IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

12-cv-356-bbc
08-cr-87-bbc

v.

PRINCE P. BECK,

Defendant.

- -

Prince P. Beck was convicted in 2009 of conspiracy to commit armed bank robbery, the substantive crime of bank robbery and a third charge of use of a firearm during the commission of the robbery. He was sentenced to a term of 324 months, which was below his advisory range of imprisonment of 360 months to life. He took an appeal to the Court of Appeals for the Seventh Circuit and when that was denied, he sought a writ of certiorari from the United States Supreme Court, which was also denied. Now he has moved for post conviction relief under 28 U.S.C. § 2255.

Defendant raises six specific claims of alleged ineffectiveness by his court-appointed attorney: (1) failing to move for a competency examination of defendant before trial; (2) failing to call a particular witness; (3) failing to move for a directed verdict after the government failed to show that the victim bank was insured by the Federal Deposit Insurance Corporation at the time of the robbery; (4) failure to object to the probation

officer's determination that defendant was a career offender; (5) failure to strike a juror that worked for the Wisconsin Department of Corrections; and (6) failure to learn that two witnesses, Michael Simmons and Lamar Liggons, testified falsely. He also seems to allege that counsel was unprepared for trial and failed to provide defendant copies of the discovery materials. For the sake of completeness, I will include these claims in the discussion.

Defendant contends that the reason he never raised any of these claims on his direct appeal is because he was represented on appeal by the same lawyer who served as his trial counsel. This is understandable because the claims all relate to the alleged ineffectiveness of his trial counsel. It was also a sensible strategy. It is the rare case in which the court of appeals can decide claims of ineffectiveness from the paper record of the trial. Massaro v. United States, 538 U.S. 500, 504 (2003) ("in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance"; trial record is rarely developed for object of litigating claim of ineffectiveness and is often incomplete or inadequate for purpose).

I conclude that none of defendant's allegations are sufficient to support his claim that he was denied his constitutional right to effective assistance. Although it is defendant's burden to prove that his rights were violated, he has failed to meet that burden. Accordingly, his motion for post conviction relief will be denied.

For the purpose of deciding this motion, I find the following facts from the record.

RECORD FACTS

Defendant Prince P. Beck was charged along with co-defendants Corey Thomas, Jarrell Murray and Lamar Liggons with one count of conspiracy to rob Bank Mutual branches in Madison and Middleton, Wisconsin and a U.S. Bank in nearby Blooming Grove. Defendant, Thomas and Murray were charged in a second count with taking funds from Bank Mutual in Madison by force, violence and intimidation; all four defendants were charged in a third count with taking funds by force, violence and intimidation from U.S. Bank in Blooming Grove; and all four defendants were charged in a fourth count with carrying and using a firearm during and in relation to a crime of violence.

The trial of the charges began on March 9, 2009 against defendant and Corey Thomas only. Co-defendant Liggons was a fugitive until one week before the trial began. In that week, he was arrested, entered into a plea agreement with the government, agreed to testify at trial against his co-defendants and entered a plea of guilty. Murray was found to be in need of a competency determination, so his case was severed from those of the other alleged conspirators. (He was later found to be competent and entered a plea of guilty on June 23, 2009.) The jury found defendant and Thomas guilty of three of the four charges; it acquitted both men of the charge in count two of taking funds from Bank Mutual.

At trial, the government presented evidence that in the morning of May 9, 2008, a telephone call was made to a Bank Mutual branch in Madison, inquiring about the time the bank opened. Shortly afterward, three masked men entered the bank and robbed it. The call was traced to defendant's cell phone; surveillance video showed that co-defendant

Thomas had been in the bank the day before; and the getaway car contained the fingerprints of Thomas and Murray.

Between May 9 and the second robbery (of the U.S. Bank branch) on May 21, 2008, the conspirators increased their number. In Chicago, defendant met up with Murray and Simmons and with Liggons, a new acquaintance, who was a friend of Simmons and his caretaker since Simmons was paralyzed from the waist down after being shot. Simmons and Liggons had been traveling for some period of time; the point of their trip was to take possession in Texas of a van that Simmons was given by his uncle, along with a gift of $3000. On their way back to Chicago, they stayed for a while in Memphis with other relatives of Simmons, where they purchased guns with some of the money from Simmons's uncle and had their pictures taken with the guns. They gambled away the rest of the money in Chicago and were in need of replacement funds. At some point while they were gambling in Chicago, they met defendant and Murray and discussed committing some robberies. Simmons agreed to defendant's suggestion that they use Simmons's van as a getaway car and he lent defendant a Tech 9 gun he had bought with his uncle's money.

On May 19, 2008, Liggons and Simmons drove to Madison with Liggons's girlfriend and stayed at her mother's house. They met that morning with defendant, Thomas and Murray and two other men and spent the rest of the day casing banks. The next day, Murray called Simmons to say they were going out the following day in the early morning to commit robberies. On May 21, 2008, as defendant, Thomas, Liggons, Murray and Simmons started out, Thomas remembered that they had forgotten gloves. They stopped

at a Dollar Store and bought a package of yellow kitchen gloves. The first robbery, of U.S. Bank, went off, but with a major hitch; Simmons had insisted on being part of the scheme, so he rolled himself into the bank in his wheelchair under the guise of opening a checking account. The four other men entered a few minutes later, demanding money and brandishing at least one gun; they collected money from the safe and ran out of the bank, leaving Simmons behind. When the police responded to the bank's calls, they found Simmons almost immediately, although he had wheeled himself some distance from the bank. He was jailed when his explanation for being in the neighborhood fell apart under questioning. Shortly after the robbery, defendant and Thomas each bought a car for cash.

Simmons called defendant from jail on a number of occasions, telling defendant to bail him out. The conversations were recorded and easily deciphered from the ineffective code the two used. Defendant's comments implicated him in the U.S. Bank robbery.

Both Liggons and Simmons testified at trial against defendant and Thomas. Murray was undergoing a competency examination at the time.

OPINION

To succeed on a claim of constitutional ineffectiveness of counsel, a defendant must prove that his attorney's performance fell below an objective standard of reasonableness *and* that he suffered prejudice as a result. 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) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)). As for the prejudice prong, "the defendant must show that [counsel's] deficient performance prejudiced the defense . . . [which] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. An evidentiary hearing is not required unless the defendant has supported his motion with a "'detailed and specific affidavit which shows that the [defendant] had actual proof of the allegations going beyond mere unsupported assertions." Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002) (quoting Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996)).

A. Failure to Seek Competency Examination of Defendant

Defendant begins his list of allegedly ineffective acts and omissions with counsel's failure to seek a competency examination. He says that an examination was necessitated by his prior history of mental illness, but he has provided no evidence that might bear on his alleged inability to understand the proceedings against him and participate in his defense. Moreover, he has no evidence that if he did have a mental illness, his lawyer knew about it. This second requirement is critical; if counsel does not have any reason to think that his client might be impaired, he cannot be deemed ineffective for failing to seek an examination.

Defendant alleges in his reply brief that he informed the probation officer in his

presentence interview of several incidents of mental illness: he told the officer he had suffered from depression since he was in elementary school, that he had been hospitalized in a psychiatric ward in 2000 (when he would have been 16 or 17), after threatening to harm himself and his sister, where he had been prescribed a mood stabilizer and a psychotropic agent and given a diagnosis of intermittent explosive disorder and depression, that he had another bout of depression while incarcerated in 2004 and had been placed on suicide watch and that he had been placed on suicide watch by the jail again on March 9, 2009, after he was convicted. Dft.'s Reply Br., dkt. #19, at 6-7.

Considered alone or as a whole, these incidents do not suggest that defendant would have been unable to participate effectively in his own defense in this case. Even if they did, defendant has made no showing that his counsel was aware of any of this history. Defendant seems to think that it is the government's burden to show that his counsel should have known of defendant's inability to understand the criminal proceedings. For example, he argues that a "clear reading of [defendant's trial] counsel's affidavit [Aff., dkt. #15] in this matter does not address whether [defendant] had the sufficient present ability to consult with him in a reasonable degree, nor does it address [defendant's] rational understanding. In fact, counsel's affidavit could suggest that he was delusional during the trial" (because counsel averred that defendant had failed to advise counsel that he and one of the prospective jurors knew each other).

Except for defendant's interpretation of his counsel's affidavit as suggesting that he was delusional during trial, his reading of the affidavit is accurate. Counsel does not say

explicitly that defendant was capable of understanding what was going on or that defendant was consulting with counsel in a rational way. However, counsel says that in the three times he has represented defendant since 2003 "there has never been a time when I believed a competency hearing was warranted. [Defendant] never said anything or exhibited behavior that led me to question his competency." Id.

At this stage of the proceedings, it is *defendant's* burden to show that he was wrongfully convicted. He must produce the specific evidence that supports his allegation of ineffectiveness. He has not done so. He has cited nothing in the record or elsewhere to suggest that his counsel had reasonable cause to suspect that defendant might have been "suffering from a mental illness or defect rendering him incapable to understanding the nature and consequences of the proceedings against him or to assist properly in his defense." United States v. Grimes, 173 F.3d 634, 635-36 (7th Cir. 1999); see also 18 U.S.C. § 4341(a). Therefore, his first claim fails.

B. Failing to Call a Helpful Witness

This claim is a strange one. Defendant says that if his counsel had called Jarrell Murray as a witness, Murray would have testified that defendant had nothing to do with the robbery, as Murray averred in an affidavit he signed on April 14, 2011. Dkt. #427 at 9-10 (08-cv-87-bbc) (In fact, Murray seems to have signed *two* affidavits, similar in content. Dkt. #19-2 is an affidavit purportedly signed by Murray on March 11, 2011, in which Murray avers that "[i]n [submitting this affidavit], my goal is to take the blame off two innocent

people that got caught up in this whole unfortunate situation and was found guilty by a jury of their 'peers' . . . [defendant] and Mr. Corey J. Thomas was not with me during the [May 21, 2008] robbery.")

Even assuming that Murray's declarations in the affidavit are credible and would have stood up to cross examination, it is wholly implausible to think that defendant's counsel could have anticipated in March 2009 that calling Murray as a witness would help defendant's case. Nothing in the record or in defendant's motion or brief supports a finding to that effect. Murray was undergoing a competency examination; he was not around to be questioned by defendant's counsel. More important, he was still facing the same criminal charges as defendant. Until those had been resolved, he was not going to be testifying in accord with either of his affidavits.

Defendant says that counsel should have asked to have the trial continued until Murray's examination had been completed, but that suggestion does not stand up to close scrutiny. At the time defendant's trial was to start, defendant's counsel knew that if the determination were that Murray was incompetent, he would not be able to call Murray as a witness. If the determination went the other way and Murray were found competent (and the trial had been continued), presumably he would be tried with defendant and Thomas, in which case, he could hardly be expected to testify on defendant's behalf. Under either scenario, continuing the trial would not benefit defendant. Under the circumstances, the whole idea of Murray's testifying on defendant's behalf is a fantasy.

C. Failure to Ask for Mistrial on Insurance Issue

Defendant's third claim is that his counsel was ineffective because he failed to move for a directed verdict on the government's alleged inability to show that the victim bank was insured by the Federal Deposit Insurance Corporation at the time of the robbery. In his motion, defendant said that the government never introduced any evidence of insurance; in his reply brief, he acknowledges that the government introduced a certificate for this purpose but he says that the certificate was "outdated." He has offered no evidence to that effect so this claim will be denied.

D. Failure to Object to Presentence Report

Defendant contends that his counsel was ineffective because he did not object to the probation office's determination that he was a career offender under the sentencing guidelines. He says that one of his prior convictions did not have as an element the "intent to manufacture, import, export or distribute." He does not identify what conviction he thinks lacks the necessary element of distribution. The presentence report shows that his two prior drug offenses both included the element of either delivery or possession with intent to deliver. PSI, dkt. #263, at ¶¶ 85& 89.

Defendant has failed to show that his career offender status is erroneous; it follows therefore that he cannot show that his counsel was ineffective in not attacking the determination of that status.

E. Failure to Strike Juror

During jury selection, one prospective juror told the court that she worked for the Wisconsin Department of Community Corrections at the Day Report Center. Trial Trans., dkt. #465, at 17. Defendant avers in his affidavit, dkt. #20, that he told his counsel that this witness knew him because she worked in the probation office to which he reported while under state supervision. He does not say that he had had any dealings with the juror or that she would have had any reason to know anything more about him than that he had been on probation. When the prospective jurors were asked by the court whether they knew either of the defendants, no one, including the juror in question, answered yes.

Defendant's counsel avers in his own affidavit, dkt. #15, that defendant never told him that he knew one of the jurors. For the sole purpose of deciding this motion, I will assume that defendant is correct, that his counsel failed to strike the prospective juror and that his failure constituted ineffective assistance. The question is whether the failure was prejudicial to defendant.

As the government points out, defendant's status as a person on state probation was not a secret to the jury. Erin Graf testified on direct examination by the government that she was defendant's probation agent and that he had provided her his cell phone number. Trial Trans., dkt. #332, at 1-P-57. On cross examination by defendant she testified that she had given defendant a travel permit to go to Chicago. Id. at 58. The court of appeals held that this testimony should not have been permitted, but that it was harmless error in light of all the evidence against defendant. This holding undercuts any assertion of prejudice by

defendant, even assuming that defendant could prove that the juror knew that he was a probationer.

F. False Statements by Simmons and Liggons

In his motion for post conviction relief, dkt. #1, defendant contended that his defense counsel was ineffective because he failed to discover that the government's key witnesses, Michael Simmons and Lamar Liggons, had provided false statements. He fleshed out this contention in his reply brief, saying that although his counsel had cross examined both witnesses and attacked their credibility, if counsel had called Jarrell Murray to testify, Murray would have testified that both witnesses had provided false statements to the government implicating defendant and Thomas in the robbery. However, defendant never identified the statements he thinks were false, which in itself is a good reason to deny this claim.

The claim can be denied on other grounds as well. First, the usual way to counter allegedly false statements is through cross examination at trial. Defendants took advantage of this tool at trial, cross examining Simmons and Liggons extensively. Second, this claim is only a variant of defendant's argument about his attorney's failure to call Murray as a witness. For the reasons explained earlier in this opinion, at the time of trial, defendant's counsel had no reason to believe that Murray had any evidence helpful to defendant and even less reason to seek a continuance pending the completion of Murray's competency determination. This claim must be denied.

G. Failure to Provide Discovery Materials to Defendant

In his reply brief, defendant alleges that he was denied access to discovery under a discovery order entered by the court on November 13, 2008. I can find no evidence of such an order. It is true that it is the general practice for defense counsel and the United States Attorney's office to reach agreements that certain discovery documents, such as documents identifying informants, are not turned over to defendants for them to keep. Assuming that counsel agreed to the policy in this case and did not turn over all of the documents to defendant, defendant has not explained how his inability to have the evidence prejudiced him. Therefore, this claim must be denied.

Defendant adds one additional claim: because the government was charging him and his co-defendants as a criminal organization, he was entitled to have all of the discovery materials under Fed. R. Crim. P. 16(a)(1)(A) and (B). I assume he means that he should have had the materials under Rule 16(C), which applies to organizational defendants. It is immaterial; nothing in Rule 16 gives him the right to any more discovery than he was given. Rule 16(C) gives an organizational defendant the right to any statement that was "legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee or agent or [if the person making the statement] was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant." Even if defendant qualified as an "organizational defendant," which he does not, he has not identified any statement that would have fallen under Rule 16(C).

H. Counsel's Failure to Prepare for Trial

Defendant does not provide any evidence of counsel's alleged failure to prepare for trial. The record shows that counsel fought diligently for his client both in the pretrial stages and at trial, as well as at sentencing, that he was well acquainted with the government's evidence and thus prepared to object to evidence he believed was improper and that he had an uphill fight to defend his client in the face of the extensive evidence tying defendant to the bank robbery. The court of appeals summarized this evidence in concluding that it was harmless error for the court to have allowed defendant's probation officer to testify and to cut short defense counsel's cross examination of Simmons about his gang affiliation as a motivation to frame defendant and his co-defendant, Thomas.

> This evidence included the prison calls between Beck and Simmons; Thomas's prints found on the bag of kitchen gloves in the getaway vehicle; the photos in the car of Liggons and Simmons with the guns in that same getaway vehicle; and the testimony of Beck's girlfriend that five men stayed at her house the night before the robbery. Coupled with the testimony of Liggons, this is strong evidence of guilt. United States v. Jackson, 540 F.3d 578, 593 (7th Cir. 2008) (finding harmless error where the evidence of guilt "was overwhelming"); Lanier v. United States, 220 F.3d 833, 839 (7th Cir. 2000).

United States v. Beck, 625 F.3d 410, 421 (7th Cir. 2010).

I. Ineffectiveness of Appellate Counsel

It appears that plaintiff is asserting his appellate counsel's alleged ineffectiveness as a separate claim of ineffectiveness as well as a justification for his not raising his claims of ineffectiveness on appeal. I have explained why it was not necessary, or even proper, for defendant to raise those claims on direct appeal, so I will address only the assertion that

counsel was ineffective on appeal.

Defendant concedes that on appeal, his counsel challenged the government's decision to call his probation officer and the court's limitation of defendant's cross examination of Liggons and Simmons. He raises the same shopworn argument he has persisted in pursuing throughout his motion: if his counsel had taken the necessary steps to call Jarrell Murray at trial, the court of appeals might not have held that the trial errors were harmless. I will not repeat the reasons why this argument is unpersuasive. I conclude that defendant has made no showing that his appellate counsel was ineffective.

J. Summary

Defendant has not established that he is entitled to relief on his motion or even to an evidentiary hearing. His evidence falls far short of showing that his counsel's representation of him fell below an objective standard of reasonableness and that he suffered prejudice as a result. Therefore, his motion for post conviction relief will be denied.

CERTIFICATE OF APPEALABILITY

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). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

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 Prince P. Beck's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. FURTHER, IT IS ORDERED that no certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 11th day of October, 2012.

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