

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

ROLAND C. SPERBERG,
Petitioner,

v.

ORDER
06-C-746-S
04-CR-84-S-01

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner asks the Court to hold 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).

FACTS

On June 2, 2004 a federal grand jury in the Western District of Wisconsin returned a one-count indictment against Roland Sperberg charging him with unlawful possession of firearms as a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Petitioner's attorney Chris Van Wagner filed suppression motions on his behalf and requested an evidentiary hearing concerning a search made by petitioner's probation officer of his

residence. The government objected to the taking of evidence on the grounds that petitioner has not made a prima facia showing on illegality. Magistrate Judge Stephen Crocker discussed the suppression motion in a telephone conference. At this conference the Magistrate Judge advised that the violation of a state statute or state regulation concerning probation search procedures did not by itself make the search unreasonable under the Fourth Amendment. On August 11, 2004 petitioner withdrew his motion to suppress evidence.

On September 7, 2004 Sperberg entered a guilty plea to the indictment before the Court. At the plea hearing petitioner testified under oath that he agreed with the statements that the government provided in its offer of proof including his prior felony conviction of OWI, 7th offense, a 1983 escape, a threat to injure conviction and a possession with intent to deliver conviction. At the plea hearing petitioner also testified that he was fully satisfied with the counsel, representation and advice given to him in the case by his attorney Chris Van Wagner. At this hearing Attorney Van Wagner stated that he wished to preserve on the record the defense objection to the applicability of §924(e).

A presentence report was filed on October 12, 2004 recommending an offense level of 30 and a category VI criminal history. Petitioner's base offense level was increased from 23 to 30 because he is an Armed Career Criminal pursuant to U.S.S.G. §

4B1.4(b)(3)(B) and 18 U.S.C. § 924(e). Petitioner's criminal history included felony convictions for Escape, Threats to Injure/Accuse of Crime and OWI, 7th offense.

On November 24, 2004 petitioner appeared before this Court for sentencing. Petitioner objected to the use of the Threats to Injure/Accuse of Crime and the OWI 7th convictions to sentence him as an Armed Career Criminal. The Court specifically found as follows: "The defendant has at least three prior convictions for violent felonies. Specifically on May 11, 1983 he was convicted of felony escape from custody. On June 5, 1988 he was convicted of threats to injure/accuse of crime. And on July 29, 2002 he was convicted of felony operating while intoxicated." The Court sentenced petitioner to 210 months in prison followed by five years of supervised release.

Petitioner appealed his judgment of conviction and sentence to the United States Court of Appeals for the Seventh Circuit. Petitioner argued that his convictions for OWI 7th and for threats to injure/accuse of crime were not violent felonies. Petitioner also argued that the government had to allege prior violent felony convictions in the indictment as a prerequisite to the imposition of an increased sentence under 18 U.S.C. § 924(e). On December 19, 2005 the Court of Appeals affirmed petitioner's judgment of conviction and sentence finding specifically that the prior convictions did not have to be alleged in the indictment and that

both petitioner's OWI 7th and threat to injure/accuse of a crime convictions were convictions for violent felonies.

On March 20, 2006 a petition for a writ of certiorari in petitioner's case was mailed to the Office of the Clerk, United States Supreme Court. The Clerk returned the petition to Attorney T. Christopher Kelly on March 27, 2006 for correction within 60 days. The petition was not filed.

On December 20, 2006 petitioner filed this motion under 28 U.S.C. § 2255.

MEMORANDUM

Petitioner claims that his counsel was ineffective when he 1) failed to object to the lack of certified judgments of his prior escape convictions at the time of his plea hearing; 2) failed to pursue his motion to suppress evidence seized in a search of his residence; 3) failed to file a writ of certiorari and 4) failed to pursue all his issues on appeal. He also challenges the constitutionality of the state convictions that were used to find he was an Armed Career Offender.

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).

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 contends that his counsel failed to object to the lack of a certified judgment of his prior escape conviction at the time of his plea hearing. Petitioner has not shown that this was deficient performance. His counsel continued to object through appeal to the applicability of § 924(e) but the Court of Appeals found that petitioner's prior felony convictions could be used to enhance his sentence. Petitioner has not shown any prejudice caused by his counsel's performance in this regard.

Petitioner also argues that this counsel failed to pursue his motion to suppress evidence seized in a search of his residence. To prevail on this claim petitioner must prove that the motion was meritorious. Owens v. United States, 387 F.3d 607, 610 (7th Cir. 2004). Petitioner has not made this showing. Further, petitioner testified under oath after his counsel withdrew the motion to suppress that he was satisfied with his counsel's representation. Petitioner has not shown that his counsel's withdrawal of the motion to suppress was deficient or prejudiced him.

Petitioner also claims his counsel failed to pursue all his issues on appeal and failed to file a writ of certiorari. There is no evidence presented that petitioner's counsel's performance on appeal was deficient. Further there is no evidence presented that petitioner's petition for a writ of certiorari would have been granted. Petitioner has failed to show that his counsel was ineffective on appeal.

Petitioner has not shown that he received ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must be denied.

Petitioner also challenges the validity of the state convictions that were used as the basis for sentencing him as an Armed Career Offender. In this collateral attack on petitioner's federal sentence he cannot challenge his state sentences. Ryan v. United States, 214 F.3d 877 (7th Cir. 2000). Further he is procedurally barred from raising this issue because he did not

raise in on appeal and has not shown cause and prejudice for failing to do so. United States v. Smith, 241 F.3d 546, 548 (7th Cir. 2001).

Petitioner's motion under 28 U.S.C. § 2255 will be denied. Petitioner is advised that in any future proceeding in this matter he must offer argument no 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 6th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge