

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD KARL WILLIAMS,

Defendant.

OPINION AND ORDER

11-cv-351-bbc
09-cr-97-bbc

Defendant Richard Karl Williams filed a motion for post conviction relief under 28 U.S.C. § 2255 that was timely under the mailbox rule. The motion was essentially a theoretical discussion of ineffective assistance of counsel, the place of 18 U.S.C. § 3553(a) in sentencing decisions, the ex post facto clause of the United States Constitution, coercion of guilty pleas and the court's failure to consider defendant's psychiatric evidence in sentencing him. The government filed a response to the motion, as best it could, given the general lack of any specific allegations in the motion. It responded to the one explicit claim, which was the alleged failure to consider defendant's mental health at sentencing. Now defendant has filed a reply to the government's response, in which he alleges for the first

time specific ways in which his counsel was ineffective, including failing to investigate a potential violation of defendant's rights under Brady v. Maryland, 373 U.S. 83 (1967) and failing to challenge the admissibility of an admission defendant made while still under the effects of anesthesia administered for a colonoscopy.

The general rule is that courts do not consider legal claims or new arguments that are raised for the first time in a reply brief. United States v. Foster, ___ F.3d ___, 2011 WL 2909455 (7th Cir. July 21, 2011); Bakery Machinery & Fabrication, Inc., 570 F.3d 845, 847 (7th Cir. 2009). Even if there were grounds for leniency in a § 2255 proceeding in which the defendant is proceeding pro se, defendant's filing does not require any additional response from the government. Defendant's unsworn and unsupported allegations are not enough to entitle him to an evidentiary hearing, let alone relief from his conviction and sentence. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996) (mere unsupported assertions not enough for grant of hearing; petitioner must file detailed and specific affidavit showing he has actual proof of allegations) see also Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002) (same).

Defendant has not sworn to the truthfulness of his allegations about his counsel; he has not identified the dates on which he talked to his counsel, where he talked to him or what he said; and he has not explained how the information he supposedly gave to his counsel would have helped avoid a conviction. Defendant seems to be saying that counsel

failed to undertake investigations that would have changed the outcome of his case, but he has not provided 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), or shown that the information discovered “would have led counsel to change his recommendation as to the plea.” Hill v. Lockhart, 474 US. 52, 58-60 (1985); see also Richardson v. United States, 379 F.3d 485 (7th Cir. 2004).

Defendant cannot show that his counsel fell below the minimum standards required of defense counsel, Strickland v. Washington, 466 U.S. 668, 687 (1984), without giving the court information sufficient to determine whether his counsel may have provided constitutionally deficient assistance. Defendant has not come close to making this showing.

As for defendant’s allegations that his counsel made promises to him about the sentence he would receive, defendant told the court at his plea hearing that he had had sufficient time to discuss his plea with his counsel and he said that no one had promised him a particular sentence. Those statements, made in open court, cannot easily be repudiated. United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) (“[The record of a Rule 11 proceeding is entitled to a “presumption of verity” . . . and the answers therein are binding.”

This leaves defendant’s claim that his sentence is invalid because the court failed to take into consideration his mental health. This is not a claim he can raise in a post

conviction motion because he could have raised it on direct appeal and did not. Therefore, defendant is barred from raising it on collateral review unless he can show both cause for his failure to raise the claim earlier and prejudice if he is not allowed to raise the claim at this time or that a fundamental miscarriage of justice would ensure if he cannot raise the claim. 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)).

Defendant has not said anything about why he did not raise his claim on direct appeal. Even if he had a good reason for doing so, he could not show any prejudice resulting from the failure. Defendant had an opportunity to say something about his mental health at his sentencing hearing, but he let the opportunity go by. He was asked whether he had any objection to the presentence report; he said he did not. Even in this motion, he does not say why his emotional difficulties would have had any bearing on his commission of his crime or his culpability.

In summary, defendant has shown no reason why he is entitled to post conviction relief.

ORDER

IT IS ORDERED that defendant Richard Karl Williams's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 29th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge