

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

SHONDELL BUCHANAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

06-C-225-S
04-CR-122-S-01
04-CR-176-S-01

Petitioner Shondell Buchanan moves to vacate his sentences pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision. Petitioner's request for an evidentiary hearing will be denied as unnecessary under 28 U.S.C. § 2255. See United States v. Kovic, 830 F.2d 680, 692 (7th Cir. 1987).

FACTS

On July 24, 2004 a federal grand jury in the Western District of Wisconsin returned a one-count indictment against petitioner for unlawfully possessing a firearm as a convicted felon. On August 4, 2004 the federal grand jury returned a superseding indictment which added two additional counts charging petitioner with knowingly possessing a stolen firearm and knowingly possessing a firearm with an obliterated serial number. (Case No. 04-CR-122-S).

Petitioner failed to appear for the final pretrial conference in the case. On December 21, 2004 the federal grand jury charged Buchanan with failure to appear. (Case No. 04-CR-176-S).

On February 25, 2005 petitioner pled guilty to Count 1 in Case No. 04-CR-122-S and to Count 1 in Case No. 04-CR-176-S pursuant to a written plea agreement. At the plea hearing the Court asked petitioner whether he was fully satisfied with the counsel, representation and advice given to him in this case by his attorney, Timothy D. Edwards. Petitioner responded that he was.

A presentence report was prepared by the United States Probation Office. At the beginning of the May 2, 2005 sentencing hearing the Court addressed petitioner's March 23, 2005 letter expressing his dissatisfaction with his plea of guilty and his counsel's representation. At that time petitioner stated that these concerns had been resolved. Both petitioner and his attorney stated that they had no objections to the presentence report.

The Court stated as follows, "The Court uses the sentencing guidelines in this case for advisory purposes only and considers the statutory purposes of sentencing in 18 United States Code Section 3553(a)." The Court determined the sentencing guideline range to be 168 to 210 months with a cap of 180 months, the statutory maximum. The Court concluded that petitioner was not entitled to any reduction for acceptance of responsibility.

The Court commented on the gruesome nature of the conduct petitioner suffered as a juvenile as well as his adult criminal history. The Court addressed the necessity of protecting the community from petitioner and sentenced petitioner to 120 months in Case No. 04-CR-122-S and to a consecutive 60 month sentence in Case No. 04-CR-176-S for a total of 180 months with a three-year term of supervised release.

Petitioner appealed his sentence. On appeal his new counsel, the federal public defender, contended that re-sentencing was required because the petitioner's drug-testing condition on supervised release improperly delegated to the probation office the duty to specify the number of tests to which petitioner must submit. Petitioner prevailed on appeal. On February 17, 2006 petitioner was resentenced modifying the conditions of his supervised release to indicate that he must submit to 60 drug tests annually during his term of supervised release.

On April 24, 2006 petitioner filed his motion to vacate his sentences pursuant to 28 U.S. C. § 2255.

MEMORANDUM

Petitioner claims that his counsel was ineffective. 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 defendant 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).

The Court addresses the merits of petitioner's claim that his trial counsel was ineffective because he had a potential conflict of interest that the district court failed to adequately address at sentencing; he failed to make objections to the presentence report, the Court's remarks at sentencing and the Court's alleged failure to meaningfully address the sentencing factors and his failure to move to suppress petitioner's statements that he owned the guns. He also claims that his appellate counsel failed to challenge his sentence based on United States v. Booker.

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 defendant must show that but for the deficient advice of counsel he would have insisted on proceeding to

trial. 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).

It appears that petitioner is claiming that his counsel is ineffective because the Court did not adequately address petitioner's concerns regarding his counsel at sentencing. The Court did address these concerns because petitioner stated on the record that they had been resolved. Petitioner has not shown that his counsel was ineffective for any conflict of interest which petitioner stated was resolved.

Petitioner cannot demonstrate that his counsel's performance for failure to object to the presentence report was deficient because at sentencing defendant advised the Court that he had reviewed the pre-sentence report with his attorney and had no objections.

Petitioner also argues that his counsel was ineffective because he failed to object to Court's remarks at sentencing and the Court's alleged failure to meaningfully address the sentencing factors. There would have been no merit to either of these objections because the record demonstrates that the Court properly considered the sentencing factors and petitioner's juvenile history. Accordingly, the failure to make this objection was not deficient performance by petitioner's counsel.

Petitioner argues that his counsel's decision not to move to suppress his statements was ineffective. This decision was a tactical one. Petitioner has not shown that any motion to suppress his statements would be meritorious. Further, at sentencing petitioner did not object to the statements in the presentence report. Accordingly, the decision to not move to suppress these statements by petitioner's counsel was not deficient performance.

In addition petitioner has not shown that absent his counsel's decisions he would have received a lesser sentence. Accordingly, petitioner was not denied effective assistance of counsel and his motion under 28 U.S.C. § 2255 will be denied.

Petitioner also argues that his appellate counsel was ineffective because he failed to challenge his sentence pursuant to United States v. Booker. Any challenges to petitioner's sentence under Booker would have been frivolous. Accordingly, petitioner's counsel was not deficient in not raising this argument.

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

Petitioner is advised that in any future proceedings in this matter he must offer argument not 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).

Shondell Buchanan v. United States of America
Case Nos. 06-C-225-S, 04-CR-122-S-01 & 04-CR-176-S-01

ORDER

IT IS ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 18th day of July, 2006.

BY THE COURT:

s/_____
JOHN C. SHABAZ
District Judge