

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERBERT R. KEGLEY,

Defendant.

ORDER

03-C-0573-C

01-CR-0062-C-01

Defendant Herbert R. Kegley has filed a motion that I construe as a post-conviction motion brought pursuant to 28 U.S.C. § 2255, in which he contends that he was denied the effective assistance of counsel at sentencing that the United States Constitution guarantees him. This is not the first motion that defendant has filed, but it is the first one in which he is challenging the validity of his conviction or sentence. Therefore, it is not a second or successive motion within the meaning of § 2255. It is timely because defendant filed it within one year after the time would have expired for taking a direct appeal of his conviction. Clay v. United States, 537 U.S. 522, 529-30 (2003) (§ 2255's one-year time limit is to be interpreted according to provisions in § 2244(d)(1)(A), under which limitation

period starts running from “date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”).

Although defendant’s allegations are not entirely clear, it appears that he is asserting that his attorney did not render effective assistance when he failed to object to the court’s refusal to make defendant’s federal sentence run concurrently with his state of Florida sentence. Defendant alleges that his counsel knew that defendant had entered his plea in reliance on receiving a concurrent sentence and knew that the court had the authority to make the sentence concurrent but failed to alert the court to these matters. However, defendant alleges also that “[i]n the federal sentencing, counsel, Jeff W. Nichols, advised the federal court of the promise of a concurrent sentence. The court then informed counsel that it could not impose a concurrent sentence.” Def.’s Motion, dkt. #25, at 5A.

I have reviewed the transcript of the sentencing hearing and the written plea agreement that defendant and his attorney executed. The plea agreement contains no promise of a concurrent sentence. Thus, defendant has no basis on which to argue that his attorney should have brought this promise to the court’s attention. The sentencing transcript shows that defendant’s counsel argued vigorously for a concurrent sentence. It shows also that the choice to impose a consecutive sentence was a deliberate one, made with full knowledge that a concurrent sentence was within the court’s discretion.

Defendant has no grounds on which to attack his representation. His attorney

represented him conscientiously and capably. He raised strong arguments in favor of a concurrent sentence and might have prevailed had the facts not been so unfavorable to defendant. I conclude that defendant has failed to show that he was denied his constitutional right to the effective assistance of counsel.

ORDER

IT IS ORDERED that defendant Herbert R. Kegley's motion for post-conviction relief is DENIED.

Entered this 3rd day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge