IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

09-cr-59-bbc-01
10-cv-613-bbc

v.

MICHAEL D. BALL,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Defendant Michael D. Ball has moved for post conviction relief under 28 U.S.C. § 2255, contending that his court-appointed counsel was constitutionally ineffective in 13 different respects. Two of the grounds are frivolous and will be dismissed. The remaining are unsupported by factual allegations. I will give defendant an opportunity to add specific allegations to support his claim.

## BACKGROUND

Defendant was charged by indictment with three counts of distributing five grams or more of crack cocaine and one count of distributing 50 grams or more of crack cocaine at

various times in 2009. On July 30, 2009, he entered a plea of guilty to count 4, charging him with distribution of 50 grams or more. He was sentenced on September 28, 2009 to a term of imprisonment of 200 months.

Defendant's first three charges grew out of controlled buys of crack cocaine from a confidential informant. The fourth charge was the result of a search made of the home of his girlfriend's parents, who agreed to a search of their home. Defendant did not live there, but he was allowed to leave belongings in one bedroom. His belongings included a safe containing 97.34 grams of crack cocaine. In 57 telephone calls that defendant made from the jail to his girlfriend and an unidentified female, he asked whether the police had recovered all of the drugs from the safe.

## OPINION

Defendant has asserted a laundry list of reasons why his counsel was ineffective. They include allegations that his counsel neglected to prepare and file a motion to suppress evidence although evidence was seized illegally (a), that counsel failed to comply with the Rules of Professional Conduct (e), refused to call defendant's girlfriend or her father to testify about the seizure of the crack cocaine (f), neglected to pursue any meaningful pre-plea investigation (h), refused to interview and investigate the lead police officer, Denise Markham, who led the illegal entry into the home of defendant's girlfriend's parents (i),

failed to subpoena radio communications made in connection with the search (j) and through lack of thoroughness, failed to represent defendant effectively (m). If these allegations about the alleged Fourth Amendment claim were supported, they might be enough to allow defendant to proceed on his motion. They are not. In their present state, they do not even require a response by the government.

It is well established that mere allegations are not enough to entitle a defendant to a hearing. He must file a detailed and specific affidavit showing he has actual proof of allegations. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996). See also Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002); Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir. 1989) (no hearing required on § 2255 motion in absence of detailed and specific affidavit showing that defendant has actual proof of allegations going beyond mere unsupported assertions). I will give defendant two weeks in which to supplement his motion with specific facts about the seizure of the crack cocaine, about what counsel would have learned had he conducted an investigation, in what specific ways counsel failed to abide by the Rules of Professional Conduct, what defendant's girlfriend and her father would have told counsel about the seizure of the crack cocaine, what counsel would have learned had he interviewed Officer Markham and why it would have been helpful to defendant to have the radio communications subpoenaed.

Defendant has also alleged that his counsel refused to take a direct appeal from his

sentence (n), deliberately misled defendant into believing that he would not receive a sentence in excess of ten years (l) and refused to let him review the grand jury transcriptions (k). Again, these allegations are too vague to go forward at the present time. A defendant alleging that he was misled into pleading guilty must demonstrate that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1970). He must allege what counsel said that was misleading about defendant's probable sentence, explaining when and where counsel made the statements and identifying any witnesses to the conversation. Key v. United States, 806 F.2d 133 (7th Cir. 1986). The same is true for the allegation that defendant refused to take an appeal. Defendant must say when and where he asked counsel to take an appeal, what counsel's response was and whether any witnesses were present when he made the request. Refusing to let defendant read the grand jury transcripts would be a potential problem only if the information in the transcripts was relevant to the defense of the case. If it merely confirmed the strength of the government's case, counsel would have had no reason to give it to defendant to read.

Defendant's remaining allegations are so conclusory or frivolous that no additional supplementation would save them. He alleges that counsel was ineffective because he did not attempt to insert into the plea agreement a provision prohibiting the government from filing an § 851 indictment (b), but the allegation is pointless. The government never filed

such an indictment.

Defendant alleges that counsel "furthered the interest of the government while refusing to put the interests of his client first" (c), and that counsel labored under a conflict of interest "when he failed to provide [defendant] with a copy of his (counsel's) release from the courts, allowing him to provide [defendant] with undivided loyalty" (d). The first of these allegations is wholly meaningless without any explanation of what counsel did or failed to do to represent defendant effectively; the second is preposterous. Lawyers do not need a "release" from the court to allow them to give their clients a vigorous defense.

ORDER

IT IS ORDERED that defendant Michael D. Ball's motion for post conviction relief is DENIED as to his allegations labeled (c) and (d). As to allegations (a), (b), (e), (f) and (h)-(n), he may have until December 8, 2010 in which to support his allegations with specific information, as outlined above. (He did not include an allegation labeled (g).) If he fails to submit such information, his motion will be denied in its entirety.

Entered this 24th day of November, 2010.

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