

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN L. LOREDO,

Defendant.

OPINION AND ORDER

10-cr-16-bbc
12-cv-291-bbc

On April 23, 2012, defendant Juan L. Loredó filed a timely motion for post conviction relief under 28 U.S.C. § 2255, alleging that his court-appointed attorney had given him constitutionally ineffective assistance. Because it was unclear from his allegations whether he had any claim, I gave him an opportunity to explain why he believed that his court appointed counsel had been ineffective. In response, defendant submitted an affidavit on July 26, 2012, in which he contended that his counsel had been ineffective in two respects: (1) prior to trial, his counsel “intimated” to him that he would be deported unless he exercised his right to trial and as a result, defendant turned down the government’s plea offer and went to trial; and (2) his counsel had failed to file motions to suppress evidence that the government wanted to use against defendant at trial.

The motion was set for briefing. The government filed its response; defendant had an opportunity to reply but did not take advantage of it.

I conclude that defendant has failed to show that he can prevail on his motion. He has not supported either of his claims of ineffectiveness with any allegations of fact, such as when and where counsel “intimated” the information about the alleged benefits of going to trial, what words counsel used, whether defendant asked any questions of counsel to clarify his understanding of counsel’s hint or suggestion and whether anyone else was present. Without facts to flesh out the first of defendant’s claims, there is no possibility of determining whether he was actually misled or whether he merely interpreted what he heard from counsel as what he wanted to hear. The same is true for the second claim; defendant has not explained why a suppression motion would have succeeded or even what evidence such a motion would have addressed.

From the record, I make the following findings of fact.

FINDINGS OF FACT

In an indictment returned on January 27, 2010, defendant was charged with one count of conspiracy to distribute methamphetamine in northwestern Wisconsin, one count of distribution and one count of possession with intent to distribute. He appeared before the court for a plea hearing on May 20, 2010, but his plea did not go through. Thereafter, defendant asked for new counsel and Adam Walsh replaced the associate federal defender who had been representing defendant.

On September 1, 2010, the grand jury returned a superseding indictment, slightly revising the drug amounts charged. Defendant went to trial on September 27, 2010 and was

found guilty on all three counts of the indictment. The jury determined that the amount of methamphetamine involved in each of the first two counts had been more than 50 grams.

Preparing the presentence report, the probation office found that defendant was responsible for 4.5 kilograms of methamphetamine, Presentence Rep., dkt. #66, at ¶¶ 38 & 44, and that he had used a credible threat of violence against a customer who owed him money. Id. at ¶ 45. Defendant's adjusted offense level was 36; his criminal history category was I; and he had a guideline range of 188 to 235 months. During the presentence interview with the probation officer, defendant confirmed his understanding that he would probably be deported after service of his sentence. Presentence Rep., dkt. #66 910-cr-16), at ¶ 70. He was sentenced on November 29, 2010 to 188 months in prison. He never said anything at sentencing about deportation.

Defendant appealed but his trial counsel, serving as appellate counsel, found no non-frivolous grounds for the appeal and filed a brief and motion to withdraw. Before the motion was granted, defendant filed a brief in response to his counsel's motion to withdraw, along with a request for new counsel. In his response, defendant argued that he did not receive effective assistance at trial or in deciding what issues to raise on appeal. He did not say anything about his counsel's advice that he would be deported unless he exercised his right to trial. The court of appeals granted counsel's motion to withdraw and dismissed the appeal on June 10, 2011. Order, dkt. #101.

MOTION FOR POST CONVICTION RELIEF

On April 23, 2012, defendant filed this motion for post conviction relief, asserting that his counsel had failed to negotiate a plea bargain with the government, which caused him to go to trial, and had also failed to file a motion for acquittal after the government ended its case. Def.'s M., dkt. #1 (12-cv-291). In an order entered on April 30, 2012, I found the second claim without merit, because the court of appeals had ruled on the sufficiency of the evidence in its dismissal of defendant's appeal, and I told defendant that his allegations in support of his first claim were too vague. Order, dkt. #2. I gave him until May 14, 2012 to submit an amended motion. In response, defendant filed an affidavit in which he said that in fact he had received a plea offer from the government that would have limited his term of incarceration to five years, subject to deportation upon completion of the sentence, but that his counsel had "intimated" to him that he would be deported unless he exercised his right to trial. Dft's Affid., dkt. #5. He averred that this "advice" caused him to proceed to trial. Id.

OPINION

Defendant did not enlarge upon the second claim he raised in his motion (that his counsel was ineffective in failing to move for acquittal at the end of the government's case) so I conclude that he has abandoned it. I conclude that he has also abandoned the claim he raised in his affidavit, that counsel was ineffective because he did not file a motion to suppress evidence because defendant has not identified any evidence that would have been

subject to suppression had counsel filed the proper motion.

As for his first claim that defendant raised in his motion, that counsel failed to negotiate a plea bargain with the government, it appears that this is another one that he is abandoning. Instead of swearing in his affidavit that his counsel never negotiated a plea bargain, he swears that his counsel caused him to turn down an offer by the government that it would recommend a sentence of five years, subject to deportation thereafter, if defendant entered a plea of guilty. He avers that counsel intimated to him that he would be deported unless he went to trial.

The flaw in this argument is that an allegation of “intimation” is a far cry from alleging a viable claim of constitutionally ineffective assistance of counsel that would warrant holding an evidentiary hearing, much less lead to a grant of the motion. Defendant is alleging that his counsel intimated to him that if he went to trial, he could avoid deportation. This would be accurate, appropriate advice *if* counsel included the words “and were acquitted” after “trial.” To the extent that defendant is contending that he went to trial on his counsel’s promise that doing so would mean he could stay in this country, whatever the outcome of the trial, he has failed to support the contention with allegations of fact. The law in this circuit is that a defendant cannot proceed on an contention that counsel made certain promises to him unless he can support the contention with allegations specifying the terms of the alleged promises, when, where and by whom the promises were made and the precise identity of any witnesses to the promise. Key v. United States, 806 F.2d 133, 139 (7th Cir. 1986). See also Kafo v. United States, 467 F.3d 1063, 1067 (7th Cir. 2006) (§

2255 “petition must be accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions”) (quoting Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996)).

Defendant has not explained exactly what his counsel told him about the connection between going to trial and avoiding deportation, where and when counsel made the “intimation” to him, what words he used and whether anyone else was present. Such an explanation is particularly important in the circumstances of this case, in which defendant’s allegations seem particularly improbable. Not only have they changed between the time he filed his motion and the time he filed his affidavit, he is not even willing to say that counsel “told” him that he could avoid deportation if he went to trial. He alleges only that counsel “intimated” this.

No doubt there are situations in which counsel tells his client one thing and the client hears something else entirely because it is what he wants to hear. However, interpreting what one hears from counsel as what one wants to hear does not mean that counsel is constitutionally ineffective. Constitutional ineffectiveness requires a showing that counsel’s performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Making that showing requires the defendant to “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) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)).

Defendant has not supplied the court with specific acts or statements of counsel that would enable the court to make that determination.

I conclude that defendant has failed to allege facts sufficient to show that he has a viable motion for post conviction relief.

ORDER

IT IS ORDERED that defendant Juan L. Loredo's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 13th day of September, 2012.

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