

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

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

v.

02-C-0304-C

00-CR-0053-C

DONALD K. LANE,
Defendant.

Defendant Donald K. Lane has filed a motion pursuant to 28 U.S.C. § 2255, challenging his conviction and sentence and asking for a new trial. Defendant was charged with possession of gun by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). He contends that his Fifth Amendment rights were violated by the court's in limine ruling on the elements of possession, that the court erred in its instructions to the jury on the elements of possession and that his attorney provided him constitutionally ineffective assistance by allowing him to testify about his momentary handling of a gun, not realizing that such testimony would incriminate him of the crime of possession. Defendant's motion will be denied. He was not justified in relying on the in limine rulings, both because they were necessarily tentative and because they were based on a prediction of the way the

evidence would come in that proved not to be correct. He cannot object to the jury instructions because the Court of Appeals for the Seventh Circuit upheld them on direct appeal. United States v. Lane, 267 F.3d 715 (7th Cir. 2001). Its holding is the law of the case. Daniels v. United States, 267 F.3d 7-6, 711 (7th Cir. 1984). Finally, defendant cannot prove that his attorney's representation of him fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 688 (1984). Until defendant's case was decided on appeal, the law on momentary possession of a firearm was not established. See Lane, 267 F.3d at 722 (Fairchild, J., concurring).

RECORD FACTS

Defendant Donald K. Lane was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Before his trial, the government moved to preclude him from presenting evidence of certain issues: that he possessed the gun for only a short period of time and did not exercise control over it sufficient to constitute possession under § 922(g); that his state probation officer told him he could possess a weapon and be around persons who possessed weapons; and that he purchased the gun in question for his girlfriend so that she could go squirrel hunting with it. The motion was granted. Defendant moved for reconsideration, arguing that it was disputed whether he had carried the gun outside to his car, as the government alleged, and that without this evidence, all that would be left was

testimony that defendant had merely touched the gun. I advised the parties that if the evidence showed nothing more than a brief touching of the gun, the jury would be justified in finding that defendant did not possess it within the meaning of § 922(g). Transcript, Vol. 1 at 1-8.

At trial, the government called Larry Bowen as a witness. Bowen testified that he had sold defendant the gun at a local bar, that defendant had held the gun in his hands while inspecting it and that defendant had carried the gun out of the bar to put it into his car. During the defense case, defendant took the stand and testified that he had held the gun in his hands while deciding whether to purchase it for his girlfriend. He denied taking it out to the car, testifying that a friend named Russ Swonger had carried it out. Swonger took the stand and corroborated the testimony that he had carried the gun to the car. Tr. 1-187-88.

Before closing arguments, the government renewed its motion in limine and asked the court to strike the testimony related to defendant's motive for possessing the gun and to bar defense counsel from arguing to the jury that holding the gun momentarily did not constitute possession. Tr., Vol. 2, 2-14, 2-16. I granted the motions, ordered certain testimony stricken from the record and told defense counsel he could not argue that a brief handling of the gun could not constitute possession. Tr. 2-30. The jury found defendant guilty of the crime of possession.

OPINION

Defendant contends that when he made his decision to testify, he was entitled to rely on the court's preliminary ruling that a momentary holding of a gun would not constitute possession and that the court's decision to withdraw that ruling violated his Fifth Amendment rights. He is wrong, for a number of reasons. First, he is wrong about the nature of the ruling. He argued prior to trial that the evidence would show only momentary *touching*; he did not concede that the evidence would be that he held the gun. My ruling was based on his representation. Second, in limine rulings are necessary tentative and subject to change depending on the evidence actually adduced and the judge's increased understanding of the issues as the case is presented. Luce v. United States, 469 U.S. 38, 41-42 (1984). Defendant had no entitlement to rely on such a ruling, particularly when the evidence showed that he had actually held the gun, not merely touched it as he had suggested prior to trial.

Third, even if defendant had been entitled to rely on the ruling, he cannot show that the court's error caused him any harm. Had he chosen not to testify, the jury would have heard only Larry Bowen's testimony that defendant had handled the gun in the bar. This testimony would have been sufficient to support a finding that defendant was guilty of the crime with which he was charged.

To the extent that defendant is arguing that it was error to charge the jury as I did,

his argument has been raised and rejected in the court of appeals and cannot be re-examined.

Finally, defendant cannot show that his counsel was ineffective because he cannot prove either the representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 688, or that the result of his trial would have been different had counsel not made errors. Id. at 694. Counsel chose to argue that § 922(g)(1) did not cover a momentary handling of a gun with no apparent motive to exercise control over it. This strategy was not unreasonable. The Court of Appeals for the Seventh Circuit had never held that such a handling would be covered by the statute. See Lane, 267 F.3d at 722 (Fairchild, J., concurring) (“As we noted in United States v. Wilson, 922 F.2d 1396, 1398, (7th Cir. 1991) not every ‘holding’ or ‘touching’ necessarily demonstrates possession.”).

It is hard to imagine what other strategy defendant’s counsel could have pursued, given the facts of the case. Had defendant denied ever holding or handling the gun, other patrons of the bar could have testified to the contrary, rendering him vulnerable to an upward adjustment at sentencing for perjuring himself at trial and obstructing justice.

In summary, I conclude that defendant has failed to show that any constitutional error was made at his trial that would entitle him to vacation of his conviction and sentence.

ORDER

IT IS ORDERED that defendant Donald K. Lane’s motion for post-conviction relief

pursuant to 28 U.S.C. § 2255 is DENIED.

Entered this 17th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge