

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

DAVID J. YEAZEL,

Petitioner,

v.

ORDER
07-C-176-S
02-CR-9-S-01

UNITED STATES OF AMERICA,

Respondent.

Petitioner David J. Yeazel moves to vacate his sentence pursuant to 28 U.S.C. § 2255. This motion has been fully briefed and is ready for decision. Petitioner's final motion for enlargement of time will be granted and his reply will be considered timely filed.

Petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is not necessary under 28 U.S.C. § 2255. See United States v. Kovic, 840 F.2d 680, 682 (7th cir. 1987).

FACTS

On January 31, 2002 a federal grand jury in the Western District of Wisconsin returned a forty-six count indictment against David J. Yeazel charging him with eleven counts of mail and wire fraud, thirty-four counts of money laundering and one count of criminal forfeiture.

On May 14, 2002 petitioner pled guilty to count twenty-six(a money laundering count) pursuant to a written plea agreement. The government agreed to recommend a two point reduction for acceptance of responsibility.

At the plea hearing the Court went through the plea agreement sentence by sentence ensuring petitioner's understanding and agreement with each paragraph in it. The Court also asked petitioner a number of questions to determine that the plea was, in fact, voluntary. At the plea hearing petitioner also testified that he was fully satisfied with his counsel's representation and advice given to him in the case.

A presentence report and addendum was prepared. The addendum calculated petitioner's total offense level at 32 and his criminal history category at Level 1, resulting in a guideline range of 121 to 151 months. The addendum indicated a two level increase for obstruction of justice and no decrease for acceptance of responsibility. Petitioner's total offense level was also increased by two points for a violation of a prior administrative order.

On July 24, 2002 petitioner was sentenced to 146 months in prison with three years supervised release. Petitioner was also ordered to pay \$3,548,119.40 restitution.

On August 5, 2002 petitioner filed a notice of appeal contending that the district court improperly calculated his total

offense level by including a two-point adjustment for violation of a prior administrative order. On November 18, 2005 the United States Court of Appeals issued an order finding that petitioner had waived his right to appeal the enhancement for violation of an administrative order. The Court ordered a limited remand pursuant to Paladino.

On December 7, 2005 this Court issued an order finding that it would have imposed the same sentence if the Sentencing Guideline had been advisory rather than mandatory. On December 31, 2005 the Court of Appeals affirmed the judgment of the district Court. The mandate was issued on January 12, 2006 and docketed in this Court on January 31, 2006.

On March 26, 2007, petitioner filed this motion under 28 U.S.C. § 2255.

MEMORANDUM

Petitioner claims that his counsel was ineffective because he objected to the use of the 1997 Sentencing Guidelines Manual, failed to obtain an acceptance of responsibility departure for him and failed to object to an increase in the offense level due to violation of an administrative order.

Three types of issues cannot be raised in a 28 U.S.C. § 2255 motion: issues that were raised on direct appeal, absent a showing of changed circumstances; non-constitutional issues that could have been raised but were not raised on direct appeal and constitutional

issues that were not raised on direct appeal, unless petitioner demonstrates cause for procedural default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 813, 816 (7th Cir. 1996). Issues raised and decided on direct appeal may not be raised again in a 28 U.S.C. § 2255 motion pursuant to the “law of the case”. See Daniels v. United States, 26 F.3d 706, 711-12 (7th Cir. 1994).

To demonstrate ineffective assistance of counsel, petitioner must show that his counsel’s representation fell below an objective standard of reasonableness and the deficient performance so prejudiced his defense that it deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 688-94 (1984). In the context of a guilty plea petitioner must show that but for the deficient advice of counsel he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Where a petitioner is challenging his sentence he must show that but for counsel’s action or inaction he would have received a shorter sentence. Glover v. United States, 531 U.S. 198 (2001).

Petitioner claims that his counsel was ineffective because he objected to the use of the 1997 Sentencing Guidelines Manual. The 2001 sentencing guidelines manual was properly used at sentencing. The objection by counsel to the 1997 Sentencing Guidelines Manual was not deficient performance.

Petitioner argues that his counsel was ineffective because he did not timely inform him of the government's plea offer. Petitioner attached a letter from the Assistant United States Attorney to his counsel dated April 12, 2002 stating that the government could only recommended a three point reduction for acceptance of responsibility if he signed a plea agreement on or before April 26, 2002.

The government then offered a subsequent agreement recommending a two level reduction for acceptance of responsibility if he signed the agreement on May 14, 2002. Petitioner signed the agreement on May 14, 2002 and the government recommended a two level reduction for acceptance of responsibility. Since the petitioner did not receive any reduction for his acceptance of responsibility because of his obstruction of justice, his counsel's failure to provide him with the earlier plea agreement did not prejudice him.

Petitioner also appears to be arguing that his counsel was ineffective because he did not prevent him from receiving an obstruction of justice enhancement. Petitioner's counsel argued on two separate occasions against imposing the enhancement. There is no evidence that counsel's performance was deficient concerning the obstruction of justice enhancement.

Petitioner also alleges that his counsel was ineffective in failing to object to the two point enhancement for violating a

prior administrative order. The record supports this enhancement. Accordingly, counsel's failure to object was not deficient performance.

Petitioner has not shown that counsel's performance was deficient nor that he would have received a shorter sentence absent his counsel's performance. Plaintiff did not receive ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must be denied.

Petitioner has also filed a motion to amend his motion under 28 U.S.C. § 2255 to add a claim that his sentence for money laundering should be vacated because "proceeds" in § 1956(a)(1) denotes net rather than gross income of an unlawful venture under U.S. v. Scialabba, 282 F. 3d 473, 478 (7th Cir. 2002). The Court will allow him to amend his motion to add this claim.

He is, however, barred from raising this claim because he could have raised it on appeal and failed to do. Scialabba was decided in February 2002 and petitioner appealed his conviction on August 5, 2002. Further, he has not shown cause nor prejudice for failing to raise this claim on appeal. Prewitt, 83 F.3d at 816. Accordingly, his motion under 28 U.S.C. §2255 must be denied.

Petitioner is advised that in any future proceeding in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion under 28 U.S.C. § 2255 must be denied. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

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ORDER

IT IS ORDERED that petitioner's motion for a final extension of time is GRANTED.

IT IS FURTHER ORDERED that petitioner's motion to amend his 28 U.S.C. § 2255 motion is GRANTED.

IT IS FURTHER ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 31st day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge