

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

L.C. GRAVES,

Defendant.  
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OPINION AND ORDER

10-cv-587-bbc  
07-cr-165-bbc

Contending that he was denied the effective assistance of counsel in connection with his federal conviction, defendant L.C. Graves has moved for vacation of his conviction and sentence under 28 U.S.C. § 2255. The motion will be denied because defendant has not shown that his counsel was ineffective in any respect.

RECORD FACTS

On June 12, 2007, defendant distributed cocaine in Madison, Wisconsin, to an informant working with law enforcement. Three days later the police executed a search warrant at his apartment and recovered more than 500 grams of cocaine and two firearms.

In a subsequent protected statement, defendant admitted his involvement in drug trafficking.

On December 5, 2007, a grand jury indicted defendant on four counts, two of which were for distributing cocaine, one for possessing cocaine with intent to distribute it and the last for possessing a firearm in furtherance of a drug crime. Defendant retained counsel.

On February 15, 2008, defendant entered a conditional plea of guilty to counts three and four of the indictment under a written plea agreement. Defendant reserved his right to file a motion to suppress evidence; the government agreed to dismiss counts one and two at the time of sentencing. Defendant acknowledged in the plea agreement that, upon conviction of count three he would be subject to a mandatory minimum penalty term of five years and a maximum of life and that, as to count four, he would be subject to a mandatory minimum penalty of 60 months, to be served consecutively to any sentence imposed on count four. At the plea hearing, he confirmed his understanding of the penalties to which he was exposed and told the court that no one had promised him a particular sentence. On February 25, 2008, defendant informed the court that he would not file a motion to suppress evidence.

In the presentence report, the probation office determined that defendant qualified as a career offender under the sentencing guidelines because he had two prior convictions, one for attempted first degree murder/aggravated discharge of a firearm and one for aggravated battery. As a career offender, he had a base offense level of 34. With a three-

level adjustment for acceptance of responsibility, his offense level was 31. As a career offender, defendant had a criminal history category of VI, making his advisory guideline range 188-235 months on count three.

Defendant's counsel filed objections and clarifications to the presentence report, none of which related directly to the guideline range. Defendant filed his own objections, but, as defendant was advised by the court, they were disregarded because they were not filed by his counsel. At sentencing, defendant told the court that he had no objections other than those that his counsel had filed. He did not challenge his career offender status, but argued that his criminal history was overstated because he had served less than three years in prison for his prior conviction. His counsel added on his behalf that he had committed the violent offenses that made him a career offender when he was much younger and at a difficult time in his life.

Defendant was sentenced to the bottom of the advisory guideline range (188 months) on count three and to the mandatory consecutive 60 months on count four. On appeal, he attacked the reasonableness of his sentence, unsuccessfully. The court of appeals denied his appeal in an order entered on July 15, 2009. Defendant filed this motion on October 7, 2010.

## OPINION

In his motion, defendant maintains that his counsel was ineffective in a number of respects: (1) failing to understand that defendant would qualify for career offender status; (2) failing to challenge the legitimacy of the prior convictions used to determine defendant's career offender status; (3) failing to file objections to the presentence report; (4) failing to object to count two of the indictment; (5) failing to file a motion to suppress; and (6) failing to ask the government to produce an affidavit from the Illinois Attorney General, giving the United States authority to use defendant's prior conviction for aggravated battery to a correctional officer. In his reply brief, defendant suggests other ways in which his counsel failed to represent him effectively. Not only is a reply brief the wrong place to raise new allegations, but none of them concerns any issue of substance.

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.

1. Counsel’s alleged failure to realize that defendant would qualify for career offender status when he advised defendant to plead guilty

This claim has no merit. Even if defendant is correct in alleging that his counsel did not know that defendant would qualify as a career offender, and I assume for the purpose of this motion that he is, he has failed to show that this lack of knowledge amounted to deficient representation. The law does not require counsel to make absolutely accurate predictions about a sentence; counsel does not always have access to the information necessary to know how his or her client's criminal history will be calculated. "[A] decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." United States v. Arvanitis, 902 F.2d 489, 494 (7th Cir. 1990) (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)).

Whatever counsel said or did not say to defendant about his probable sentence, defendant knew the maximum sentence to which he could be subject when he was reviewing the written plea agreement proposed by the government and when he advised the court that he understood the maximum sentences that he could receive on each count. In other words, defendant acknowledged that he could be subject to a sentence as long as 45 years. His sentence was less than half that length, so even if his counsel's advice was deficient, it did not mislead defendant to his prejudice.

Moreover, to establish prejudice by any ineffectiveness stemming from counsel's

allegedly bad advice on sentencing, defendant has to show that he would not have pleaded guilty had he received accurate advice but would have gone to trial. Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (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” (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985))). Defendant has made no such showing. He has not even alleged that he would have gone to trial had he been given better advice. Even if he had made such an allegation, he would have to support it. “[A] mere allegation that [a defendant] 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)).

2 & 3. Counsel’s failure to challenge the use of the prior conviction used for finding defendant a career offender

Contentions 2 overlaps contention 3, which is that counsel failed to file objections to the presentence report, so I will consider both under this heading. The record shows that defendant’s counsel raised objections and clarifications to the presentence report but did not object to the probation office’s recommendation that defendant had the necessary two predicate crimes to qualify as a career offender. The lack of objections does not demonstrate ineffectiveness without a showing by defendant that the second crime could not serve as a

predicate for his status.

Defendant has not suggested any grounds on which his counsel could have objected, although for his sixth contention, he asserts that his counsel was ineffective because he did not require the government to obtain an affidavit from the Illinois attorney general allowing the federal government to use defendant's prior conviction for aggravated battery to make him a career offender. Apparently, defendant believes that when he agreed to plead guilty to the aggravated battery charge in exchange for a promise from the state that he would receive no additional time, the new charge could not be used against him for any purpose by any government, and certainly not unless the state attorney general agreed to its use.

This is not the way the law works. Whatever the punishment meted out by the state, the fact of the crime, its nature and the potential penalty are all that must be known to determine whether it is a felony crime of violence. If it is, it may be used by this court in sentencing defendant. The federal government is not bound by any promises made to defendant by the state and need not obtain permission to do so from the state of Illinois.

Defendant raises several other objections to the use of prior convictions, arguing that his traffic convictions should not have been considered, that his early release on parole put his career offender status "out of range," his 1992 felony convictions were run concurrently and his aggravated battery conviction did not include an incident report. Defendant's traffic convictions were never considered in his criminal history; that history was determined solely



by his career offender status. His early release from parole did not put the career offender status “out of range”; both of the felony convictions used as predicate crimes were committed within 15 years of the offense at issue in this case and were properly used against him. The concurrent sentences he received for his 1992 crimes were taken into consideration; the offense was considered to be only one of the two offenses needed for career offender status; the other required offense was his 1993 offense for aggravated battery. Finally, the omission of an incident report from the record of the 1993 offense is irrelevant; the indictment charged defendant and others with one count of attempted first degree murder of a correctional officer and aggravated battery. This is sufficient to show that the crime was one of violence.

4. Counsel’s failure to object to count 2 of the indictment

Defendant does not explain why counsel should have objected to a count that was dropped during plea negotiations and had no effect on defendant’s sentence. I can think of no reason and will not give the allegation any further consideration.

5. Counsel’s failure to file a motion to suppress

Defendant fails to support this allegation with any facts that might show that he had grounds on which to file a motion to suppress. He does not suggest that there was anything

improper about the search of his apartment that would have support such a motion. These omissions doom this claim.

6. Lack of affidavit from Illinois attorney general

As explained above, the court was not required to obtain an affidavit from the Illinois attorney general or anyone else allowing it to consider defendant's prior conviction for aggravated battery. The battery qualifies as a predicate offense for career offender status, regardless whether the resolution of the charge was an agreement by the state not to ask for additional prison time in exchange for defendant's plea of guilty. In fact, the records from the Circuit Court for Cook County, Illinois show that defendant was sentenced to a four-year term of imprisonment to run concurrently to his sentence in the 1992 case.

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.

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 L.C. Graves's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED for defendant's failure to show that he was provided ineffective assistance by his trial counsel.

No certificate of appealability shall issue.

Entered this 7th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge