

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN RICHARDSON,

Defendant.

ORDER

10-cv-417-bbc

Defendant Martin Richardson has moved under 28 U.S.C. § 2255 to vacate his judgment of conviction, contending that he was denied the effective assistance of counsel at his trial. He asserts that counsel failed him in three ways: (1) he did not obtain the records of defendant's cell phone that would show definitively that defendant was not in Madison at the time he was alleged to be engaged in a drug deal; (2) he did not have an expert evaluate the video tape that the government introduced into evidence at trial; and (3) he did not seek to interview Joanna Lopez about her knowledge of defendant and her opportunity to have seen him during the drug deal.

Defendant raised the issue of the cell phone records when he moved for a new trial. I was not persuaded then that the cell phone records proved that defendant was not in

Madison at the time of the drug deal and I am not persuaded now. The cell phone records show that a particular cell phone was used between Madison and Chicago; they do not show that defendant was the one using the cell phone.

The information about the video tape raises a closer question. Defendant's counsel says that his expert has analyzed the tape and concluded that it shows that no one was sitting in the passenger seat at the time of the drug deal. The government says that the testimony of both the undercover police officer who participated in the drug deal and the sheriff's deputy who stopped the car provides unequivocal proof that a passenger was present. I am not so sure. It is highly unlikely, but not impossible, that members of two different law enforcement agencies would lie about the presence of the passenger. An evidentiary hearing on the videotape would resolve any questions on that point.

As to defendant's counsel's alleged ineffectiveness in not questioning Joanna Lopez, defendant says his trial counsel stipulated that Joanna Lopez was sitting behind the driver in the rear seat of the car in which the alleged drug transaction took place and that Lopez was "unable to positively identify, one way or the other, whether the person sitting in the front passenger seat is the defendant Martin Richardson, because of her use of drugs that night." Stip., dkt. #60. Defendant says that the stipulation did not accurately reflect what Lopez said to the interviewing detective, which is that she denied knowing defendant. Coad aff., dkt. #3, exh. 5. In addition, defendant says, Lopez did not say that she used drugs that

day but made a more general statement that she smokes a lot of marijuana so she doesn't remember a lot of things. Id. He argues that counsel was constitutionally ineffective when he failed to interview Lopez and call her as a witness to testify that she did not even know who defendant was.

The government counters with a transcript of the interview in which Lopez (oddly, identified in this portion of the transcript by the initials LP instead of JL, as she was referred to earlier in the transcript) told the detective first that she didn't think she'd ever seen defendant and then said "maybe" or "probably" she'd met him once., Dkt. #9-3 at 2-3. It is hard to see any significant variance in the transcript and the stipulation, but because I will schedule an evidentiary hearing on the videotape, I will allow counsel to develop at that hearing its argument about the importance of trial counsel's failure to interview Joanna Lopez to determine what her actual statements were and what she knew about defendant.

ORDER

IT IS ORDERED that an evidentiary hearing will be held in this case on December 17, 2010 at 9:00 a.m. to take up defendant Martin Richardson's claim that he was denied the effective assistance of counsel when his trial counsel failed to hire an videotape expert to analyze the police video and failed to interview Joanna Lopez about her knowledge of

defendant.

Entered this 12th day of November, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge