IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

06-CR-0022-C-01

v.

EMMIT Z. QUINN,

Defendant.

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Defendant Emmit Z. Quinn filed a motion for postconviction relief on June 20, 2007, alleging that his counsel was constitutionally ineffective, that his plea of guilty was not entered knowingly and intelligently and that he was denied his Fifth and Sixth Amendment rights at sentencing. He alleged that his appointed counsel was ineffective in two respects: in failing to investigate the facts of the case properly and failing to take an appeal on defendant's behalf. He alleged that his plea was not made intelligently because he did not know that the government would apply a two-level enhancement and that the court would take into consideration an additional eight grams of crack cocaine not covered in the plea agreement. He based his Fifth and Sixth Amendment claims on the court's reliance at sentencing on facts not alleged in the indictment or found by a jury and the court's

imposition of a sentence within the advisory guideline range.

In an order entered on June 29, 2007, I denied defendant's motion with respect to his claim that he entered his plea not knowing that the government would breach its agreement on drug quantity. Even if defendant were correct about his allegation that the government had agreed to a maximum quantity, the inclusion of the additional eight grams made no difference to defendant's offense level or to his sentence. I found no merit with respect to the additional claim that the court had sentenced him unconstitutionally. It has been well settled since United States v. Booker, 543 U.S. 220 (2005), that so long as the sentencing court treats the guidelines as advisory, it may take into account facts not found by a jury or admitted by the defendant when imposing a sentence.

Turning to the claim of ineffective assistance in defendant's motion, I noted the oddity of defendant's allegation that his counsel failed to investigate the facts surrounding defendant's arrest. According to defendant, if his attorney had conducted an adequate investigation, he would have discovered that defendant never made incriminating statements to the police. Left unexplained by defendant was why his counsel would have needed to investigate something that defendant could have told him. I advised defendant that if he meant to allege that he told counsel that he never made the statements attributed to him and counsel never followed up on the information, he would have to submit an affidavit to the court setting forth in detail what he said to his attorney, what statements he made to the

police and exactly what counsel would have learned had he investigated.

Defendant submitted an affidavit in response to this order, but it includes no reference to the claimed failure to investigate the alleged incriminating statements. He does discuss the claim in his memorandum but he still does not say what his attorney would have learned had he investigated. Therefore, I will assume that defendant does not intend to pursue this claim.

With respect to defendant's claim that his trial counsel failed or refused to take an appeal from defendant's sentence despite defendant's request that he do so, I told defendant that he would have to provide the court with detailed information supporting his allegation that he asked counsel to take an appeal. He has provided such information in the affidavit and he will be allowed to go forward on this claim. Roe v. Flores-Ortega, 524 U.S. 470, 484 (2000) (when counsel's constitutionally deficient performance deprives defendant of appeal that he otherwise would have taken, defendant has made out successful ineffective assistance of counsel claim entitling him to appeal).

Defendant's next claim involves his contention that he was denied due process when the government did not honor the plea agreement by adding the additional eight grams to the relevant conduct and when the court adjusted the guidelines upward by two levels because he possessed a knife when he was arrested. Defendant contends that his plea was not a knowing and intelligent one because he did not know that either of these things would

happen.

Although I denied defendant's claim as it related to the extra eight grams of cocaine in the June 29 order, I will consider his brief and letter as a motion to reconsider the earlier ruling on his claim. In the earlier order, I overlooked the fact that his plea agreement did include a paragraph on drug amount, just as defendant had alleged. However, this fact does not require a different result. The paragraph provided that "defendant agrees that the relevant conduct in his case involved 40 grams of 'crack' cocaine. " Plea Agmt., dkt. #11, at 2. At sentencing I found the relevant amount to be 48 grams. The fact that the amount considered in sentencing was different does not mean that the government breached its agreement with defendant. The agreement does not say that the government cannot or will not try to prove that defendant was responsible for no more than 40 grams; it says only that defendant agrees he was involved with 40 grams. Even if the agreement was that the government would not recommend that the court find an amount in excess of 40 grams, the government would not have breached such an agreement. It was the court's decision to accept the probation officer's calculation of the amount of crack cocaine rather than the amount agreed to by defendant.

Defendant was informed at the plea hearing that the court was not bound by any recommendations made by the government in the plea agreement. He acknowledged at the hearing that he understood this and he acknowledged it when he signed the plea agreement.

This entire discussion of drug quantity is of academic interest only because the eight-gram difference had no effect upon the guideline calculations. As I explained in the June 29 order, the offense level is the same for quantities between 35 and 50 grams of crack cocaine. Whether the amount was 40 grams or 48 grams, the offense level would have been 30. The extra amount might have been a basis for a sentence near the high end of the guideline range, but it was not. Not only was defendant given a sentence corresponding to the low end of the guideline range but the range itself was reduced on the finding that defendant's criminal history overstated the seriousness of his criminal conduct.

Defendant has an additional reason for alleging that his plea was not valid. He mentioned it in his postconviction motion, but did not make it clear in that motion that he was alleging two independent reasons why his plea was not entered knowingly and intelligently. In his new submissions, he has made it explicit that his claim is based not only on the allegedly improper calculation of drug amounts but on his lack of understanding that his sentence could be enhanced for his possession of a dangerous weapon. He says that his attorney never told him that the government could go beyond the plea agreement and seek a two-level enhancement for the knife found in his possession at the time of his arrest. Indeed, in his new submissions, he has expanded exponentially on his claim. He has made allegations about his counsel that indicate that he has an entirely new claim, which is that he entered his plea of guilty only because his counsel misrepresented the consequences to

him and essentially forced him to plead guilty. He alleges that counsel told him that if he did not agree to the plea, the government would argue that the court should find that defendant's relevant conduct amounted to as much as 150 grams of crack cocaine, that defendant had sold drugs to minors and that the court should apply an unspecified enhancement. To persuade defendant to accept the plea agreement, counsel allegedly told defendant that if he did, no enhancement would be employed to increase his offense level, the drug amount would be limited to the 40 grams set forth in the plea agreement, the base offense level would be 27 with the three-point downward adjustment for acceptance of responsibility, his criminal history category would be IV and the guideline range would be no more than 80 to 108 months. Defendant alleges that he wanted to go to trial and the only reason he did not were the promises and threats made to him by his attorney. Furthermore, he adds, counsel told him to lie to the court if asked whether any promises or threats had been made to him.

The mere failure of counsel to warn defendant that he might receive an upward adjustment for possession of a knife would not invalidate the guilty plea. Defendant knew from the plea hearing that the probation office would calculate the advisory sentencing guidelines, taking into consideration a number of factors such as drug quantity and previous criminal history, as well as any other factors that were relevant. This explanation was sufficient to make his plea a knowing one. He is not entitled to know his exact sentence in

advance. "A proper plea colloquy informs the defendant of the contingent nature of the sentence." United States v. Barnes, 83 F.3d 934, 938-39 (7th Cir. 1996) (citing Fed. R. Crim. P. 11(e)(3)). A defendant who knows the nature of the charge against him, who admits the facts on which the charge is based, who knows the maximum sentence to which he can be sentenced and who knows that his sentence will be influenced by the application of the guidelines to the facts cannot claim mistake or lack of adequate knowledge. Id. at 939. "'The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.'" United States v. Gomez, 326 F.3d 971, 975 (8th Cir. 2003) (quoting Brady v. United States, 397 U.S. 742, 757 (1970).

Assuming that defendant is correct in his allegation that his counsel failed to warn him that the court might take his possession of a knife into consideration at sentencing, he has not stated a claim of either ineffectiveness of counsel or a violation of due process. "'[A] decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.'" United States v. Arvanitis, 902 F.2d 489, 494 (7th Cir. 1990) (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)).

Defendant's more fervid allegations about his counsel's performance require a

different analysis, to determine whether defendant has stated a claim that his plea was not only unknowing and unintelligent but involuntary. There are a number of reasons to find that he has not done so. First, defendant did not mention any of his counsel's alleged threats and promises in his original pleading. Second, as the plea hearing, he told the court he understood that he could receive a sentence up to the statutory maximum and he confirmed that he had been threatened or forced to plead guilty. In this circuit, such statements by a defendant at a plea hearing are given more weight than statements made in a postconviction proceeding. E.g., United States v. Martinez, 169 F.3d 1049, 1053 (7th Cir. 1999) ("Because of the great weight we place on these in-court statements, we credit them over [defendant's] later claims."); United States v. Winston, 34 F.3d 574, 578 (7th Cir. 1994) ("the record of a Rule 11 proceeding is entitled to a 'presumption of verity' . . . and the answers contained therein are binding"). Third, if counsel did tell defendant that he might receive a higher sentence if he went to trial, he was not threatening defendant but giving him a realistic appraisal of the costs of refusing a plea agreement. Fourth, defendant knew when he read the presentence report and at his sentencing hearing that his sentence had not been calculated in the manner his attorney had allegedly promised him but he said nothing to the court about his dashed expectations. Even when asked specifically whether he had any objections other than those his counsel had raised on his behalf, defendant did not mention his concerns about the promises he says now were the reason he entered his

plea.

Defendant's claim of an involuntary plea could be dismissed in this order, but because it raises factual issues and because a hearing will be necessary anyway on defendant's claim that he was denied an appeal, I will allow it to go forward.

ORDER

IT IS ORDERED that defendant Emmit Z. Quinn's motion for reconsideration of the denial of his claim that his plea of guilty was not a knowing and intelligent one because the court considered more cocaine than he had agreed to is GRANTED: on reconsideration, the motion is DENIED again with respect to this claim. Defendant's motion is DENIED also with respect to his claim that his attorney did not undertake an investigation of defendant's allegation that he never made the statements about drug dealing attributed to him by the Stoughton police.

FURTHER, IT IS ORDERED that defendant may go forward on his claim that his attorney made promises and threats to him that caused him to enter his plea of guilty involuntarily and on his claim that his attorney failed or refused to take an appeal on defendant's behalf despite defendant's explicit request that he do so. Resolving these two issues will require an evidentiary hearing at which both defendant and his trial counsel can testify. I will delay scheduling the hearing until counsel has been appointed to represent

defendant, after which I will hold a scheduling hearing.

Entered this 27th day of July, 2007.

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