

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY ROBINSON,

Defendant.

OPINION AND ORDER

11-cv-636-bbc
08-cr-152-bbc

As directed by this court on August 15, 2011, defendant Timothy Robinson has filed a motion under 28 U.S.C. § 2255 challenging his conviction for three counts of possession with intent to distribute crack cocaine. Unfortunately, he fails to show in this motion how his appellate counsel deprived him of constitutionally adequate representation. Therefore, his motion must be denied.

BACKGROUND

As set out in the July 28, 2011 order in this case, dkt. #50 (08-cr-152), an indictment returned in October 2008 charged defendant with three counts of distributing crack cocaine.

Defendant entered a plea of guilty to count 1 on January 7, 2009. He was sentenced to a term of ten years, the statutory minimum sentence. The sentence was entered on March 13, 2009. He filed a motion for post conviction relief on March 29, 2010, which was timely under the “mailbox rule” that applies to prison inmates. He contended that his counsel had failed to take an appeal of his sentence, despite defendant’s request that he do so, and that counsel had failed to undertake a proper investigation of the case against defendant. I set an evidentiary hearing on the first and dismissed the second one because defendant had not supported it with precise information setting forth what an investigation would have revealed.

At the evidentiary hearing, I concluded that defendant had asked his counsel to take an appeal of his case. I vacated the judgment and then reinstated it so that defendant’s appeal rights would be reinstated. New counsel was appointed to represent defendant on appeal, which was unsuccessful. The court of appeals affirmed this court’s decision on January 21, 2011. Defendant filed a new motion for post conviction relief on June 27, 2011. I found this motion timely but insufficient to make out a claim that defendant was in custody illegally. I gave him an opportunity to flesh it out, but then reconsidered that decision because a further review of his motion showed that he was contesting the validity of the same custody he had challenged in his March 29, 2010 motion.

Defendant then advised the court that he did not intend in his June 17 motion to

challenge his trial counsel's ineffectiveness but to his appellate counsel's failure to raise the issues defendant wanted the court to hear. Dft.'s Aug. 4, 2100 ltr., dkt. #6 (11-cv-459-bbc). I reviewed this letter, determined that such a claim would not be barred by defendant's previous motion and gave defendant until September 15, 2011 in which to explain in more detail how his appellate attorney had failed him.

OPINION

Defendant filed the supplemental motion on September 15, as directed, but he did not add enough detail to make out a claim of ineffectiveness by his appellate counsel. All he says about appellate counsel is that counsel never went over the issues with defendant that defendant wanted to raise. He adds that he defendant wrote to the court on December 12, 2010, to alert it to his concern that his appellate counsel was not communicating with him. He says nothing about what issues he wanted to raise except to say that he wanted to appeal his sentence and that during trial preparation, he wanted to challenge the lab reports on the drugs he was charged with intending to distribute.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court examined a criminal defendant's right to constitutionally effective counsel, concluding that a defendant would be entitled to relief if he could establish that his attorney's performance fell below an objective standard of reasonableness *and* that he suffered prejudice as a result. The Court

explained that it was not enough simply to allege ineffectiveness, a defendant must “establish the specific acts or omissions of counsel that he believes constituted ineffective assistance” and from which the court can “determine whether such acts or omissions fall outside the wide range of professionally competent assistance.” Id. at 687-88. See also Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)). Defendant has said only that his appellate counsel did not communicate with him. Even if this were enough to show ineffectiveness by itself, it is not enough to establish that defendant suffered any prejudice as a result. To do this, he would have to show how he was prejudiced by his appellate counsel’s failure to raise the issues he wanted to assert on appeal. At a minimum, he would have to identify something that was done or omitted at his trial that might have led to the reversal of his sentence or even of his conviction if counsel had raised it on appeal.

In his motion, he says that he wanted to challenge the lab reports showing that he was dealing the crack form of cocaine. Giving this statement a liberal interpretation, I might read it as something that defendant wanted to raise on appeal. The problem is that he has no evidence that the lab reports were erroneous in any respect. He also says that he wanted to appeal from his sentence but he does not say what was wrong with his sentence. His guidelines range was 121 to 151 months; he was sentenced to a term of 120 months. It would be hard for him to show that this sentence was unreasonable.

I conclude that defendant has not shown that there is any reasonable probability that, but for counsel's omissions, the appeal of his sentence or conviction or both would have been successful. Therefore, I must deny his motion.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this case, defendant has not made the necessary showing, so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Timothy Robinson's motion for post conviction relief, filed on June 27, 2011 and supplemented on September 15, 2011 is DENIED. No

certificate of appealability shall issue.

Entered this 22nd day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge