

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

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DENNIS DICKINSON,

Petitioner,

v.

ORDER  
07-C-279-S  
06-CR-59-S-01

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Dennis Dickinson, by counsel, moves to vacate his sentence pursuant to 28 U.S.C. § 2255. The United States filed a response to the motion on June 18, 2007. Petitioner's reply was to be filed not later than July 18, 2007 and has not been filed to date.

Petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is not necessary under 28 U.S.C. § 2255. See United States v. Kovic, 840 F.2d 680, 682 (7<sup>th</sup> cir. 1987).

FACTS

On March 9, 2006 a federal grand jury in the Western District of Wisconsin returned a three-count indictment against Dennis Dickinson charging him with knowingly and intentionally possessing with the intent to distribute more than five grams of crack cocaine

and knowingly and intentionally possessing heroin and cocaine with the intent to distribute it.

On March 30, 2006 petitioner pled guilty to knowingly and intentionally possessing more than 5 grams of crack cocaine with the intent to distribute it. The plea agreement signed by petitioner included the following paragraph:

If the defendant provides substantial assistance before sentencing, the United States agrees to move the Court pursuant to 18 U.S.C. §2553(e) to impose a sentence reflecting that assistance. If the defendant provides substantial assistance after sentencing, the United States agrees to move the Court pursuant to Federal Rules of Criminal Procedure 35 and 18 U.S.C. §3553(e) to reduce the defendant's sentence to reflect that assistance. The decision whether to make such a request based upon substantial assistance rest entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin. The defendant acknowledges that even if the United States makes such a request, the Court is not required to reduce the defendant's sentence.

At the plea hearing the Court went through the plea agreement sentence by sentence ensuring petitioner's understanding and agreement with each paragraph in it. The Court also asked petitioner a number of questions to determine that the plea was, in fact, voluntary. At the plea hearing petitioner also testified that he was fully satisfied with his counsel's representation and advice given to him in the case.

A presentence report was prepared. The report determined that petitioner was responsible for 1,171.621 kilograms of marijuana equivalent. This amount was not challenged by petitioner.

On June 9, 2006 petitioner was sentenced to 200 months in prison with five years supervised release. Petitioner did not appeal his judgment of conviction.

On May 17, 2007 petitioner filed this motion under 28 U.S.C. § 2255.

#### MEMORANDUM

Petitioner claims that the government breached the plea agreement, that his counsel was ineffective and that his sentence was unconstitutional. 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 petitioner demonstrates cause for procedural default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 813, 816 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1994).

Petitioner claims that the government breached the plea agreement by failing to file a substantial assistance motion. The

agreement is a part of the record. At the plea hearing the Court went through the agreement with petitioner sentence by sentence. The agreement provided that if petitioner provided substantial assistance the government would move to reduce his sentence. The agreement specifically stated as follows: "The decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin."

By not moving to reduce petitioner's sentence the government did not breach the plea agreement because the decision whether to make the motion was within the discretion of the United States Attorney's Office. The government did not promise petitioner anything it did not provide. Accordingly, the government did not breach the plea agreement.

Petitioner also claims that his counsel was ineffective because he coerced him into pleading guilty. 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 petitioner must show that but for the deficient advice of counsel he would not have pled guilty. 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).

Petitioner has submitted no evidence that his counsel's performance was deficient. The transcript of the plea hearing indicates that the Court questioned petitioner about the voluntariness of his plea. He also asked whether petitioner was satisfied with his attorney's representation, advice and counsel. Petitioner testified that he was satisfied. The record indicates that petitioner's plea was knowing and voluntary and not a product of coercion. Further, petitioner has submitted no evidence that absent his counsel's performance he would have gone to trial.

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

Petitioner also claims that his sentence is unconstitutional. Petitioner is procedurally barred from raising this issue because he did not raise it on appeal and has not shown cause and prejudice for failing to do so. United States v. Smith, 241 F.3d 546, 548 (7<sup>th</sup> Cir. 2001).

Petitioner's motion under 28 U.S.C. § 2255 will be denied. Petitioner is advised that in any future proceeding in this matter he must offer argument no 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 (7<sup>th</sup> Cir. 1997).

ORDER

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

Entered this 25th day of July, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge