

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONNIE RAINES,

Defendant.

ORDER

04-C-0448-C

Defendant Ronnie Raines has filed a motion to vacate his sentence pursuant to § 2255. The motion is timely: he was sentenced on April 11, 2002, then re-sentenced on May 2, 2003. He appealed from his sentence and conviction; his appeal was denied on April 10, 2003. Although he did not petition for certiorari, the one-year limitations period did not start to run until the expiration of the 90-day period for filing such a petition. Clay v. United States, 537 U.S. 522 (2003). His appeal was filed on July 6, 2004.

In his motion, defendant sets out twelve grounds for the vacation of his sentence: (1) his trial counsel gave him ineffective assistance; (2) the court relied on false or inaccurate information to determine relevant conduct and drug quantities in sentencing him; (3) the court misinterpreted USSG § 3C1.1 in giving him an upward adjustment in his sentence for

obstruction of justice; (4) the court relied on false or inaccurate information in finding that defendant was in possession of a gun during a crime; (5) the court used unreliable information in refusing to give defendant a downward adjustment for acceptance of responsibility; (6) the court failed to perform an adequate inquiry into the voluntariness of defendant's plea; (7) the government breached the plea agreement; (8) defendant's speedy trial rights were violated; (9) the court violated Fed. R. Crim. P. Rule 32(b)(6)(A) by not insuring that defendant received a copy of the presentence report 35 days before sentencing; (10) the court erred in finding him a manager or supervisor when sentencing him; (11) his appellate counsel gave him ineffective assistance; and (12) the court violated the principles set out in Blakely v. Washington, 124 S. Ct. 2531 (2004), when it enhanced his sentence using facts that had not been found by a jury.

In his motion, defendant refers to exhibits, presumably contained in an appendix. He has advised the court that he would be mailing the appendix within a week of sending the motion and accompanying brief, but the appendix has never been received. If he wants the appendix considered by the court, he should file and serve it promptly.

I will give the government an opportunity to be heard on the motion. Although defendant has raised his first, second, fourth and fifth claims on direct appeal and is therefore presumptively barred from raising them in a collateral motion by the doctrine of the law of the case, he has alleged that his appellate attorney gave him constitutionally

ineffective assistance. It may be that if he can prove his allegation, he would be relieved of the usual bar to re-argument of these claims. He is correct when he alleges that the court did not question him directly about the voluntariness of the plea. It is difficult to believe that the questions would have made a difference in light of his allegations that his trial counsel told him not to say anything about any “behind the scenes” promises that had been made to him but he alleges he would have divulged all of this had he only been asked. In any event, the failure to ask the questions was a violation of Fed. R. Crim. P. 11. The one claim on which defendant cannot go forward is the one he raises in reliance on Blakely v. Washington. *If Blakely* does apply to the federal sentencing guidelines, it applies only to cases pending on direct appeal. In the event the Supreme Court were to hold that it has retroactive application, defendant could renew his claim. At the present time, however, defendant’s claim is premature.

ORDER

IT IS ORDERED that the government may have until August 24, 2004, in which to file and serve a brief in opposition to defendant’s motion to vacate his sentence, brought pursuant to 28 U.S.C. § 2255. Defendant may have until September 14, 2004, in which to serve and file a reply brief. If an evidentiary hearing is necessary, the court will appoint counsel to represent

defendant if he demonstrates that he is financially eligible for such an appointment.

Entered this 2nd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge