

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONNES B. CAMPBELL,

Defendant.

ORDER

06-CR-0089-C-01
07-C-497-C

Defendant Connes B. Campbell has filed a motion pursuant to 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel because his court-appointed counsel failed to ask for a competency evaluation to review defendant's mental limitations. Defendant contends as well that he was denied due process by the court's failure to order a competency evaluation on its own motion and by the court's failure to treat the powder cocaine-crack cocaine ratio as non-binding when sentencing defendant. I conclude that the record shows conclusively that defendant could not prevail on these contentions.

RECORD FACTS

Defendant was charged with one count of knowing and intentional possession of

more than 5 grams of cocaine base and possession with intent to distribute and was arraigned on April 27, 2006. Counsel was appointed to represent him. A plea hearing was scheduled for June 15, 2006, but was continued for eight days when defendant advised the court that he did not comprehend what was involved in the plea agreement or in the entire case and needed more time to talk with his counsel.

On June 23, 2007, defendant appeared before the court and stated that he was able to understand what was being said to him. His attorney told the court that he and his investigator had visited defendant in the Dodge County jail and had gone over the plea agreement letter again in depth and that defendant had advised them he understood its terms. Defendant volunteered to the court the consequences of pleading guilty ("The consequence of me pleading guilty is that can get from five to forty years; right?). In response to questions from the court, he said he understood that the government was accusing him of being in possession of more than 5 grams of cocaine base or crack, he understood how the sentencing guidelines would work and he understood each of the rights he was giving up by pleading guilty. He expressed a lack of understanding at first of the right against self-incrimination. When it was explained that it meant that he was giving up his right to make the government prove that he committed the crime charged against him, he said that he understood it.

Defendant's experienced trial counsel never suggested to the court that defendant was

not competent to understand his rights, the charges against him or the consequences of pleading guilty, provided he had additional time to discuss these matters with counsel and with the investigator. The probation officer who conducted the presentence investigation never raised any question of defendant's competency to understand the court proceedings or the seriousness of his decision to plead guilty. He classified defendant as a career offender because of defendant's prior felony convictions. The officer reported defendant's history of learning disabilities and a 2000 diagnosis of reading disorder, disorder of written expression and mixed receptive expressive language disorder, along with alcohol and cannabis abuse, post-traumatic stress disorder and panic disorder. The probation officer noted defendant's enrollment in a special education curriculum in grade school and his borderline intellectual functioning, for which he had been receiving social security disability benefits until his arrest in May 2006.

Defendant appealed from his conviction and sentence. His trial counsel filed a brief, explaining that he had found no possible merit to the three possible issues that defendant might be able to raise: his career offender status, the reasonableness of his 188-month sentence and the court's refusal to deviate from the statutory treatment of crack cocaine as more serious than powder. The court of appeals accepted counsel's brief, invited defendant to respond to counsel and, after hearing from defendant, dismissed the appeal as frivolous.

DISCUSSION

Although defendant has raised three issues in support of his motion, he can proceed only on the first one. The third one involving the challenge to the crack-powder differential for cocaine offenses is barred because it was raised on direct appeal and denied. The law of the case doctrine prevents reargument of issues that were decided on direct appeal or could have been, except in unusual circumstances that do not exist here. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007).). This rule does not bar consideration of defendant's challenges to his attorney's failure to order a determination of his mental competency or the court's failure to order such a determination on its own motion. Such issues are better raised in a postconviction motion than on direct appeal, United States v. Taglia, 922 F.2d 413, 417-18 (7th Cir. 1991, because the direct appeal is limited to the record before the trial court. As a general rule, the bare record would not contain the information that a reviewing court would need to evaluate counsel's ineffectiveness to the extent it rested on matters that did not occur in court.

In determining whether a person is capable of entering a knowing and intelligent plea of guilty, the court must find that the person has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and that he has a rational as well as a factual understanding of the proceedings. Dusky v. United States, 363 U.S. 402, (1960) (per curiam). From my observations of defendant and from his answers to the

questions put to him at the plea hearing, I have no doubt that he had sufficient mental capacity to consult with his attorney and that he had a factual understanding of the proceedings. It might take defendant a little longer than other people to understand something as complex as a plea agreement and its consequences, but he is capable of understanding it when he has sufficient explanation and time to deliberate. He has not suggested he has any mental or emotional impairments that were not brought to the court's attention. He had at least a basic understanding of how the system works from arrest to plea or trial to sentencing and prison because he had been convicted of felonies in the past.

At his plea hearing, defendant indicated clearly his ability to understand the questions asked him. When he did not understand a question, he said so. He knew from his experience during the preceding week that if he told the court he was having trouble understanding the proceedings, he would be given additional time to consider his guilty plea.

Now, more than a year after defendant has been convicted and sentenced and has lost his appeal, he wants to contradict his statements and charge his attorney with ineffectiveness for not seeking a competency examination or contend that the error was the court's in not directing a competency evaluation of defendant on its own motion. He has shown no compelling reason (or any reason at all) why the court should believe his assertion today that he could not understand what was being said to him when he made contrary statements to the court at the time of the plea hearing. United States v. Peterson, 414 F.3d 825, 827 (7th

Cir. 2005) (“Judges need not let litigants contradict themselves so readily; a motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction.”).

A motion for post conviction relief may be denied if the files and records of the case show conclusively that the movant is not entitled to relief. 28 U.S.C. § 2255, ¶ 2. This is a case in which denial is warranted because the files and records show that defendant is not entitled to relief on his mental competency claims. No reasonable jurist could review the record in the case and conclude that defendant was denied any effective assistance by his attorney’s failure to ask for a competency hearing or the court’s failure to order a hearing on its own motion. Despite defendant’s very real intellectual impairments, he exhibited no inability to make an informed decision to plead guilty once he had had an adequate time to consult with his attorney and to go over the plea agreement proposal.

ORDER

IT IS ORDERED that defendant Connes B. Campbell’s motion for postconviction

relief, filed pursuant to 28 U.S.C. § 2255, is DENIED.

Entered this 17th day of October, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge