IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

04-CR-0059-C
05-C-0685-C

v.

JAMES T. SCHLIFER,

Defendant.

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Defendant James T. Schlifer filed a motion for post conviction relief on November 21, 2005, along with a request for an evidentiary hearing on his motion. He alleged that the government had breached a plea agreement with him and that his attorney had been ineffective in leading him to believe that he would not be sentenced as a career offender and that his sentence would be no greater than 24-30 months. In an order entered on December 15, 2005, I told defendant that unless he could show cause and prejudice for his failure to argue on appeal that the government had breached the plea agreement, this claim could not succeed. Further, I noted that neither the written plea agreement that defendant signed nor the oral summary of the agreement at defendant's plea hearing contained any promise that

defendant would not receive a sentence in excess of 30 months. I directed defendant to file a supplemental pleading setting out specific facts about when his attorney told him what sentence he could expect to receive, where and when the discussion took place and whether anyone else was present to hear what counsel said or failed to say. I told him also that he should explain why he thinks he would have gone to trial had he received accurate advice about the probability of being sentenced as a career offender.

In response to the December 15, 2005 order, defendant submitted a "supplemental pleading and affidavit" in which he avers that his counsel told him on June 20, 2004, that if he signed the plea agreement on that date, the government was willing to agree to a guideline sentence in the range of 24-30 months, that he asked his counsel to inquire of the government whether he would be sentenced as a career offender and that counsel informed him later after conferring with the government that it would not. He avers that he asked counsel to raise the issue of his career offender sentencing on appeal but counsel failed to do so. Also, he says that if he had known he could be sentenced as a career offender, he would have insisted on going to trial.

Defendant's supplemental pleading is still short on specifics. His explanation of what he was told by his counsel and when is only a little less vague than what he said originally. He refers to only one date on which he met with counsel and gives almost no detail about the conversation. He does not say whether he discussed with his counsel his extensive

criminal record and how that might affect his sentence. He does not say whether his counsel discussed the sentencing guidelines with him or not. In short, his lack of any reference to any date or to other meetings with his counsel does not supply the specificity that defendant must provide before the court is required to hold an evidentiary hearing.

Moreover, defendant's supplement does not answer the obvious questions his contentions raise. If, as defendant says, he asked his counsel to confer with the government to make sure that he would not be considered a career offender, why did he not ask that the promise be included in the written plea agreement? Why did he sign the agreement if the promise was not in there? Did he ask his attorney why the promise was not included in the agreement? If he was promised a sentence no greater than 30 months, why did he not say so to the court, either at his plea hearing, when he was asked whether any other promises had been made to him that were not the subject of the written plea agreement, or when he was sentenced?

It is telling that defendant never says he was surprised to read in the presentence report that he was eligible to be sentenced as a career offender. Surely, when he read the report and realized that his sentencing guideline range was 151-188 months, he must have realized that both his lawyer and the government had misled him if both of them promised him that his sentencing range would not exceed 30 months.

The vagueness of defendant's pleading is troubling, particularly for someone with as

long and serious a criminal record as defendant has. It is hard to believe that with that record, he could reasonably have thought he would not be sentenced as a career criminal. In fact, he qualified in two separate ways for a long sentence. First, he was a career offender as that term is defined in U.S.S.G. § 4B1.1 because he was at least 18 at the time of his offense, he was being sentenced for a controlled substance offense and he had two prior convictions for crimes of violence. Second, his criminal history score was 25, almost double the minimum to qualify for the highest category. If he had not been sentenced as a career offender, his guideline range would have been the same as a career offender's because of his criminal history.

The fact remains that defendant never said a word to the court, not at his plea hearing when he did not hear the government say it had promised a short sentence, not after he read the presentence report, not at sentencing when he knew the stakes and not on appeal when his attorney alleged failed to raise the issue of the government's promise. Instead, at his plea hearing, he told the court that no one had made any promises to him that were not summarized in the plea agreement he signed.

It is true, as defendant says, that his counsel argued vigorously on his behalf that he should not be treated as a career offender, but this fact provides no support for defendant's claim that both his attorney and the government had promised him a sentence of no more than 30 months. Defendant's attorney grounded his argument on the court of appeals'

decision in United States v. Booker, 375 F.3d 508 (7th Cir. 2004), aff'd, 125 S. Ct. 738 (2005), that increasing a sentence on the basis of the sentencing judge's factual findings violated the defendant's Sixth Amendment right to have a jury make determinations that would lead to higher sentences. If the government had made the promise defendant says it did, counsel's argument would have been unnecessary.

I am not persuaded that defendant has made the requisite showing that his counsel failed to give him constitutionally adequate representation in connection with his plea of guilty so as to require an evidentiary hearing on the issue. Moreover, defendant has not said anything specific about his willingness to go to trial had he known he could be sentenced as a career offender. All he says is that he would have gone to trial if he had known what the sentencing guidelines would be. He does not suggest that he had any defenses he could have raised or any reason to think that the government would have had any difficulty proving his guilt. The record evidence is all to the contrary. It shows that state agents executed a search warrant at defendant's home and found dozens of incriminating items, including a rifle under the mattress, assorted lithium batteries, pseudoephedrine tablets, scales, a coffee grinder with white powder residue, a burn pit with empty pseudoephedrine boxes and blister packs, together with fuel cans and an LP cylinder that tested positive for the presence of ammonia. A number of persons provided evidence to investigators and the grand jury implicating defendant in the production of methamphetamine. Misty Johnson told

investigators that she had been living with defendant and had manufactured methamphetamine with him on many occasions during the six-to-eight-week period they lived together. She also said that defendant had distributed methamphetamine to at least four other individuals.

In the light of this extensive evidence, it is highly unlikely that defendant would have chosen to proceed to trial and forgo the three point reduction in his offense level that he would receive if he entered a plea of guilty. A claim of constitutionally ineffective counsel in connection with a plea of guilty requires two showings: that counsel's representation fell below the minimum required of defense counsel *and* that defendant suffered prejudice as a result of the ineffective assistance. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Defendant has not provided the details necessary to suggest that his counsel did not provide effective representation and he has failed to show that even if the representation was inadequate, he was prejudiced by the alleged misinformation about his potential sentence because he entered a plea of guilty rather than going to trial and requiring the government to prove his guilt.

ORDER

IT IS ORDERED that defendant James T. Schlifer's motion for post conviction relief brought pursuant to 28 U.S.C. § 2255 and his request for an evidentiary hearing are

DENIED for defendant's failure to adduce sufficient factual support for his motion to warrant an evidentiary hearing or to show that he is in custody illegally.

Entered this 13th day of January, 2006.

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