

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

JERRY L. EZZELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
04-C-181-S
02-CR-080-S-01

On May 28, 2004 the Court denied petitioner's motion under 28 U.S.C. § 2255. On November 4, 2004 the United States Court of Appeals for the Seventh Circuit remanded the above entitled matter to this Court for consideration of petitioner's ineffective assistance of counsel claim. Specifically, the Court of Appeals stated:

The sentencing court's reliance on the witness statements increased Ezzell's sentence, and so counsel's failure to object to their inclusion could establish prejudice if Ezzel can show that counsel's actions were deficient.

MEMORANDUM

Petitioner requests 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). Petitioner also asks this Court to recuse itself because denying him an evidentiary hearing indicates prejudice. The Court is

neither biased nor prejudiced against petitioner. Accordingly, petitioner's motion to recuse the Court will be denied. See 28 U.S.C. §§ 144 and 455.

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). When analyzing counsel's performance at sentencing, prejudice exists when, but for counsel's action or inaction, the movant would have received a shorter sentence See Glover v. United States, 531 U.S. 198 (2001).

Petitioner claims that his counsel was ineffective when he failed to object to the district court's reliance on certain witness statements to calculate the total drug quantity. Petitioner has not presented any evidence to support his uncorroborated claim that he instructed his counsel to object to the witness statements. It was not unreasonable for counsel not to make these objections for to do so may have risked petitioner's reduction for acceptance of responsibility. Immediately prior to sentencing, the Court asks the parties for any objections or further objections they may have to the sentencing guidelines. Counsel made a strategic decision to accept the drug calculations and to argue for a sentence in the middle of the guideline range.

Petitioner has not shown that had counsel objected to the statements he would have received a shorter sentence. As the Court stated in sentencing petitioner at the top of the guidelines, "a sentence at the top of the guideline range is warranted regardless of where within the quantity range the amount of cocaine falls based upon your continued criminal conduct."

Petitioner has shown neither deficient performance by his counsel nor prejudice. Accordingly, his 28 U.S.C. § 2255 motion will 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 request for an evidentiary hearing is DENIED.

IT IS FURTHER ORDERED that petitioner's motion for recusal of the Court is DENIED.

IT IS FURTHER ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 on his ineffective assistance of counsel claim is DENIED.

Entered this 6th day of April, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge