

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEREK FARMER,

Defendant.

OPINION AND ORDER

10-cv-759-bbc
09-cr-113-bbc

Defendant Derek Farmer has moved for post conviction relief under 28 U.S.C. § 2255, alleging that he was denied the effective assistance of counsel at his criminal trial and afterward, when counsel refused to take an appeal on defendant's behalf. The motion will be denied as to defendant's claim that counsel was ineffective at trial and a ruling will be reserved on the claim that counsel refused or failed to take an appeal. Defendant will have an opportunity to submit an affidavit in support of that claim.

BACKGROUND

Defendant was charged in August 2009 with two counts of distribution of heroin.

When law enforcement officers came to his apartment to arrest him, they found and seized a firearm at the same time. In October, defendant entered a plea of guilty to one count of the indictment. During the plea hearing, he told the court that he had had enough time to discuss the case with his counsel, that he agreed with the terms of the plea agreement, that he knew the court could sentence him up to the maximum penalty of 20 years in prison, that he understood that his possession of a firearm would be taken into consideration when his advisory sentencing guidelines were determined, that no one had promised him anything in return for his plea or threatened or forced him to enter his plea and no one had promised him a specific sentence. Transcript of plea hrg., dkt. #131, at 8-11.

The probation office recommended an advisory sentencing range of 70-87 months, with a base offense level of 26, a two-level enhancement for possession of a firearm and a three-level reduction for acceptance of responsibility. Defendant's counsel filed clarifications but no objections to the presentence report.

Defendant was sentenced on December 29, 2009. He did not raise any objections to the presentence report. His sentence was 78 months, which was within the advisory guideline range.

Defendant did not appeal but filed this timely post conviction motion on November 29, 2010. He alleges that his counsel was ineffective at trial in two respects: he told defendant that if he entered an open plea and accepted responsibility, the court would

sentence him to no more than 63 months, and he did not tell defendant that his guidelines could be enhanced for his possession of a gun. Defendant alleges that counsel was ineffective after trial in not taking an appeal after defendant asked him to.

OPINION

In order to show that his trial counsel was constitutionally ineffective, defendant must show that counsel's representation of him fell below the minimum standard to be expected of defense lawyers. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). It is not enough simply to allege ineffectiveness; a defendant must "establish the specific acts or omissions of counsel that he believes constituted ineffective assistance" and from which the court can "determine whether such acts or omissions fall outside the wide range of professionally competent assistance." Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009).

Defendant alleges first that counsel told him that if he entered an open plea and accepted responsibility, the court would sentence him to no more than 63 months. Defendant does not explain what he means when he talks about an "open plea." but I assume he means a plea that does not depend on the government's offering a particular sentence. This allegation falls short of stating a viable claim in two respects. The first is that defendant has not said that he would not have pleaded guilty had counsel not made this alleged promise

to him. He is required to make this showing. Hill v. Lockhart, 474 U.S. 52, 59 (1970) (defendant must demonstrate that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”). Nothing in defendant’s motion suggests that he would have gone to trial had it not been for counsel’s alleged promise.

The second obstacle for defendant is that he told the court under oath at his plea hearing that no one had made any promises to him to persuade him to enter a plea of guilty. He has not provided a compelling explanation for his change of position. Courts are not receptive to allegations that depend on disavowing earlier statements made under oath. United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) (“Because of the great weight we place on these in-court statements, we credit them over his later claims [that he would not have pleaded guilty.]”). See also 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.”).

Defendant has also alleged that counsel did not tell him that his possession of a firearm would increase his sentence. This allegation defies credulity. The plea agreement, dkt. #53, referred explicitly to the firearm and to the sentencing guideline provision (U.S.S.G. § 2D1.1(b)(2)) that would be applied because of the discovery of the firearm. Defendant signed the agreement before the plea hearing, but even if he somehow overlooked this

provision of the agreement when he signed it, he heard it discussed at the hearing and he told the court that he understood what the agreement said. Had he not heard of the provision before hand, why would he not have asked about it? Moreover, as with his other allegation of ineffectiveness, he has not said that he would have gone to trial had he known about the gun enhancement. (It is implausible that he would have, when the evidence was so clear that he had been in possession of the gun in his apartment.)

Defendant's third and final allegation is that his counsel was ineffective after trial in not taking an appeal after defendant asked him to. The government is prepared to hold an evidentiary hearing on this allegation, but before I schedule such a hearing, I will require defendant to submit an affidavit in which he states exactly what he told his counsel about taking an appeal, where he and counsel were when this conversation occurred, when it took place, who else, if anyone, was present and what part or parts of his trial proceeding he thought might be overturned on appeal.

ORDER

IT IS ORDERED that defendant Derek Farmer's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED with respect to his claims that his trial counsel was constitutionally ineffective at trial. A ruling is reserved on his claim that trial counsel was ineffective because he did not take an appeal of defendant's conviction and sentence after

being asked to do so. Defendant may have until July 5, 2011 in which to submit an affidavit in which he states exactly what he told his counsel about taking an appeal, where he and counsel were when this conversation occurred, when it took place, who else, if anyone, was present and what part or parts of his trial proceeding he thought might be overturned on appeal.

Entered this 7th day of June, 2011.

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