IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ODELL DOBBS,

Defendant.

OPINION AND ORDER

10-cv-584-bbc
08-cr-102-bbc

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Defendant Odell Dobbs's motion for post conviction relief under 28 U.S.C. § 2255 is before the court for resolution. Defendant contests his conviction and sentence on the ground that his counsel failed to give him minimally effective representation in a number of respects. With his reply brief, defendant filed a motion to "prevent/cure a serious miscarriage of justice" that I construed as an amendment to his original motion and directed the government to respond to it.

Despite the reams of paper that defendant's jailhouse lawyers have filed on his behalf, there is little to his post conviction challenge. In fact, much of it is based on a misunderstanding of the facts of the case and the rest falls short of entitling defendant to any

relief. I conclude that the motion must be denied.

BACKGROUND

Defendant was arrested at a motel in Madison, Wisconsin, where he had gone to sell crack cocaine and heroin to a confidential information working with local law enforcement. Following defendant's arrest, a canine alerted on his car, which was searched and found to contain a scale, 23 packages of crack cocaine weighing more than 50 grams in total and five packages of heroin weighing approximately 2.6 grams.

Defendant was advised of his rights and agreed to talk with the officers. He admitted that he had hidden drugs in his car and intended to sell them. He told the officers that he lived at several addresses in southern Wisconsin, including one where he had stored 100 grams of crack. Defendant agreed to call his girlfriend and tell her to cooperate with the police. She showed them where she had hidden the 100 grams of crack, along with a Bryco 9mm pistol.

Defendant was charged in an indictment with possessing with intent to distribute 50 grams or more of crack cocaine and possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The first charge carried a mandatory minimum sentence of 10 years, but this minimum increased to 20 years when the government filed an information under 21 U.S.C. § 851, subjecting defendant to a greater penalty because he had a previous

conviction for a felony drug offense.

Defendant entered into a plea agreement with the government in which he agreed to plead guilty to the drug charge, understanding that he was subject to the enhanced penalty under § 851, and the government agreed to dismiss the gun charge at the time of sentencing. At the plea hearing, defendant told the court that he had an eighth grade education and that he was not prevented from understanding what was being said to him by illness, medication, fatigue or being under the influence of drugs or alcohol. Trans. of plea hrg., dkt. #3-1 (10-cv-584) at 2-3. He stated that he understood the maximum penalties to which he was subject, that he understood the elements of the crime charged against him (the date, the place and the intentional and knowing possession of crack cocaine with the intent to distribute it), id. at 4-6, the rights he was giving up when he entered a plea of guilty, id. at 6-8, and the provisions of the plea agreement (which the government summarized on the record), id. at 8-10. He acknowledged that the United States had made no other promises or guarantees to him about the sentence he would receive, id. at 10, and that it could prove at trial that he had arrived at the motel with the intent to sell crack cocaine. Id. at 11-12.

The probation office prepared a presentence report in which it calculated an advisory offense level starting at 34, with a two-level increase for possession of the firearm in connection with the drug offense and a three-level reduction for acceptance of responsibility. However, because defendant had both a previous drug conviction and a conviction for a

violent offense, he was a career offender under the guidelines and his adjusted offense level was 34, with guidelines of 262-327 months. (His career offender guidelines did not take the firearm into consideration.)

Defendant's counsel challenged the career offender recommendation, arguing that the previous conviction for battery did not qualify as a crime of violence under the career offender guidelines. The government produced documents showing that defendant had been charged with aggravated battery in case no. 05CR0416301 in Cook County, Illinois, and that he had been convicted of the charge and sentenced to a term of 30 months. The indictment charged defendant with pushing, kicking and striking the victim, knowing that he was a peace officer. The documents refuted defendant's assertion that he was wrongly classified as a career offender.

Defendant's counsel challenged the amount of crack cocaine, as well as the enhancement for defendant's possession of a firearm in connection with a drug offense. Both challenges were rejected in light of the amounts of crack cocaine found in defendant's car and residence and the presence of the gun in the residence in close proximity to the drugs. (The determination relating to the gun became irrelevant to defendant's challenge to his sentence once the career offender guidelines took effect.) Defendant argued that he was entitled to a downward variance in his sentence because of his cooperation with law enforcement.

Defendant was sentenced to a term of 262 months, 22 months above the mandatory

minimum sentence required with the filing of the § 851 information. I denied his request for a downward variance to reflect his alleged cooperation, after finding that his assistance to law enforcement was not significant.

Defendant appealed his sentence only, taking the position that he did not want his guilty plea vacated. His trial counsel represented him on appeal but advised the court of appeals that he could not identify any nonfrivolous ground for an appeal. The court of appeals agreed and dismissed the appeal in an order entered on October 6, 2009. Defendant filed this motion on October 6, 2010.

OPINION

In his original motion, defendant asserted that his counsel was ineffective in three respects: (1) counsel gave him erroneous advice about pleading guilty; (2) counsel did not challenge the sufficiency of the indictment and failed to investigate and challenge the legality of defendant's arrest; and (3) counsel did not challenge the use of a misdemeanor conviction in determining that defendant was a career offender. In his amended motion, defendant added a claim that he lacks the intellectual capacity to understand what his counsel, the government and the court were saying to him. It is not clear whether this last contention is a stand-alone claim or whether it is intended to serve as another way in which defendant's counsel failed him, that is, by not recognizing his cognitive disability and obtaining an

evaluation of his ability to understand and participate in the proceedings. I will consider it as both.

1. Challenges to the effectiveness of counsel

The general rule in post conviction motions is that a defendant may not raise any challenge to his conviction and sentence that he could have raised on direct appeal unless he can show both that he had good cause for not raising it and that he would be prejudiced if not permitted to raise it in a post conviction motion or that a miscarriage of justice would result if the issue is not heard. Prewitt v. United States, 83 F.3d 932, 935 (7th Cir. 1996) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise the claims on direct appeal and actual prejudice from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice.") (citing Reed v. Farley, 512 U.S. 339, 354 (1994)); see also Galbraith v. United States, 313 F.3d 1001, 1006 (7th Cir. 2002).

This rule does not apply to challenges to the effectiveness of counsel. In fact, preserving the issue and raising it in a post conviction motion is almost always the better way to proceed, as the Supreme Court explained in Massaro v. United States, 538 U.S. 500, 504 (2003): "[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." This is because the trial record is rarely developed

enough to allow a determination of ineffectiveness but requires evidence outside the trial record.

The standard for ineffectiveness was set out in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

2. Counsel's alleged erroneous advice about the guilty plea

Defendant alleges that his counsel provided misinformation and erroneous advice about the sentence that the court might impose on him if he entered a plea of guilty. He says that his counsel told him he would receive 10-13 years if he entered into an early agreement and in exchange, the government would dismiss the remaining count. He says now that if he had known the length of the sentence to which he would be subject, he would never have pleaded guilty, but "would have rolled the dice, and went to trial." M., filed as dkt. # 52 in 08-cr-102-bbc, at 5. In his amended motion, he suggests that even if his counsel

did tell him what he faced if he pleaded guilty, he was unable to understand what he was being told.

This claim of ineffectiveness goes nowhere. At his plea hearing, defendant told the court that he understood that he could receive a sentence up to the statutory maximum of life, that no promises had been made to him except those in the written plea agreement and that he was able to understand what was being said to him. The statements of a defendant at a plea hearing are "'entitled to a "presumption of verity" . . . and the answers therein are binding.'" United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) (quoting United States v. Winston, 34 F.3d 574, 578 (7th Cir. 1994)). 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." Id.; United States v. Cieslowski, 410 F.3d 353, 358 (7th Cir. 2005); United States v. Gwiadzinski, 141 F.3d 784, 788 (7th Cir. 1998). Defendant has shown no reason why I should believe the statements made on his behalf in his motion rather than the statements he made in open court.

Even if I were to accept as true defendant's statements that his counsel gave him inaccurate advice, defendant would not be able to show that he was prejudiced by the advice. To show prejudice, "'the defendant must show that there is a reasonable probability that, but

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Defendant has made no such showing. A "mere allegation that he would have chosen a path other than the [one he took] is insufficient by itself to establish prejudice." Id. (citing Bethel v. United States, 458 F.3d 711, 718 (7th Cir. 2006)).

3. Counsel's alleged failure to challenge the sufficiency of the indictment and investigate and challenge the legality of defendant's arrest

Defendant fails to support this allegation with any facts. He does not say what was insufficient about the indictment or what counsel would have learned had he done more investigating. These omissions doom his claim.

The failure to challenge the indictment needs little comment because defendant has not suggested any reason to find it insufficient. To the contrary, it states the elements of the charges, the dates on which the crimes are alleged to have occurred and the judicial district in which the crime took place.

To succeed on a claim of failure to investigate, a defendant must provide the court "sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced," Hardamon v. United States, 319 F.3d 943, 951 ((7th Cir. 2003), and show that the information discovered "would have led counsel to change his

recommendation as to the plea." Hill v. Lockhart, 474 US. 52, 58-60 (1985). See also Richardson v. United States, 379 F.3d 485 (7th Cir. 2004). Defendant has not identified any exculpatory evidence that counsel might have found if he had investigated more thoroughly and I can think of no possibilities, given the nature of the crime and the circumstances in which defendant was arrested. Defendant talks vaguely in his motion about wiretaps and warrants but he does not explain why they would have been needed when the police were working with a confidential informant, they caught defendant red-handed, preparing to sell drugs and a canine alerted on his car.

4. Counsel's alleged failure to challenge the use of a misdemeanor conviction for career offender status

This claim is meritless. The record shows that defendant's counsel did challenge the conviction as insufficient to justify career offender status and was unsuccessful because the documents from Cook County showed that the conviction was for a felony involving violent behavior.

5. Defendant's alleged cognitive deficits

Although defendant never exhibited any difficulty in understanding what was said to

him in court at any proceeding, he now argues that the court should have realized from the facts that he had only an eighth grade education and that he had been in special education classes that he was unable to understand anything of what was being said to him. He seems to be asserting also that his counsel was ineffective because he did not bring defendant's lack of understanding to the court's attention. Defendant asks for an evidentiary hearing to establish his inability to enter an intelligent plea of guilty.

I am not persuaded that any hearing is necessary. It is one thing to have had only an eighth grade education and another thing to be unable to understand what is going on in a court proceeding. Defendant has produced nothing to show that his need for special education and his lack of progress in the school system added up to a complete inability to understand the trial proceedings.

Defendant says that he answered the questions put to him in court proceedings by simply giving the answers his counsel had told him to give. This is improbable. The questions are not so rote or predictable as he would characterize them. He could not simply answer "yes" to every question, yet he displayed no hesitation about answering them and gave no sign of needing to consult with his counsel before he gave his answers. Had he done so, I would have explored with him his ability to understand and I would have re-framed any question he failed to understand. Many defendants do need extra time and additional explanations of the proceedings and of their rights, particularly the non-English speaking

ones, but defendant gave no indication that he needed any help.

Defendant has produced no evidence other than his own statements to support his claim that he was unable to understand the plea hearing or the advice that his counsel was giving him. Simply saying that he had trouble in school and has trouble today filling out forms and writing is not enough to require the holding of an evidentiary hearing on this claim or give it any further consideration.

In summary, I find that defendant has failed to show that his counsel did not provide him effective assistance in connection with the charges brought against him. Defendant has failed to show that counsel gave him inaccurate advice or that counsel should have undertaken more investigation of the legitimacy of defendant's arrest and the resulting indictment. The record shows that counsel raised a number of challenges to defendant's presentence report and argued vigorously on his behalf at sentencing. Defendant has no evidence that counsel knew of defendant's alleged inability to understand what counsel and the court were telling him. More to the point, defendant has no evidence that he was in fact unable to understand what he was hearing. Therefore, the motion for post conviction relief will be denied.

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).

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 Odell Dobbs's original and amended motions for post conviction relief under 28 U.S.C. § 2255 are DENIED for defendant's failure to show that he was provided ineffective assistance by his trial counsel or that he was unable to

understand what was being said to him.

No certificate of appealability shall issue.

Entered this 4th day of February, 2011.

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