

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CAROL D. ARMSTRONG,

Defendant.

ORDER

02-C-0585-C

00-CR-0118-C-03

Defendant Carol D. Armstrong has moved to vacate her sentence and conviction pursuant to 28 U.S.C. § 2255. She contends that her indictment is defective because it does not specify the amount of drugs she is alleged to have conspired to distribute, that the court erred in not finding that she had accepted responsibility for her criminal conduct and in enhancing her sentence for obstruction of justice, that she was denied due process when the court allowed her to testify at her co-defendant's sentencing hearing without representation by counsel, that her attorney provided ineffective representation by failing to move for a downward departure pursuant to U.S.S.G. § 5K1.1 and that the court erred in holding her accountable for 22 kilograms of cocaine rather than the 10 to 12 kilograms she admitted selling.

It appears that, like a number of other credulous prisoners, defendant has received help from another prisoner who is purporting to help her with her motion without knowing the circumstances of her conviction and sentencing. The first error lies in the contention that the indictment is defective for

not specifying the amount of drugs defendant is alleged to have conspired to distribute. In fact, the indictment does specify that defendant is charged with a conspiracy involving more than 500 grams of cocaine. No more specificity is necessary to justify a sentence of between five and 40 years. Moreover, even if the indictment had failed to charge “more than 500 grams,” it would not be a defective indictment. United States v. Cotton, 122 S. Ct. 1781 (2002). The only consequence would be that defendant’s sentence would be capped at the lowest maximum sentence specified in 21 U.S.C. § 841 (b). Id.

Second, defendant argues that she sold only 10-12 kilograms rather than the 22 attributed to her by the government and by the author of the presentence report. She forgets that her attorney advised the court in writing that defendant was not disputing the government’s charge that she was responsible for 22 kilograms. She cannot argue that her attorney misstated her acknowledgment of her involvement with the 22 kilograms. She had an opportunity at her sentencing to tell the court whether she disagreed with any statement in the presentence report or addendum and she said she did not.

Third, it is not true that defendant was unrepresented by counsel at the time she testified at her co-defendant’s sentencing. David Brumfield’s sentencing took place before her own sentencing during the period in which she was represented by counsel in connection with her own charges. She has not explained why she did not consult her court-appointed counsel for advice before she testified or if she did, why her counsel denied her the advice she was seeking.

Fourth, defendant is well aware why she was denied a downward adjustment for acceptance of responsibility: she gave false material testimony knowingly at David Brumfield’s sentencing about his

involvement in the conspiracy to sell cocaine. At defendant's sentencing I found that she was not credible when she attempted to disavow her testimony as having been given without preparation and without consultation with her counsel. I find it equally incredible today, in the absence of any new evidence that would support her disavowal or even her own explanation for her supposed failure to consult with her court-appointed counsel.

Fifth, it would have been a useless gesture for defendant's attorney to have moved for a downward departure pursuant to § 5K1.1. Not only are such motions solely within the government's discretion, defendant has not shown that she gave the government any valuable information that led to the prosecution of others. Rather, she undermined the government's efforts to prove David Brumfield's criminal responsibility by testifying falsely at his sentencing.

ORDER

IT IS ORDERED that defendant Carol D. Armstrong's motion for vacation of her conviction and sentence, brought pursuant to 28 U.S.C. § 2255, is DENIED for defendant's failure to show that she is in custody illegally.

Entered this 5th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge