IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES V. FRAZIER,

Defendant.

OPINION AND ORDER

10-cv-732-bbc
06-cr-221-bbc

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Defendant believes that he was forced improperly to represent himself at trial, that his trial counsel failed to investigate the facts of his case and that his appellate counsel was ineffective for failing to raise critical issues on appeal. He has filed a motion for post conviction relief from his 2007 conviction and sentence under 28 U.S.C. § 2255. I find that defendant has failed to support his claims with any facts or law and that his motion must be denied.

RECORD FACTS

Informant Christopher Freeman made two controlled buys of crack cocaine from

defendant James Frazier in August 2006. Early in the morning of September 9, 2006, a cashier at a McDonald's in Beloit called the police and reported that there were several individuals counting large amounts of money in a car in the drive-through. Knowing that an armed bank robbery had taken place that night and that the robbers were still at large, Beloit police officers conducted a high-risk traffic stop of what turned out to be a car in which defendant was a passenger. Defendant was told to get out of the car and submit to a patdown. During the course of the search, two bags with about 26 grams of crack cocaine fell from his pants leg. Defendant tried to kick the bags under the car and he asked Officer Stephanie Herro to pretend that she had not seen anything. Later, as Herro drove him to the police station, he told her that he had just made a mistake and was trying to get some money.

In November 2006, defendant was indicted by a grand jury on three counts of drug distribution. Counsel was appointed to represent him, but within two months, the magistrate judge granted counsel's motion to withdraw on the ground that he had irreconcilable differences with his client. New counsel was appointed and the trial date was continued for almost two months to give counsel time to prepare. Three weeks before the continued trial date, the second counsel asked to withdraw. At a hearing on the matter, the magistrate judge agreed to appoint a third counsel, but warned defendant that this would be the last attorney that would be appointed for him and that if he did not cooperate with

counsel this time, he would have to represent himself. The trial date was continued for four months.

Not surprisingly, given his record, defendant was unable to work with his third appointed counsel. He appeared before the magistrate judge, insisting that he no longer wanted the third counsel to represent him. The magistrate judge relieved counsel of his obligation to represent defendant. He held another hearing with defendant the next week, warning defendant of the difficulties of self-representation and urging him to reconsider his decision and work with his third counsel, who was still willing to represent him. The magistrate judge told defendant that the August 2007 trial date would not move. On July 12, 2007, the magistrate judge held still another hearing with defendant in an effort to encourage him to accept representation by his third counsel. Defendant refused to have his third counsel represent him, even as stand-by counsel.

On July 20, 2007, the magistrate judge held an evidentiary hearing on defendant's motion to suppress evidence. Defendant contended that the traffic stop and subsequent seizure of crack cocaine were illegal, but the magistrate judge recommended denial of the motion and the recommendation was followed by the court.

Defendant went ahead with trial, representing himself. During the jury deliberations, the jury sent a note asking whether it could be a hung jury on one count or two counts and reach a verdict on the third count. I brought the jury back into the courtroom and read it

the Seventh Circuit Pattern Instruction 7.06, Disagreement among Jurors, and then urged the jurors to go home for the evening and return to the courthouse the next day to resume their deliberations. The jury chose to stay and returned a unanimous verdict on all three counts within 40 minutes. It found defendant guilty on two counts and not guilty on a third.

The probation office prepared a presentence report in which it recommended a finding that defendant was a career offender under the guidelines. His advisory guideline range was 360 months to life. He was sentenced to 360 months. Defendant appealed, raising one issue: whether he was entitled to a limited remand under Kimbrough v. United States, 552 U.S. 85 (2007). The court of appeals found that a sentence imposed under the career offender guidelines raised no Kimbrough problem requiring a limited remand for new sentencing and it affirmed defendant's sentence on October 26, 2009. Defendant filed this motion on October 22, 2010, well within statutory deadline.

OPINION

Defendant attacks his sentence on three grounds: (1) he did not waive his Sixth Amendment right to counsel before trial; (2) his three appointed trial counsel were ineffective for failing to investigate the facts of his case; and (3) his appointed appellate attorney was ineffective for failing to raise the following issues: (a) his Fourth Amendment

rights were violated in the course of the illegal stop and search; (2) the court coerced a verdict from the jury; (c) the court abused its discretion by failing to grant him a third extension of time in which to prepare for trial; and (d) his sentence was illegal.

A. Denial of Counsel at Trial

The government argues that defendant cannot raise this issue at this time because he did not raise it on direct appeal. Ordinarily, this would be a solid ground on which to deny the claim, but in this case, defendant is attacking the performance of his appellate counsel. It is true that defendant did not list this particular claim as one that his appellate counsel failed to raise, but he has generally criticized his appellate attorney's refusal to raise the issues defendant wanted him to raise. To be on the safe side, I will address the claim.

Defendant was given ample opportunities to have the assistance of counsel at his trial, but he was unwilling to cooperate with any of the lawyers appointed to represent him. It was reasonable for the magistrate judge to refuse to appoint another lawyer to represent defendant after defendant had shown that he could not work with any one of the three capable counsel appointed to represent him. In light of the many hearings that the magistrate judge held at which he warned defendant of the dangers of proceeding without counsel and encouraged him to work with counsel, defendant cannot argue plausibly that he was denied the representation of counsel. He was the one who made the decisions to jettison

his court appointed counsel, knowing that his continued recalcitrance would lead to his having to represent himself. His actions are evidence of a knowing and intentional decision to proceed pro se at trial. United States v. Harris, 2 F.3d 1452, 1455 (7th Cir. 1993) (citing United States v. Fazzini, 871 F.2d 635, 642 (7th Cir. 1989)). See also United States v. Oreye, 263 F.3d 669, 670 (7th Cir. 2003) (it is not necessary for defendant to say in so many words that he wants to proceed without counsel; "if you're given several options, and you turn down all but one, you've selected the one you didn't turn down")

B. Ineffectiveness of Trial Counsel

Defendant asserts that his trial counsel were ineffective because they failed to investigate the facts of his case. He does not explain what facts they should have investigated or what they would have found had they done so. This omission is enough to doom his claim. A defendant who wants to overturn his conviction on this ground, he 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).

Defendant's claim would fail for another reason. It is well established that a defendant who chooses to represent himself cannot claim ineffectiveness of counsel. Peoples v. United States, 403 F.3d 844, 849 (7th Cir. 2005) (citing Faretta v. California, 422 U.S.

806, 834 n.46 (1975)).

C. Ineffectiveness of Appellate Counsel

1. Failure to raise Fourth Amendment challenge

Defendant believes that his appellate counsel should have argued on appeal that the district court erred in deciding that defendant's Fourth Amendment rights had not been violated during his stop and subsequent search. Defendant has not cited anything to suggest that appellate counsel would have had grounds to raise such an argument on appeal, although it is his obligation to show that counsel's failure to raise the issue was evidence that counsel was performing below the minimum level of competence required of appellate counsel *and* that the failure caused him prejudice. It is not surprising that defendant has not made this showing; he was unable to show before his trial that his stop and search were illegal in any respect.

2. Failure to argue court's coercion of jury

Defendant believes that it was coercion for the court to re-read jury instruction 7.06 to the jury after it reported that it was able to get unanimous agreement on only one of the three counts charged against him. The court of appeals has held on a number of occasions that the reading of this instruction is a proper step to take when a jury reports that it is

unable to agree. United States v. Silvern, 484 F.3d 879 (7th Cir. 1973) (en banc); see also United States v. Hamann, 688 F.2d 507, 511 (7th Cir. 1988) (holding that it is within trial judge's discretion whether to re-read jury instruction).

The jury was not "rushed to judgment," as defendant alleges. To the contrary, the jurors were encouraged to go home and resume their deliberations in the morning. They chose, instead, to continue to deliberate and they reached a unanimous verdict shortly thereafter, but not because of any coercion by the court. Appellate counsel had no valid ground on which to argue jury coercion.

3. Failure to argue the denial of a continuance of the trial

Appellate counsel would have known from the record of the case that such an appeal would have no chance of succeeding, in light of the extensive warnings given defendant by the magistrate judge. Moreover, defendant does not say what he might have accomplished had the trial been postponed. Without such a showing, he has no chance of showing prejudice, as he must. He has no plausible claim of ineffectiveness of appellate counsel on this issue.

5. Failure to argue the illegality of defendant's sentence

Defendant has not identified anything illegal about his sentence. He asserts that it

was error for the court to sentence him under the 2006 version of the sentencing guidelines when he was sentenced on the day that the 2007 version became effective. He adds that the court erred in taking into consideration the drug charge of which the jury acquitted him.

Defendant has not identified any prejudice that he suffered from being sentenced under the 2006 version of the guidelines or even that the 2006 version differed from the 2007 version, so I need not give this claim any consideration. As for taking into consideration the drug charge of which he was acquitted, it is well settled that courts may consider charges of which a defendant was acquitted if the evidence is sufficient to allow the court to find the elements of the charge by a preponderance of the evidence. U.S.S.G. § 6A1.3. The drug charge in question concerned a transaction in which the confidential informant arranged a meeting with defendant, defendant met him at the designated place, drove him away a short distance, made the sale and dropped him off. Law enforcement observed the entire transaction. This evidence is more than sufficient to meet the preponderance of the evidence standard. Even if it were not, the inclusion of the drugs from the second transaction did not have any effect on defendant's sentence because his base offense level was determined by his career offender status and not by the amounts of crack cocaine he sold.

On appeal, defendant's counsel argued for a limited remand, arguing that the sentencing court had not acknowledged that it was free to sentence below the guidelines in

light of Kimbrough, 552 U.S. 85. At the time the law in the circuit was that sentencing judges were not free to disregard the career offender guidelines and depart downward under Kimbrough. This did not change until March 17, 2010, when the court of appeals decided in United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010), that sentencing courts were free to reject any guideline, including the career offender guidelines, if they disagreed with it on a policy ground. Unfortunately, this decision came well after defendant's appeal had been decided and it has not been held to be retroactive so as to apply to cases decided before March 17, 2010.

In summary, I cannot find that defendant is entitled to the vacation of his conviction and sentence under § 2255. His motion 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 James V. Frazier's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED for defendant's failure to show that he was denied his Sixth Amendment right to counsel or that he was provided constitutionally ineffective representation by either his trial or appellate counsel.

No certificate of appealability shall issue.

Entered this 9th day of February, 2011.

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