a nullity and could proceed to try him on all of the counts charged against him. The government's questioning was intended to elicit each witness's understanding that if he violated the terms of the plea agreement by testifying untruthfully, he would no longer be protected under the plea agreement from prosecution either for the crimes covered by the agreement or for perjury.

As for alleged misstatements, defendant identifies two: the prosecution referred in its rebuttal argument to one of the victim's having had a gun stuck in his head, although the evidence was that the gun had been stuck in his back, and to Victor Caldwell's saying that "the guy on the phone had the gun." Dft.'s Br., dkt. #236, at 24. These two misstatements were not prejudicial to defendant. First, they were only two statements in a long and complicated case. Second, the jurors were instructed that they were not to rely on the lawyers' statement of the facts but rather were to rely on their own collective memory of the evidence to determine the facts.

In summary, defendant cannot establish that the government engaged in any

misconduct to which his counsel should have objected. Counsel was not ineffective in this respect.

3. Failure to object to admission of gun into evidence

Defendant argues that the government could not have introduced into evidence the gun recovered from him in Milwaukee because the state had agreed in the state proceeding against defendant to dismiss any reference to a handgun and the federal government is bound by this agreement under the Full Faith and Credit Clause of the United States Constitution. This is an innovative but unpersuasive argument. Any decisions in the state court about the gun related solely to its use in a state robbery prosecution against defendant; those decisions would not control the federal government's use of the same weapon to prove its use in other robberies in another county.

Defendant argues also that his counsel should have objected when the government left the gun in plain sight during the entire trial and sent it back to the jury during deliberations when the evidence was inadequate to establish that it was the same gun used in the Madison robberies. I do not recall seeing the gun "in plain sight" during the trial. If it was in plain sight of the jury but in a place where I could not see it, I would have expected one of the three defendants or their lawyers to complain. None of them did. The lack of any comment suggests that defendant's assertion is in error.

Defendant's counsel did object to the government's efforts to prove that the gun was defendant's. It was not proof of his ineffectiveness that his objections were insufficient to keep the gun from the jury or to prevent the government from arguing that the jury should consider it as evidence against defendant. Melissa Quamme testified to having seen a similar looking gun on the bed after one of the armed robberies and having fired a similar gun in the country; Angela Cramer testified to having seen a similar looking handgun after the Great Midwest bank robbery; and defendant's statement to the Milwaukee detective added additional evidence that the gun at the trial was the one that had been used in the robberies. It was proper for the jury to consider it in that light when determining whether the government had put in sufficient proof to enable them to find him guilty beyond a reasonable doubt.

4. Failure to object to Melissa Quamme's testimony about gun

At trial, Melissa Quamme testified that defendant had given her a gun and that she had fired the gun out in the country during the summer of 1997, that the gun defendant had purchased appeared to be the same gun he had allowed her to fire and that it appeared to the same one she had seen co-defendant James Fleming place on a bed after one of the charged robberies. Defendant alleges that his counsel was ineffective because he did not object to Quamme's testimony about shooting the gun or the government's failure to advise

him of Quamme's testimony before trial.

Defendant is entitled to the production of statements made by prospective witnesses, 18 U.S.C. § 3500, to advance notice of the government's intent to introduce evidence of prior bad acts, Fed. R. Evid. 404(b), and to evidence that would be exculpatory, Brady v. Maryland, 373 U.S. 83 (1963). He cites nothing that would require the government to advise him in advance of trial that a witness can identify a gun as belonging to defendant or that she had fired it at one time (assuming that the witness had not signed a statement to that effect). It was not ineffective representation for defendant's counsel not to object to the testimony when he had no legal basis for doing so.

5. Failure to object to government's failure to prove that guns used in robberies were real

Trial counsel had no reason to object to the government's "failure" to prove that defendant and his colleagues used real guns because the evidence was more than sufficient to make this showing. Victor Caldwell, a participant in the crime spree, testified that the guns were real. Melissa Quamme testified that she had shot defendant's gun on one occasion. With one exception, the victims testified that the guns used in the robberies looked real. The evidence showed that defendant had bought a real gun in 1996, that he was still in possession of it in 1998 and that it looked like the description of one of the guns used in the 1997 robberies. From this evidence, the jury could have drawn the inference that the

guns used in the robberies were real. In fact, its verdict shows that it paid close attention to the evidence about the use of guns, because it acquitted James Fleming of the one robbery in which the victim had said that the gun did not look real.

6. Failure to object to insufficiency of evidence to prove "use" element of offenses

Defendant's trial counsel was not ineffective for failing to argue that defendant did not "use" the weapons his co-conspirators used. As a conspirator, he is responsible for the offenses of his co-conspirators if the offenses are committed in furtherance of the conspiracy and are a reasonable consequence of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). It was certainly a reasonable consequence of the conspiracy to commit armed robbery that defendant's co-conspirators would use guns and it is undisputed that their use of the guns furthered the conspiracy.

7. Failure to correct government witnesses' perjured testimony

Not surprisingly, defendant continues to take the position that all of the government's witnesses perjured themselves on the witness stand. That issue was fought out at trial; defendant's counsel was vocal and vigorous in challenging the witnesses' credibility and pointing out the discrepancies between their trial testimony and their many statements made before trial to the FBI and to the grand jury. Defendant has no basis on which to

complain about his counsel's efforts in this regard. Strickland does not require trial counsel to work miracles.

8. Failure to object to sentence computation

Defendant believes that his trial counsel was ineffective because he did not object to the court's imposition of three consecutive sentences for his weapons convictions. Defendant received a sentence of 87 months on each of four robbery counts, with the terms to run concurrently, a sentence of 45 years on three gun counts (five years on the first count of conviction under 18 U.S.C. § 924(c) and twenty years on each of the other two counts, with all counts to run consecutively). He argues that such sentencing is a violation of the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), that any fact that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt.

Defendant's argument makes no sense. Apprendi has no application to his sentence. He was charged with three violations of § 924(c)(1) and the jury found him guilty of the three violations, using the beyond-a-reasonable-doubt standard. Once the jury had made those findings, the court had no discretion but to impose the 45-year sentence mandated by § 924(c). Defendant's counsel had no ground on which to object to the sentence for the § 924(c) counts.

Defendant talks about the inapplicability of 18 U.S.C. § 844(h) for reasons he never makes clear. He was not indicted or sentenced under § 844(h). He makes an equally incomprehensible argument to the effect that the jury should have been told that he would receive consecutive sentences of 20 years each on counts 15 and 17, although it is improper to allow the jury to consider punishment when determining the guilt of an offender. Finally, he argues that the government had the duty to give him notice of the higher sentence he would receive if found guilty of two or more § 924(c) counts. That notice was implicit in the indictment. A look at the cited statute would have given him notice that he was facing a significant sentence.

9. Failure to object to sentencing enhancements

Again citing Apprendi, defendant argues that his counsel should have objected to the enhancement of his sentence for obstruction of justice and for loss to a financial institution. Apprendi would not have provided defendant any assistance because it holds only that a court may not sentence above a sentencing range determined by Congress in reliance on facts not found by a jury beyond a reasonable doubt. Defendant's sentences on the robbery charges were well within the statutory maximum even with the enhancements, so they raised no possible issue under Apprendi.

10. Failure to object to perjured testimony of witnesses

Defendant alleges that the prosecution violated 18 U.S.C. § 201, which prohibits government officials from giving or receiving anything of value in return for testimony. His theory is one that gained short term popularity in 1998, when a panel of the Court of Appeals for the Tenth Circuit held that the government violated the statute when it gave plea agreements and other promises to prospective witnesses in return for their testimony. United States v. Singleton, 144 F.3d 1343 (1998), The case was reversed by an en banc court. United States v. Singleton, 165 F.3d 1297 (1999).

Defendant's allegation is a variation of the point urged in Singleton because he is arguing that the prosecution was calling as witnesses persons who had given admittedly perjured testimony before the grand jury and was offering them plea agreements in return for their testimony. This is a misstatement of what happened. The prosecution did not give the witnesses benefits for their prior perjured testimony but promised them benefits if they gave truthful testimony at trial. It was not procuring perjured testimony. Singleton, 165 F.3d at 1300 ("whoever" as used in § 201(c) does not include United States acting in its sovereign capacity). See also United States v. Blassingame, 197 F.3d 271, 285 (7th Cir.1999) (confirming that 18 U.S.C. § 201(c)(2) does not require exclusion of evidence obtained through promise of immunity); United States v. Condon, 170 F.3d 687, 689 (7th Cir. 1999) (proper for government to promise reduced sentences and benefits under Witness

Protection Act in return for testimony). Defendant's counsel had no reason to object to the testimony but ample reason to subject it to strenuous cross-examination, which he did.

11. Failure to call defendant to testify

Despite having had at least two opportunities at trial to advise the court and his counsel that he wished to testify in his own behalf, defendant argues that his counsel was ineffective for failing to call him to the stand. In an affidavit submitted with his § 2255 motion, he avers that he would have denied having had anything to do with the robberies, having given Quamme his gun to fire and having asked Cramer to lie for him at his state trial for the robbery of the Great Midwest Savings & Loan robbery. He would also have given evidence about the circumstances of his questioning in connection with the Milwaukee tavern robbery in support of his claim that the prosecution should not have been able to introduce the statement he gave to the detective. Given the weight of the evidence against him and the inculpatory testimony of most of his co-conspirators, it is not reasonable to think that the jury would have been impressed with his general denial of participation in the robberies. Thus, I cannot find that he was prejudiced, even if he had not forfeited his right to testify by his failure to object when his counsel told the court that he would not call defendant to the stand.

12. Failure to object to withholding of Stacy Pete's May 12, 1999 grand jury testimony

In an argument that is almost impossible to follow, let alone parse, defendant seems to be saying that he was prejudiced by the government's failure to make it clear to the grand jury that indicted him that Stacy Pete had testified before *two* previous grand juries. This makes no sense. The government is not required to inform a grand jury that a witness has appeared previously before another grand jury.

Defendant seems to be arguing also that he was prejudiced by the government's failure to make it clear to the trial jury that Pete had appeared before a total of three grand juries. He says that Pete testified at trial that she had been before grand juries on January 6, 1999 and March 15, 2001 and did not mention her appearance on May 12, 1999. In addition, he alleges that the government never produced transcripts of Pete's May 12 appearance.

I find it hard to believe that the government withheld transcripts of any grand jury appearance by any witness in this case and that I never heard about it from any one of defendants' counsel. For purposes of defendant's motion, I will assume that it happened as defendant has alleged. Even so, it does not establish prejudice. Stacy Pete was cross-examined exhaustively by all three lawyers for defendant and his co-defendants. The allegedly missing transcript covered the period between her false testimony to the grand jury on January 5, 1999 and her purportedly truthful testimony to the March 15, 2001 grand

jury. Presumably, the May 12, 1999 testimony was false as well or the government would have made use of it at trial.

Additional evidence of Pete's lack of credibility would not have changed the picture that she presented to the jury. It was clear that Pete was not a particularly credible witness, that she had lied before the grand jury and lied to law enforcement agents, that she was frightened of co-defendant Michael Brown but still physically and emotionally attracted to him, that she had decided to tell the truth because she learned that Brown was going to tell the police about her involvement in the crimes and that her prime motive in testifying was to get the best deal she could for herself.

13. Failure to object to prosecution's failure to advise grand jury of perjured testimony

As I explained above, the government is not required to disclose to the grand jury evidence that a witness has given false testimony previously to another grand jury. Even if such a requirement existed, it is implausible that giving the grand jury this information about Pete and Angela Cramer would have caused the grand jury not to indict defendant. Therefore, it was not ineffective assistance for defendant's counsel not to object to the non-disclosure of this information.

14. Failure to object to use of co-defendants' out-of-court statements

On direct appeal, defendant objected to the admission into evidence of his co-defendant's statements that had been redacted to eliminate all references to defendant. The court of appeals found the use of the statements permissible. United States v. Sutton, 337 F.3d 792, 799 (7th Cir. 2003). Defendant is bound by this decision by the appellate court. It is the law of the case and not subject to re-litigation.

Even if the matter were not closed, defendant could not prevail on it. The statements did not implicate Crawford v. Washington, 541 U.S. 36 (2004); even if they did, Crawford was decided long after defendant's trial and it has no retroactive application. Murillo v. Frank, 402 F.3d 786, 790-91 (7th Cir. 2005).

C. Alleged Ineffectiveness of Appellate Counsel

Defendant's only challenge to his appellate counsel's representation is one based on appellate counsel's failure to identify on appeal the myriad ways in which trial counsel had been ineffective. This challenge fails because defendant has not shown that trial counsel was ineffective in any way. It would fail in any event because it is inadvisable to raise ineffectiveness of counsel on direct appeal, when the evidence is limited to the record made at trial. United States v. Taglia, 922 F.2d 413, 417-18 (7th Cir. 1991) (explaining pros and cons of raising ineffectiveness of counsel claim on direct appeal or preserving it for

postconviction motion. See also Peoples v. United States, No. 03-2774 (7th Cir. Apr. 6, 2005) (holding that defendant who raises ineffectiveness claim on direct appeal cannot raise claim again in postconviction motion, even if claim is supported by new allegations not raised on direct appeal).

D. Supplement to Motion

On January 10, 2005, defendant filed a supplement to his original postconviction motion, adding a claim that the grand and petit juries in his case did not contain any minority representation. After the government responded to this supplement, pointing out that defendant had nothing more than speculation to support his claim, defendant moved on April 4, 2005 for disclosure of records pursuant to 28 U.S.C. §§ 1867, 1867(a), (b), (d) and (f) and 1868 , saying he needed the records to pursue a challenge to the composition of the jury pool in this district. Defendant's supplemental claim is without any merit. In relying on his understanding of the percentage of minorities in the Madison population and the lack of any minorities on his jury, he overlooks the fact that Madison is only one of a number of cities that make up the jury pool for this court; in fact, Dane County is only one of the eight counties included in the geographical area from which the jurors are drawn. He overlooks as well the statistical probability that no one jury panel will reflect the exact percentage of minorities within the area from which the jurors are drawn. Even the jury pool

will not reflect the exact percentage of minorities, if some portion of the minorities are not yet citizens and eligible to vote, because the jury pool is drawn from the voting lists.

It is too late for defendant to move for disclosure of records relating to the jury panel. The time for doing that was before the voir dire examination began in his trial, "or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867. Defendant says that he could not have discovered the information earlier but offers no support for this statement. Both his supplement to his postconviction motion and his motion for disclosure of jury records will be denied.

ORDER

IT IS ORDERED that defendant Robert D. Sutton's supplement to his motion filed on January 10, 2005, his motion for disclosure of records relating to the composition of the district's jury pool and his motion for postconviction relief, brought pursuant to 28 U.S.C. § 2255, are DENIED.

Entered this 26th day of April, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge