

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

JOHN D. OHLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
06-C-537-S
02-CR-150-S-01

Petitioner John D. Ohlinger moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision.

FACTS

On November 14, 2002 a federal grand jury in the Western District of Wisconsin returned a two count indictment against John D. Ohlinger charging him with one count of knowingly shipping child pornography by means of a computer through interstate commerce in violation of 18 U.S.C. § 2252(a)(1) and one count of knowingly possessing a computer hard drive containing multiple depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B).

On March 12, 2003 the grand jury returned a superseding two count indictment charging Ohlinger in Count 1 with knowingly shipping in interstate commerce by computer visual depictions of

child pornography in violation of 18 U.S.C. §2252(a)(1) and in Count 2 with knowingly possessing more than two matters containing multiple depictions of minors engaged in sexually explicit conduct on February 22, 2002 in violation of 18 U.S.C. § 2252(a)(4)(B).

On May 30, 2003 petitioner entered a guilty plea to Count 1 of the superseding indictment pursuant to a written plea agreement. The plea agreement expressly provided that all relevant conduct would be used to determine the sentencing guideline range and the resulting sentence.

At the plea hearing petitioner testified under oath that he agreed with the statements that the government provided in its offer of proof. Ohlinger specifically stated under oath, "I was aware, sir, that the image was of a minor." He also admitted that he knowingly shipped this image in interstate commerce by means of a computer.

At the plea hearing petitioner also stated that he voluntarily signed the plea agreement and that he was fully satisfied with the counsel, representation and advice given to him in the case by his attorney Jonas Bednarek.

Before the sentencing hearing petitioner moved to withdraw his guilty plea and asked for new counsel. He based his motion on an ex parte letter in which he stated that he had been coerced into pleading guilty by his attorney. At his sentencing petitioner also brought to the Court's attention an undated letter (stamped as

received in this Court on May 8, 2003) written by Victor White in which he stated that he not petitioner had sent the picture to the law enforcement officer on the internet. In the letter Mr. White states, "so I won't tell you where I am."

At the August 27, 2003 sentencing the Court denied Ohlinger's motions to withdraw his guilty plea and for new counsel and denied his objections to the Presentence report. The Court then departed upward and sentenced petitioner to the statutory maximum of 360 months in prison.

Petitioner appealed his judgment of conviction and sentence to the United States Court of Appeals for the Seventh Circuit. Petitioner argued that the Court erred in its application of the sentencing guidelines. The Court of Appeals affirmed petitioner's judgment of conviction finding that the district court did not err in applying the guidelines and that the 360 months sentence was reasonable.

MEMORANDUM

Petitioner raises five claims in his 28 U.S.C. § 2255 motion. He claims that his internet communications were obtained prior to an illegal wiretap and that this evidence should have been suppressed. He also contends that he should have been allowed to withdraw his guilty plea because there was no evidence that the girl in the photograph was a minor and that he had no knowledge that the photograph moved in interstate commerce. Petitioner's

final argument is that the Court improperly denied his motion to withdraw his guilty plea at sentencing.

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).

Petitioner's five claims are barred from collateral review in this Court because he failed to raise them on direct appeal unless he can demonstrate cause and prejudice for failing to raise them. Galbraith v. United States, 313 F.3d 1001, 1006-1007 (7th Cir. 2002). It appears that petitioner is alleging that ineffective assistance of trial counsel and appellate counsel is the cause for not raising these claims on direct appeal.

Were petitioner to demonstrate cause he would also have to prove that he was prejudiced. To show that petitioner has not been prejudiced, the Court addresses the merits of each of his five claims.

Petitioner's first two claims are that his internet communications were obtained by illegal wiretapping and that the evidence should have been suppressed. These two grounds are without merit because the evidence was obtained by monitoring online discussions between petitioner and an undercover law enforcement agent. These monitored recordings are exempt from the federal wiretap statute under 18 U.S.C. § 2511(2)(c). Since these two claims lack legal merit petitioner was not prejudiced by any failure to raise them on direct appeal.

Petitioner also claims that his guilty plea was not voluntary because there was no evidence presented that the photograph depicted a minor or that petitioner knew the photograph moved in interstate commerce. These claims are frivolous because petitioner admitted under oath that he knew the photograph was of a minor and had been shipped in interstate commerce. Petitioner was not prejudiced by his counsel's failure to raise these argument in the district court or on direct appeal.

Petitioner's final claim is that his guilty plea was not voluntary and that the Court should have allowed him to withdraw his plea prior to sentencing. At the plea hearing petitioner testified under oath that he was voluntarily pleading guilty and that he was satisfied with his counsel's representation. Prior to the sentencing petitioner moved to withdraw his guilty plea. This motion was based upon an ex parte letter dated August 2, 2003 letter in which he states that his plea was coerced by defense

counsel. The Court denied this motion based on petitioner's testimony under oath at the plea hearing.

At his sentencing petitioner also brought to the Court's attention an undated letter (stamped as received in this Court on May 8, 2003) by Victor White in which he stated that he not petitioner had sent the picture. Petitioner argues that White should have been called as a witness. This would have been impossible given the fact that in the letter Mr. White states, "so I won't tell you where I am." Petitioner's motion to withdraw his guilty plea because of Victor White's letter was properly denied because petitioner did not bring the letter to the Court's attention at the plea hearing and petitioner admitted to knowingly sending the picture of a minor engaged in sexually explicit conduct by computer through interstate commerce.

Petitioner's claim that the Court should have allowed him to withdraw his guilty plea is without legal merit . Accordingly, petitioner was not prejudiced by his counsel's failure to raise this issue on appeal. Since petitioner has not shown cause and prejudice for failing to raise his five claims on appeal, he is barred from raising them in this motion.

The Court will address the merits of petitioner's possible claim that his trial and appellate counsel were ineffective. 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 his counsel was ineffective because he failed to raise the grounds petitioner raises in this motion. These grounds lack legal merit. Accordingly, counsel's failure to raise them was not deficient performance. Further petitioner has not shown any prejudice caused by his counsel's performance. Petitioner has not shown that he received ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must be denied.

Petitioner is advised that in any future proceedings 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).

ORDER

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

Entered this 26th day of January, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge