

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES T. SCHLIFER,

Defendant.

ORDER

04-CR-0059-C-01
05-C-0685-C

Defendant James T. Schlifer has filed a motion for post conviction relief pursuant to 28 U.S.C. § 2255, contending that he was deprived of his constitutional right to the effective assistance of counsel because counsel did not warn him that he might be sentenced as a career offender and that the government breached its plea agreement with him. Defendant alleges that he entered into a plea agreement with the government under which he believed he would be subject to a sentence of 24-30 months, given the amount of methamphetamine for which he was being held responsible. When the probation officer calculated the guideline range, however, she found that defendant had two prior felony convictions for crimes of violence in addition to the felony controlled substance offense for which he was being

sentenced. Defendant received a sentence of 120 months.

The breach of the plea agreement contention is a non-starter. The written plea agreement that defendant signed and that the government summarized at the plea hearing contained no promise that defendant would be sentenced to no more than 24-30 months. Moreover, even if the government had made such a promise, defendant could not raise it on a post conviction motion unless he could show both cause and prejudice for not having raised it on appeal. He has not said anything in his motion to explain why he could not have raised the issue on appeal.

This leaves only the claim that counsel was constitutionally ineffective in his estimate of defendant's probable sentence. As it stands, the claim is inadequate. If defendant wants to pursue it, he will have to submit an affidavit setting forth details about what counsel told him, where and when the discussion took place and whether anyone else was present to hear what counsel said or failed to say. Key v. United States, 806 F.2d 133, 139 (7th Cir. 1996). (Defendant should bear in mind that he told the court that no one had made him any promises of any kind in addition to those that were set out in the plea agreement and that his statements in open court carry a presumption of truthfulness.) In addition, defendant will have to show that at a hearing he could establish that there is a reasonable probability that if his counsel had given him accurate advice, defendant would not have entered a plea of guilty but would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Because defendant's motion is deficient as filed, I will give him an opportunity to file a supplemental pleading, setting forth with specificity exactly what his counsel told him, where and when the conversation took place and whether anyone else was present and explaining why he would have insisted on going to trial had his counsel told him that he might be sentenced as a career offender.

ORDER

IT IS ORDERED that defendant James T. Schlifer may have until January 13, 2006, in which to file a supplemental pleading in this matter, setting forth with specificity exactly what his counsel told him about a possible sentence, where and when the conversation took place and whether anyone else was present and explaining why he would have insisted on going to trial had his counsel told him that he might be sentenced as a career offender.

Entered this 15th day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge