IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

10-cv-417-bbc
08-cr-150-bbc

v.

MARTIN RICHARDSON,

Defendant.

- -

Defendant Martin Richardson filed a motion for post conviction relief on July 26, 2010, contending that he had been denied constitutionally effective assistance of counsel at trial. Defendant argued that he had been ill served in three respects: his retained counsel had not obtained the records of defendant's cell phone that would have shown that defendant was not in Madison, Wisconsin at the time the government said he was engaged in a drug deal; counsel did not have an expert evaluate the videotape taken of the interior of the car in which defendant was allegedly riding at the time of the drug deal; and counsel did not seek to interview another passenger in the car, Joanna Lopez, about her knowledge of defendant and her opportunity to have seen him during the deal. After extended briefing

and an evidentiary hearing, it is clear that defendant has fallen far short of showing either that his counsel was ineffective under the standard set in Strickland v. Washington, 466 U.S. 688 (1984), or that any ineffectiveness caused defendant prejudice. Id.

From the record, which includes the transcript of the court trial and the transcript of the evidentiary hearing on the post conviction motion, I make the following findings of fact.

FACTS

A. The Crime Scene

On June 6, 2008, undercover police officer Kim Meyer arranged a meeting to buy crack cocaine at the parking lot of Famous Dave's Restaurant on Park Street in Madison. Officer Meyer arrived at the lot sometime before 1:30. Shortly afterward, a black Jeep Cherokee pulled in behind her, about 10 to 15 feet away. She got out of her car and climbed into the back left seat of the Jeep. As she did so, she took note of the three occupants of the car: the driver, a black male; a black male passenger in the front seat whom she identified at trial as defendant; and one Hispanic woman in the back left seat (later determined to be Joanna Lopez). The Jeep drove off through the lot; Meyer exchanged $100 with the front seat passenger for a bag containing four tied-off baggie corners of crack cocaine. The Jeep continued through the restaurant lot, returned to Meyer's car and dropped her off. Meyer estimated that she was in the Jeep about 30 seconds. The weather was sunny and she had no

difficulty seeing the occupants. Later, a detective showed her a picture of defendant and she recognized him as the person in the front passenger seat.

Someone (presumably another law enforcement officer) videotaped the Jeep's interior at some point during the drug deal. Meyer does not know who this was. (Neither party has attempted to identify the videotape or the videographer. No one has attested to the circumstances in which the tape was made, where the videographer was situated during the taping or what the videographer observed in addition to what he or she filmed.)

Soon after the Jeep left Famous Dave's, Deputy Sheriff Keith Severson made a pre-arranged stop of the vehicle around 1:30 p.m. He observed two black men in the front seat and one Hispanic woman in the back seat. Severson was only five feet from the front seat passenger, in broad daylight with no obstructions between him and the passenger. The front seat passenger responded to Severson's request for identification by displaying an Illinois identification card saying that he was Martin Richardson. Later in the afternoon, when another detective showed Severson a photograph of defendant, Severson was able to confirm that it was the front seat passenger. At trial, Severson identified defendant as the person who had shown him his ID card at the time of the stop.

B. Defendant's Arrest and Preparation for Trial

In October 2008, while David Jordan was representing defendant on a domestic

relations matter, Jordan learned that defendant was being held in the Cook County jail on state charges of being an armed habitual criminal. At the request of defendant's girlfriend, Jordan visited defendant at the jail, where he learned that defendant was being denied release because he had federal charges pending against him. Jordan checked into the nature of the federal charges and obtained discovery from the United States Attorney in Madison. Knowing that a Cook County conviction on the armed habitual criminal charges could make defendant a career offender for federal sentencing purposes, Jordan saw his first task as obtaining a continuance of the Illinois charges.

Jordan was successful and defendant was transferred to Wisconsin to await trial in federal court. Jordan met with him in Chicago before he was transferred and met with him again on December 11, 2008 for about 30 minutes after his arraignment before the magistrate judge. On January 9, 2009, Jordan visited defendant for 80 minutes at the Dodge County jail, where defendant was being held awaiting trial in this case. Jordan had no other meetings with defendant until the day of his trial, February 13, 2009.

Jordan viewed the evidence of the two police officers as essentially insurmountable; both had been within feet of defendant, both were able to identify him afterwards and Severson had seen a copy of defendant's Illinois ID. Jordan was aware that Joanna Lopez had told the government that her use of drugs made her memory unreliable, that she was not able to identify the front seat passenger and that she had no other evidence helpful to the

government. He spoke with defendant about Lopez and they agreed that it would help the defense to stipulate with the government that she could not say whether defendant was in the front seat or not. This would avoid the possibility of Lopez's being called as a witness and suddenly deciding that she did remember that defendant had been present and had handed the drugs to undercover officer Meyer.

As for the videotape, Jordan concluded that it did not hurt his client because nothing could be made out on it. Jordan tried to subpoena the records of defendant's cell phone, but could not obtain them from Sprint before trial. He did not move for a continuance of the trial to give Sprint time to comply.

C. Trial

Defendant waived his right to a jury trial. Two days before the court trial, the government filed an information under 21 U.S.C. § 851 on February 11, 2009, making defendant eligible for increased penalties if he was found guilty. The parties stipulated that the drug transaction took place in Madison, Wisconsin, that it involved crack cocaine in the amount of 1.798 grams, that Lopez was in the Jeep when the drugs were sold but could not testify whether the person sitting in the front seat of the car was defendant, that after the Jeep left Famous Dave's, it drove several miles before it was stopped by law enforcement and that no one left the Jeep or changed positions in it between the drug transaction and the traffic

stop.

As witnesses, the government called the two law enforcement officers; defendant called himself and his girlfriend. The police officer described the drug deal and her part in it and identified defendant as the front seat passenger; the sheriff's deputy described his stop of defendant and the other two in the Jeep.

In defendant's case, defendant testified that he had been in Madison on June 6, 2008 but had left for Chicago before 9:00 that morning. Trial trans, dkt. #93 (08-cr-150-bbc) at 29. His girlfriend testified that defendant had been with her in Chicago from before noon through the rest of the day. Id. at 37.

After hearing the evidence and the parties' arguments, I determined that defendant had adduced no credible evidence to challenge the reliability of the government witnesses' identification of him as a participant in the June 6, 2008 cocaine deal. Although defendant had telephone records showing the numbers called from his cell phone on June 6, 2008, the records did not show either the origin of the calls or the location of the cell phone. (Defendant had tried to obtain records from Sprint that would show the location of the cell towers for each call, but even these would have shown only where the cell phone was used; they would not have shown that it was defendant that used the phone at a particular location.) The records he had provided no support for his alibi. His girlfriend's testimony that he was in her house in Chicago by noon on June 6 was not persuasive, given her strong

interest in keeping him out of jail and the lack of any objective support for her testimony. No one else had seen defendant in Chicago that morning and she had no particular reason for remembering, eight months later, that she had spent June 6 with defendant rather than some other day.

The government played a videotape of the drug transaction, acknowledging that nothing could be discerned of the identities of the occupants of the Jeep because of the glare on the windshield. Watching the video confirmed its lack of evidentiary value.

D. Motion for New Trial

Before defendant was sentenced, he moved for a new trial, on the ground that Sprint had finally produced the cell phone records and that they supported his claim that he had not been in Madison at the time the drug transaction took place. I denied the motion, holding that the records showed at best that defendant's cell phone was near a particular cell tower on June 6; they did not show that defendant was in possession of the cell phone at any particular time.

E. Sentencing

After his motion for a new trial was denied, defendant fired David Jordan as his counsel and retained Richard Coad. Sentencing took place on July 23, 2009. Defendant's

advisory guideline range was 262-327 months. He was sentenced to a term of 200 months. He did not appeal.

F. Motion for Post Conviction Relief

Still represented by Richard Coad, defendant filed this timely motion for post conviction relief on July 26, 2010, alleging that David Jordan had provided constitutionally ineffective representation because he did not obtain the cell phone records from Sprint, did not retain an expert to analyze the police department videotape of the Jeep's interior and never arranged an interview with Joanna Lopez about her knowledge of defendant. I ruled that I would not revisit the issue of the cell phone records because they had no evidentiary value, but that I would allow defendant an opportunity to show that he had been denied effective representation with respect to the Joanna Lopez and the videotape. Nov. 15, 2010 order, dkt. #11 (case 10-cv-417-bbc) at 2,

An evidentiary hearing was held on April 14, 2011. To show deficient performance by his retained counsel, defendant called two witnesses: Hans Pigorsch, a person with considerable experience in the field computer graphics, and Stephen Meyer, a criminal defense lawyer.

Hans Pigorsch is a largely self-taught practitioner of long experience in the field of video, film and computer graphics. He received a degree in film, video and television from

the University of Wisconsin in 1979 and worked in those fields at the university and in the media productions program of a local hospital. In the mid-eighties, he joined a company that did video productions and began working with computer graphics programs. Eventually, he bought part of the company and developed it as Pigorsch Media Design, which he operates with his wife. In the 20 years he has owned the firm, he has become familiar with many computerized rendering systems, many ways of manipulating video and many of the products that enable users to undertake the sophisticated manipulation of images, such as Adobe After Effects. He has no certification in this particular field by any law enforcement organization or any other organization. His work in this case was not peer reviewed or performed according to any standard operating procedure, although such procedures exist.

Defendant's counsel retained Pigorsch to analyze the videotape taken of the drug June 6, 2008 drug transaction. Essentially, Pigorsch slowed down the speed of the tape so that he could examine it precisely, frame by frame. After doing this, Pigorsch concluded that the tape established that no person had been sitting in the front passenger seat of the Jeep at the time of the alleged drug transaction. Pigorsch recorded each step that he took in his analysis. He has never done a similar analysis for use in a trial.

Stephen Meyer testified as an expert in criminal defense law that in his opinion, Jordan had done an ineffective job of representing defendant. He based his opinion on the fact that before trial, Jordan met with defendant for a total of only 80 minutes, that he did not perform

an analysis of the videotape or arrange for one to be done, that he did not meet with Joanna Lopez to explore her recollection of defendant and that he had failed to obtain the Sprint records that would show the calls that defendant had made and received on June 6, 2008. Meyer believed that an effective defense counsel would have obtained the records before trial and then determined by calling persons who had made calls to defendant during the morning of June 6 whether the cell phone was in defendant's possession. Because Jordan did not have the records, he was unable to locate persons other than defendant's girlfriend who had talked to him that morning. Finally, Meyer said, defendant had failed to talk to the Dane County Sheriff to determine whether it had a videotape of the stop of defendant's vehicle (as opposed to the videotape of the interior of the Jeep taken at the time of the transaction). Neither Meyer nor defendant's counsel identified any information that counsel would have obtained had he taken the steps Meyer believed he should have, with the exception of the videotape analysis.

The government called David Jordan, who testified to his trial strategy and his conversations with defendant, as set out above. It also called Scott Kuntz, a Dane County Sheriff's deputy, trained in forensic video and audio analysis, who described his training, the law enforcement standards applicable to his work and the importance of peer reviews of such work. Kuntz testified that it was difficult to see anything inside the Jeep because of the sun's glare and the resulting overexposure of the front windshield, but that he was convinced that

a white line could be seen on the tape that was inconsistent with any shadows or reflections on the windows. In his opinion, the consistency of the image in a number of frames showed that this line was within the car's interior, moving as one would expect it to move as the vehicle moved in relation to the videographer. From the placement of the line, he believed it could have been the white line of an undershirt or a necklace.

OPINION

To demonstrate constitutional ineffectiveness of counsel, defendant must show that his "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Sussman v. Jenkins, No. 09-3940, slip op. at 47 (7th Cir. Apr. 1, 2011). The presumption is that counsel's choices constituted sound trial strategy, Strickland, 466 U.S. at 689, and it is defendant's burden to show that they did not.

Not only must a defendant make the showing of ineffectiveness, he must also show that counsel's representation deprived him of a fair trial. Id. at 687. In a case like this one, in which the alleged deficiencies are failures to investigate, the defendant cannot presume prejudice simply from the failure to investigate. He must be able to show "a reasonable

probability that, but for counsel's [failure to investigate] the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Defendant's expert expressed the opinion that it was unprofessional for Jordan to have failed to interview Lopez, failed to obtain a continuance of trial so that he could secure the cell phone records and failed to analyze the videotape, but he never identified any evidence that Jordan might have obtained had he taken those steps, with the exception of the analysis of the videotape. Taking those in order, Jordan explained why he did not want to interview Lopez or call her as a witness. As he explained, drug users are not reliable witnesses. Lopez had given the government no helpful information; Jordan's realistic fear was that if he called her at trial, she might decide that she did remember who had been sitting in the front passenger side during the drug deal. Her deposition testimony to the contrary was not compelling. In light of the overwhelming testimony by the two law enforcement officers that there was a passenger in the front seat of the Jeep and that it was defendant, Jordan chose wisely not to interview Lopez or call her at trial and run the risk of making the government's task any easier than it was.

Second, Meyer testified that an effective lawyer would have used the cell phone records to place calls to persons who had called defendant's cell phone during the morning of June 6, to find out whether defendant was in possession of the cell phone at the critical

time. (Although I had ruled that this issue was no longer in dispute, I allowed defendant to discuss it briefly at trial.). Despite Meyer's firm belief that not following up this obvious line of inquiry was per se ineffectiveness, neither Meyer nor defendant's current counsel did anything like that at any time after Sprint turned over the cell phone records in April 2009. In the absence of any such investigation, defendant can only speculate that an investigation would have helped defendant. He cannot show a reasonable probability that the outcome of the trial would have been different, as Strickland requires.

It is worth noting an anomaly in defendant's position that his counsel must have failed to appreciate because he pointed it out in support of defendant's motion for post conviction relief. Dkt. #1 (10-cv-417-bbc) at 5. The cell phone record shows that a call was made from defendant's telephone at 1:00 p.m on June 6, 2008, originating in the Milwaukee area. Defendant's trial testimony, and that of his girlfriend, was that he was in Chicago well before noon that day and that he did not leave for the rest of the day. It cannot be true that defendant was making telephone calls in Milwaukee at 1:00 *and* that he was in bed with his girlfriend in Chicago at the same time. In any event, nothing raised at the evidentiary hearing warrants re-opening the issue of the cell phone records.

As for the final issue, the videotape, defendant has placed considerable weight on it (and invested significant resources in it), trying to prove that the tape establishes that no one was in the front passenger seat of the Jeep at Famous Dave's on June 6, 2008. The effort falls

short in several respects. First, defendant was unable to prove that Han Pigorsch is an expert in forensic analysis of videotapes. He had no formal training in the field; his work was not peer reviewed; and he did not follow an approved protocol. But it is essentially irrelevant whether he is an expert in this field because defendant has not shown that videotape analysis is the relevant field for the question in dispute. Pigorsch seemed to be perfectly capable of slowing down the video frames so that they could be viewed closely, but as he himself noted, he is not an expert in optical physics, hrg. trans., dkt. #26 (10-cv-417-bbc), at 68, or in any similar field that would enable him to answer the questions posed by the videotape. For example, his expertise in videotape analysis did not mean that he could explain why the frames that appeared to show no person in the front passenger seat or why the images were not affected by glare from the summer sun on the car windows and if so, to what extent, what the angle was from which the videotape was taken and where the Jeep was in relation to the vehicle in which the videographer was located.

Pigorsch's careful work in slowing down the video images did not provide reliable evidence from which a person could reach a conclusion about the presence of a passenger in the front seat of Jeep. It was enough to raise a question about why the videotape appeared not to show a passenger there, but it did not rebut the testimony of the two law enforcement officers who said they had seen defendant in the front passenger seat during the drug deal and shortly thereafter. From the evidence that defendant has produced, I cannot find that

defendant's failure to subject the videotape to forensic testing was ineffective representation or that if it were, it is reasonably probable that taking that step would have changed the outcome of the trial.

Two other points require minimal discussion. First, both Meyer and defendant's counsel emphasized what they thought was the lack of time Jordan spent with defendant in preparing to defend against these charges. Clearly, both believe he should have spent more time, but their opinions are irrelevant. The genius of Strickland, 466 U.S. 668, is that it does not focus on time spent, on specific tasks performed or particular investigations carried out but on whether counsel's performance fell below an objective standard of reasonableness and whether the defendant was prejudiced as a result. The Court refrained explicitly from establishing mechanical rules or rigid standards, explaining that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696.

Time spent with a client in preparation for trial becomes relevant only if the client can show that if counsel had spent the additional time, he would have obtained important information that would have led to a different strategy at trial or a different line of inquiry. In this case, counsel has made no such showing; he simply contends that the time spent was inadequate.

Second, at the evidentiary hearing, defendant's counsel tried to question Jordan about

a 1993 disciplinary ruling against him in Illinois and pending disciplinary complaints against him. I ruled the questions improper under Fed. R. Evid. 608(b) because counsel was trying to introduce specific acts of misconduct to attack Jordan's character for truthfulness. Even if they had not been improper for this reason, they were irrelevant. Nothing hinged on the truthfulness of Jordan's testimony; the question was what he did or did not do on behalf of his client. The answer to that was based on facts that were a matter of record. If, for example, he had not told the truth about his reasons for not interviewing Joanna Lopez, what difference would it have made? Defendant has not come forward with any evidence that Lopez had information that if explored would have raised a reasonable probability that the outcome of the trial would have been different.

In short, defendant has failed to show that David Jordan did not give him effective representation at trial or that any omissions or failures by Jordan prejudiced defendant. Accordingly, defendant's motion for post conviction relief will be denied.

ORDER

IT IS ORDERED that defendant Martin Richardson's motion for post conviction relief

under 28 U.S.C. § 2255 is DENIED.

Entered this 23d day of May, 2011.

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