

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZAN MORGAN,

Defendant.

OPINION and ORDER

05-C-0012-C

02-CR-0141-C-02

Defendant Zan Morgan has moved pursuant to 28 U.S.C. § 2255 for vacation or modification of his sentence and conviction, contending that he was denied the effective assistance of counsel when his attorney refused to arrange for an independent analysis of a taped telephone conversation that was introduced into evidence against him. He alleges also that his attorney failed to undertake any investigation of his case and that he and his counsel had an irreconcilable conflict. I conclude that the record refutes defendant's contention that it was ineffective assistance not to arrange for an analysis of the conversation and that defendant has offered nothing but general assertions unsupported by any detail to support his two remaining contentions.

Defendant was found guilty by a jury of distributing cocaine base. At trial, a cooperating witness, Thomas Green, testified that he, defendant and Dezel Jones were close friends and relied upon each other to deal drugs and that he dealt with defendant a few times a week and had been doing so since 1994. Green testified that he usually made contact with defendant by telephone and had developed a code for communicating about drug transactions; that he, defendant and Jones pooled their money to buy larger amounts of cocaine; and that on July 16, 2002, he called defendant in an effort to set up a meeting with an undercover officer. When he called, he used a number that defendant had provided him and that he had used successfully in the past to reach defendant. Defendant did not want to meet the undercover officer but in the course of four different phone calls arranged with Green to wait where he was. Twenty minutes later, Jones showed up with the ounce of cocaine base that Green had ordered. Green was not surprised that Jones showed up in defendant's place because it was not unusual for Green to order from one friend and have another make the delivery.

Officers conducting surveillance on defendant's residence testified that they saw a small maroon vehicle leaving the vicinity of defendant's house at 3509 Spencer Lane minutes before the delivery took place and that they determined later that Jones had been in the car.

Jones testified that defendant called him on July 16 after speaking with Green, that Jones went to defendant's house, picked up an ounce of cocaine base and took it to Green

at the Taco Bell, and that Jones kept the money Green provided him as payment for a debt defendant owed him.

Green testified that he had known defendant for years and was able to identify him as the person with whom he had spoken on the phone. Government trial exhibit 4a was a phone company certification that the number Green called was assigned to Christeena Pearson at 3509 Spencer Lane; trial exhibit 6 showed that the phone number that Jones listed when he was booked into the Dane County jail was one assigned to the same residence.

OPINION

To prevail on his § 2255 motion, defendant must show that his counsel's representation of him was so obviously deficient that he was not acting as the counsel required by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 690 (1984). As the summary of evidence shows, counsel's failure to spend the money and time to arrange for an analysis of the taped telephone conversations did not make his representation of defendant ineffective. The weight of the evidence showing that defendant was the caller would have persuaded most conscientious lawyers that proving the contrary was a wild goose chase, even if defendant maintained that he was not the caller.

Defendant has alleged that his counsel did not undertake adequate pretrial

investigation of the case, but he has not said what counsel could have learned had he investigated more thoroughly. The Court of the Appeals for the Seventh Circuit has held that a mere allegation that counsel did not investigate thoroughly does not raise a claim under § 2255. Rather, a defendant must allege “sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced.” Hardamon v. United States, 319 F.3d 943, 951 ((7th Cir. 2003). Defendant has not identified any witnesses that might have given testimony favorable to him or that could have impeached the government’s witnesses. He confines himself to his simple allegation that his counsel did not do anything to investigate the case.

Finally, defendant alleges that he and his counsel had irreconcilable differences, but he does not identify with precision what those differences were or why he did not raise them before his trial. It was apparent at the aborted plea hearing that defendant and his counsel had some differences of opinion about defendant’s decision to go to trial. At the time, trial counsel admitted that he was unprepared to go to trial because he had anticipated that defendant would be entering a plea of guilty. To give counsel time to prepare, the trial was continued more than three weeks. Defendant never complained again about his inability to communicate with counsel.

Defendant has made no showing that he and counsel had “a complete breakdown in communication” that interfered with his defense or that his counsel was nothing more than

a “warm body” standing next to him at trial, as he suggests in his § 2255 motion at page 7. In fact, counsel made a concerted effort to attack a virtually unassailable case against defendant, cross examining the government’s witnesses vigorously and arguing persuasively on defendant’s behalf.

In summary, defendant has failed to show that he was denied his constitutional right to effective assistance of counsel. Accordingly, his § 2255 motion will be denied.

ORDER

IT IS ORDERED that defendant Zan Morgan’s motion for relief pursuant to 28 U.S.C. § 2255 is DENIED.

Entered this 28th day of March, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge