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-0707-C
02-CR-0135-C-01

v.

DONALD HEISLER,

Defendant.

- -

Defendant Donald Heisler has moved pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence and has asked to have counsel appointed to represent him on the motion. He contends that he was coerced by the government and his court-appointed attorney into pleading guilty, that his counsel was ineffective both at trial and on appeal and that the court relied at sentencing upon facts that had not been found by the jury.

BACKGROUND

On October 10, 2002, a grand jury returned an indictment charging defendant with assaulting one female prison employee, Amy Kangas, and intimidating another, Jill

Wendtland. A number of inmates observed defendant attacking Kangas and formed a protective barrier around her, to enable her to radio for help. The intimidating letter to Wendtland was picked up from the food slot on defendant's cell on September 17, 2002.

On November 9, 2002, a month after the indictment issued,, Kangas answered her phone and heard a male voice saying, "I want to eat your pussy." An investigation showed that the call originated from the Dane County jail and that at the time it was placed, defendant was the only inmate who had access to the telephone from which the call was made. On December 11, 2002, a letter from defendant arrived at FCI-Oxford addressed to Richard Ciardo, a cooperating witness in the investigation of the assault on Kangas. The letter started out, "Turns out that you are nothing but a God damn RAT" and continued in the same vein.

On December 13, 2002, the government moved for modification of defendant's conditions of detention to prohibit him from sending outgoing mail except through his trial counsel, from making outgoing telephone calls and from copying and distributing discovery. The government asked for an order requiring defendant to return all discovery to his trial counsel immediately. On December 18, 2002, the magistrate judge entered a stipulated order barring defendant from sending outgoing mail except though his counsel, from making telephone calls to anyone other than his mother, brother and attorney and from copying and distributing discovery materials. On January 3, 2003, he held a hearing on the motion and

entered an order with the same conditions on mail and phone privileges but requiring defendant to turn over all discovery materials to his attorney.

On December 17, 2002, before the magistrate judge had ruled on the government's motions, defendant's trial counsel, Joseph Sommers, wrote defendant, saying,

> Last week, due to my mother-in-law's death, I was in Omaha, NE. Today my father died. Due to this, for the most part I will be out of commission. In the meantime, please find enclosed the Government's motion to modify your conditions of detention. The court today wanted to sign the Government's proposed order, to which I was opposed, and therefore, a hearing will probably be scheduled sometime next week. In the meantime, there is strong indication that the court will be signing an order saying that you cannot send any outgoing mail except through me and not make any outgoing telephone calls except to family members or myself.
>
> The government today indicated to me that they are strongly considering investigating your brother in regards to what they believe was his assistance in what they believe was an attempt to harass and intimidate witnesses. If this was not a bluff, and they can corroborate the information that was proffered to me today, this could easily result in your brother being criminally charged. You may want to strongly rethink your course of action.

Approximately two weeks later, FBI agents went to defendant's brother's home to discuss with him the possibility of his involvement in defendant's attempt to intimidate witnesses. Defendant's brother was angry about the visit and told defendant so in a phone call defendant placed to him.

On April 23, 2003, defendant appeared before the court to plead guilty and to discuss his competency. I found that defendant was not suffering from a mental disease or defect that would make him mentally incompetent to the extent that he would be unable to

understand the nature and consequences of the charges against him or to assist properly in his defense. In questioning defendant about his plea, I asked him whether anyone had made any promises to him other than the ones the government had made in the plea agreement and whether anyone had threatened or forced him to plead guilty. He answered "no" to both questions. He said nothing to indicate that the government or anyone else had coerced him into pleading guilty by threatening to prosecute his brother.

Defendant filed a notice of appeal but dismissed it before it could be heard.

OPINION

Although I identified defendant's claims in his § 2255 motion as including both a claim of illegal coercion and a claim of ineffective assistance of counsel, it is apparent from the additional materials defendant has filed that the ineffectiveness claim relates primarily to his counsel's alleged coercion. He does not allege that his counsel was ineffective in any other respect, with the exception of counsel's failure to appeal his sentence on the basis of Apprendi v. New Jersey, 530 U.S. 466 (2000), an issue I will take up in connection with defendant's claim that he was sentenced improperly.

The claim of coercion does not stand up to close scrutiny. First, defendant has not shown that the government's decision to investigate his brother was an attempt to threaten him rather than a legitimate law enforcement decision. In an effort to show that the

government could not have had reason to investigate anyone, he says in his reply brief that he learned Kangas's telephone number from the discovery materials and that he wrote the threatening letter to Wendtland before he was indicted. He says nothing about the statements in the letter to Wendtland that he had learned of her home address and presumably her son's name "[a]fter having a few of my associates in Milwaukee and Madison do some searching" or about the clearly implied threat in the letter that her son would be killed unless Wendtland followed "the instructions at the end of this letter." It is irrelevant that he wrote the letter before he was indicted; it clearly suggests that confederates of defendant will help him carry out his threat. The government may have been wrong about how defendant was getting his information but defendant cannot say that they did not have reason to question defendant's known friends, associates and family members to learn whether he had the capability of carrying out his threats.

Second, defendant has merely alleged that his attorney coerced him into pleading guilty and abandoning his appeal. He has not produced any evidentiary support for this allegation, such as an affidavit setting forth specific times, places and details of the allegedly coercive statements. District courts are not required to hold evidentiary hearings on § 2255 motions in the absence of a "'detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions.'" Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002) (quoting Prewitt v. United States,

83 F.3d 812 (7th Cir. 1996) (quoting in turn Barry v. United States, 528 F.2d 1094, 1101 (7th Cir. 1976))). Defendant argues that the letter he attached to his motion supports his claim of coercion but the letter makes no reference to a guilty plea. It says instead that "You may want to strongly rethink your course of action." In light of the discussion in the first paragraph about the probability of an order modifying defendant's conditions of detention, it is likely that when counsel referred to "your course of action," he meant the telephone call to Kangas and not defendant's decision to plead guilty or go to trial. Other than the letter, defendant presented no detailed and specific affidavit. His motion rests on bare allegations of coercion by the government and counsel.

Not only has defendant not produced any specific support for his allegation of coercion, he has produced nothing to support his conclusory allegation that he would have gone to trial had his counsel not kept telling him that doing so would cause the government to prosecute his brother. "[M]erely making such an allegation is insufficient. The defendant must be able to show that there is a reasonable probability that the result of the proceeding would be different." Key v. United States, 806 F.2d 133, 139 (7th Cir. 1986) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (internal citations omitted). Given the evidence the government could muster, which included eyewitnesses to the assault against Kangas as well as Kangas herself, together with the letter to Wendtland that came from defendant's own cell, it is wholly improbable that defendant would have chosen to go to trial and give up the

three point reduction in his guideline range that he received because he pleaded guilty well before trial. Defendant says he was prohibited from talking to family members, but he admits he was allowed to call his mother and the magistrate judge's orders exempted defendant's brother from the prohibition. He was not without persons to talk with, as he tries to imply.

Third, the amount of time that passed after counsel sent the letter to defendant is a strong indication that the government's investigation of defendant's brother did not coerce defendant's guilty plea. The letter was sent on December 17, 2002; according to defendant's reply brief, FBI agents interviewed his brother approximately two weeks later. Defendant does not allege any other action or statement by the government after that. He did not enter his plea of guilty until April 23, 2003. It defies belief to think that he was still feeling pressured to plead guilty almost four months after his receipt of the allegedly coercive letter and the interview of his brother.

Fourth, defendant told the court at his plea hearing that no one had threatened him or forced him to enter his plea of guilty and no one had made any promises to him other than those incorporated into the written plea agreement he had signed. Statements such as these that are made at a plea hearing carry a presumption of correctness. Bridgeman v. United States, 229 F.3d 589, 592 (7th Cir. 2000).

I conclude that defendant has failed to show any possible merit to his claims of

coercion.

Defendant's remaining contention is that he was sentenced illegally because the court relied on facts that the jury had not found. He cannot prevail on this claim because he was sentenced as a career offender. The Court of Appeals for the Seventh Circuit has held that the sentencing court does not violate Blakely v. Washington, 124 S. Ct. 2531 (2004), Apprendi, 530 U.S. 466, or United States v. Booker, 375 F.3d 508 (7th Cir. 2004), when it determines that a defendant is a career offender under the Sentencing Guidelines. United States v. Pittman, 2004 WL 2567901 (7th Cir. Nov. 12, 2004). The facts that a court uses to determine career offender status are not the sort of facts that a jury must determine but facts that have been determined in previous judicial proceedings.

If, as Pittman holds, defendant has no viable argument under Apprendi, he cannot show that his counsel gave him ineffectively assistance by not pursuing an appeal based on the holding in Apprendi. In summary, I conclude that defendant has no ground for vacating his sentence. His § 2255 motion must be denied.

ORDER

IT IS ORDERED that defendant Donald Heisler's § 2255 motion to vacate his sentence is DENIED. Because defendant has not shown any entitlement to an

evidentiary hearing, his request for counsel is DENIED also.

Entered this 29th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge