

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

BEVERLY A. MARTY,

Defendant.

ORDER

06-C-0610-C

05-CR-0029-C-01

Defendant Beverly A. Marty has moved pursuant to 28 U.S.C. § 2255 to modify and correct her sentence. Defendant contends that her sentence is illegal because the court erred in its calculation of the drug quantity attributable to her and abused its discretion in calculating her relevant conduct. Defendant's motion must be denied because it is merely an effort to re-argue matters raised in the court of appeals on direct appeal from her sentence. Section 2255 cannot be used for that purpose. The law of the case doctrine prevents it. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986).

In support of her argument defendant asserts that her sentence should have been based upon the plea agreement's recommendation that the total drug amount attributable to her was between 100-400 kilograms. At defendant's sentencing hearing, I rejected the plea agreement and relied instead upon the presentence report in making the assessment of the drug amount attributable to defendant. The court of appeals affirmed the judgment, noting that the estimation of the quantity of drugs for which defendant was responsible was reasonable. The court of appeals' ruling disposes of defendant's claims that I erred in my calculation of the drug quantity attributable to her and abused my discretion in calculating her relevant conduct in violation of the plea agreement. The law does not provide defendant another chance to reassert those same challenges.

If defendant is arguing that it was error for the court to make a determination of relevant conduct rather than have the jury make it, she is barred from raising this argument in a post-conviction motion because she could have raised it on direct appeal. If she had, it would have been unsuccessful. After United States v. Booker, 543 U.S. 220 (2005), it is clear that a sentencing court may rely on facts not proven beyond a reasonable doubt now that the guidelines are advisory only.

ORDER

IT IS ORDERED that defendant Beverly Marty's motion pursuant to 28 U.S.C. § 2255 for modification and correction of her sentence is DENIED.

Entered this 27th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge