IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

05-C-0228-C
04-CR-0111-C-02

v.

TIMOTHY L. STEVENS,

Defendant.

- -

Defendant Timothy L. Stevens filed a motion for postconviction relief pursuant to 28 U.S.C. § 2255 on April 14, 2005. As grounds for his motion, he alleged that the court sentenced him on the basis of facts not found by a jury beyond a reasonable doubt and that his counsel gave him constitutionally ineffective assistance by failing to investigate the case before rushing defendant into a plea agreement, failing to argue for a minor role in the conspiracy charged against him and failing to take an appeal. On April 21, 2005, I entered an order directing defendant to file an affidavit stating whether he asked his attorney to take an appeal and if so, what steps he took to consult with his attorney about the appeal.

On May 9, 2005, defendant filed an affidavit in which he averred that he and his

counsel had had a discussion of appeal on the day that defendant entered his guilty plea and that he had brought the subject up again a day or two before the December 16, 2004 sentencing. At that time, he averred, he had called counsel at his office to ask about an appeal and had been told by counsel that he could not file an appeal until defendant had been sentenced, at which point they would have ten days in which to do so. Defendant averred that "[b]ased on these calls I was given the impression he was plan[n]ing to file an appeal since I asked him to [do] so." Dft.'s Aff., dkt. #58, at 2. Defendant avers that he tried to contact his counsel after sentencing but was unable to speak to him until February 2005, when counsel said he had a heavy case load and was planning to contact the magistrate judge to withdraw from the case. Defendant says he did not learn until March 2005 that no appeal had been filed on his behalf.

With the affidavit, defendant filed an amended motion, adding allegations that the court had erred in using defendant's prior convictions to enhance his sentence and in imposing a period of supervised release on him when it was not part of the plea agreement and that his attorney failed to offer any defense, failed to object to the superseding indictment even though it charged conduct clearly outside the date the conspiracy ended, failed to seek a reduction in his offense level for his minor role in the offense and failed to explain defendant's rights to him or tell him that the court would take his "relevant conduct" into consideration when sentencing him.

On May 9, 2005, I ordered the government to respond to defendant's motion, which it did on June 24, 2005. In reply, defendant filed a 29-page traverse and a 19-page supplemental affidavit, in both of which he expands upon his original claims and adds some new ones. I will ignore any claims presented for the first time in the traverse, such as the claim that the government did not fulfill the promises it made in the plea agreement; defendant was advised that his motion was the one document in which he could raise any and all claims relating to his challenge to his conviction and sentence. Raising new claims in a traverse is improper because it does not provide the government an opportunity to be heard on the claims.

BACKGROUND FACTS

Defendant was indicted along with two others in an eight-count indictment returned by a grand jury on July 14, 2004. Count 1 charged him and his co-defendants Carlee Hamilton and Keith Stevens with conspiring to distribute cocaine from approximately November 2002 through December 2003. Counts 2-6 charged the defendants with distributing cocaine on specific dates from June 16, 2003 through December 2, 2003. In a superseding indictment returned on August 25, 2003, the grand jury added a ninth count in which it charged defendant with possessing cocaine with the intent to distribute it on July 16, 2004.

On October 7, 2004, defendant pleaded guilty to the conspiracy charge in count 1 of the indictment after having reached a plea agreement with the government. According to the agreement, the government promised to ask the court to sentence defendant between the minimum and maximum sentences prescribed by statute, "using whatever facts it believes relevant to impose a sentence within that range" other than information provided by defendant under the terms of the plea agreement, in compliance with U.S.S.G. § 1B1.8. At the hearing defendant told the court that he understood that in pleading guilty he faced a maximum penalty of 20 years in prison, a $1,000,000 fine, at least three years of supervised release and a $100 special assessment.

At the sentencing on December 16, 2005, I imposed a discretionary sentence of 57 months because no jury had found the facts that would support the drug amount attributable to defendant and defendant had not stipulated to the drug amounts or waived his right to a jury determination of the amount. Defendant did not appeal from the sentence.

OPINION

Although defendant argued in his motion that his sentence was illegal because it was based on facts not found by a jury beyond a reasonable doubt and therefore violated the holdings in Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005), he has no grounds for his argument because he was not sentenced

under mandatory sentencing guidelines. Instead, he was given a discretionary sentence, making Booker inapplicable. Booker held that the Sixth Amendment is violated when a court is required to imposes a sentence that is based upon facts not found by the jury but that no violation occurs when a judge imposes a discretionary sentence, even if that sentence is based upon the same facts. Id. at 750. Therefore, it is not necessary to address defendant's claim that it was error to enhance his sentence in reliance on his prior convictions and the drug quantity in the presentence report when no jury had found that he had the prior sentences or that he was responsible for the quantity of drugs witnesses said he had. (Even if the sentence had not been a discretionary one, using defendant's prior sentences to enhance his sentence would not have violated defendant's Sixth Amendment rights; prior convictions are not covered by the holding in Booker. Id. at 756 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" to avoid a Sixth Amendment violation when sentencing under a mandatory sentencing guideline scheme).)

I turn next to defendant's allegations of counsel's ineffectiveness at trial. Defendant starts by accusing his attorney of failing to investigate the case and failing to provide a defense. He does not say what his attorney should have investigated, what he might have found had he done the desired investigation or what kind of defense he might have offered.

These omissions are fatal to his claim. In Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003), the court of appeals held that a defendant alleging that his trial counsel failed to investigate the case against the defendant must provide the court "sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." In addition, the defendant must show that the information discovered "would have led counsel to change his recommendation as to the plea." Hill v. Lockhart, 474 US. 52, 58-60 (1985); see also Richardson v. United States, 379 F.3d 485 (7th Cir. 2004) (citing Hardamon and Hill).

Defendant has not listed any favorable evidence that his counsel might have discovered had he undertaken an additional investigation. It is highly unlikely that he could have found any. The evidence the government had amassed against defendant was extensive. The government had been conducting a large drug trafficking investigation on and around the Lac Courte Oreilles Reservation in Sawyer County, Wisconsin. The evidence against defendant included controlled purchases from him and his co-conspirators, recorded conversations with defendant and his co-conspirators, information from cooperating defendants in this case and in related cases and testimony by grand jury witnesses that they had made purchases of cocaine and crack cocaine from defendant. Defendant's allegations of failure to investigate or to mount a defense do not state any viable claim.

Defendant maintains that his counsel should have objected to the superseding

indictment because it was clearly outside the date the conspiracy ended. Such an objection would have been pointless. The change in the superseding indictment was the addition of a new charge against defendant alone for knowing possession with intent to distribute cocaine on July 16, 2004. It was separate from the charged conspiracy. Accordingly, it is irrelevant that the charged conduct took place after the conspiracy was alleged to have ended.

Defendant argues that his trial counsel failed him by not seeking a reduction in defendant's guidelines sentencing range for the minor role he played in the conspiracy. To be eligible for a minor role reduction under U.S.S.G. § 3B1.2, defendant would have had to show that he was substantially less culpable than the average participant. Id. cmt. 3(A). He could not have made this showing in light of the evidence the government had of his extensive drug dealings, including the grand jury testimony of four witnesses that they had bought cocaine or crack cocaine from defendant, the statements of David Dennis, Steven Martinson and co-defendant Carlee Hamilton about defendant's involvement in the conspiracy and the evidence of the controlled purchases of cocaine from defendant.

Defendant alleges that his attorney failed to object to the court's imposition of a period of supervised release that was not part of the plea agreement. Defendant has no basis for this allegation. Not only was the period of supervised release part of the plea agreement but the matter was discussed in open court two times. In response to my direct question,

defendant confirmed that he understood that he would be subject to a three-year term of supervised release if he was found guilty. The plea agreement also made it plain that the court would use "whatever facts it believes relevant to impose the sentence." Plea Agreement, dkt. #30, at 1.

As to defendant's allegation that his attorney failed to explain his rights to him, defendant advised the court to the contrary at his plea hearing. At that time, I asked him whether he had had enough time to go over with his attorney the possible defenses he might have to the charge against him and the consequences of pleading guilty. He said that he had. Throughout the plea colloquy he stated that he understand each right he was giving up. It is not credible for him to say now that his lawyer did not advise him of his rights.

Defendant makes the unlikely allegation that if he had known he would get more time he never would have taken the plea agreement. He does not flesh out this allegation with any facts. As with his claim that his attorney did not investigate his case, this lack of factual information defeats his claim. Berkey v. United States, 318 F.3d 768, 772-73 (7th Cir. 2003) (not enough for defendant to allege that he would have insisted on going to trial and not pleaded guilty had counsel given him correct information; he must go further and present objective evidence that reasonable probability exists that he would have taken that step). Defendant was told at his arraignment the maximum term of imprisonment to which he would be subject; he was reminded of this again when he entered his plea. In addition,

he told the court that he had not been promised a particular sentence.

The final question is counsel's alleged failure to take an appeal of defendant's sentence. Nowhere in defendant's affidavit on that subject is there a statement that after his sentence, defendant asked his attorney to take an appeal. However, defendant describes talking to counsel about appealing on two occasions and being told that it was too early. If defendant is correct, then his counsel should have anticipated that he would want to appeal and should have consulted with him about it after he was sentenced. Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000) (consultation constitutionally required when there is reason to think that rational defendant would want to appeal or that particular defendant has "reasonably demonstrated to counsel that he was interested in appealing").

Defendant's affidavit is far from compelling. Although it would seem easy enough to say that he had asked his lawyer to appeal right after he was sentenced, if that was the case, defendant has not made such a statement. He has filed voluminous documents but the record remains blank as to what, if anything, he said to counsel about appealing after he was sentenced. In the interests of justice, however, I will schedule the matter for an evidentiary hearing limited to the questions whether defendant's counsel performed his duty of consulting with defendant about the advantages and disadvantages of appealing and whether defendant asked him to appeal. See Roe, 528 U.S. at 428 (if counsel has consulted with his client about advantages and disadvantages of taking an appeal and made reasonable effort

to determine his client's wishes, he performs in constitutionally ineffective manner only if he fails to follow defendant's express instructions about appealing).

ORDER

IT IS ORDERED that defendant Timothy Stevens's motion for postconviction relief, filed pursuant to 28 U.S.C. § 2255, is DENIED with respect to defendant's claims that his sentence is unconstitutional because it was based on facts not found by a jury and that his attorney gave him unconstitutionally ineffective representation, with the exception of his claim that his attorney failed or refused to take an appeal for him from his sentence after he asked counsel to do so. On the question of appeal, an evidentiary hearing will be held on November 4, 2005 at 9:00 a.m. Counsel will be appointed to represent defendant Stevens at government expense.

Entered this 5th day of August, 2005.

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