

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JENNIFER M. CHANEY,

Defendant.

OPINION AND ORDER

12-cv-416-bbc

10-cr-188-bbc

Defendant Jennifer Chaney has filed a motion for post conviction relief under 28 U.S.C. § 2255. She contends that her sentence should be vacated because the court sentenced her as if she had been found guilty of distributing crack cocaine; this was an error, she says, because the government had not proved that the cocaine she was distributing was crack and not powder cocaine. In a related claim, she contends that her court-appointed counsel was ineffective in representing her.

When defendant entered a plea of guilty to the charges against her, she conceded that the cocaine she distributed was in the form of crack, so she has no viable claim that she was sentenced erroneously on that ground. She says her counsel was constitutionally ineffective but she has not alleged any specific acts or omissions that might support her contention. Therefore, her motion must be denied.

BACKGROUND

Together with four other individuals, Jennifer Chaney was charged in a 13-count indictment with conspiracy to distribute cocaine base and distribution of cocaine base in violation of 21 U.S.C. § 841. She appeared for a January 5, 2011 arraignment on a summons and counsel was appointed to represent her at government expense. On June 6, 2011, she entered a plea of guilty to an information in which she was charged with conspiracy to distribute cocaine base. At the plea hearing, she agreed that the cocaine she was distributing was crack cocaine and that the amount fairly attributable to her was between 840 grams and 2.8 kilograms. She faced a minimum mandatory penalty of ten years in prison and a maximum penalty of 20 years.

The probation office found that defendant was eligible for the safety valve under U.S.S.G. § 5C1.2, which meant that the court was not prohibited from giving her a sentence below the ten-year mandatory minimum sentence. At sentencing, I found that defendant's guideline range was 87-108 months. I sentenced her to 60 months after finding that employment history, her acceptance of responsibility and her lack of criminal history, including her lack of any criminal behavior after she left the conspiracy, warranted a variance from the guidelines.

Defendant appealed her sentence unsuccessfully, arguing that in sentences for crimes involving powder cocaine and those involving crack cocaine made any sentence imposed in accordance with the guidelines unreasonable. She did not make the argument that she should not have been sentenced for distributing crack cocaine because the government had

never proved that she had been involved with the base form of cocaine.

The court of appeals' decision issued on March 15, 2011. The one-year period for filing a post conviction motion began to run 90 days later. Defendant filed this motion on June 11, 2012, within the statute of limitations. § 2255(f).

OPINION

A. Crack Cocaine Argument

In arguing that she was sentenced improperly for conspiracy to distribute the crack form of cocaine, defendant relies on DePierre v. United States, 131 S. Ct. 2225 (2011), a case in which the Supreme Court held that the term “base cocaine” in 21 U.S.C. § 841(b)(1) meant not only the form of cocaine often referred to as “crack,” but any chemically basic form of cocaine. In other words, for sentencing purposes, “cocaine base” includes not just crack, but free base and coca paste as well.

This case does not help defendant. There was never any question in her case about her involvement with free base or coca paste. The charge against her involved crack cocaine. To the extent that she is arguing that she could not be held responsible for dealing in crack unless the government proved to the court that it was crack cocaine that she was dealing, she is wrong. That would be true only if she had gone to trial; since she entered a plea of guilty and admitted that she had been dealing crack cocaine, the government was not required to put in proof that the cocaine was the crack form.

B. Ineffective Assistance of Counsel

Defendant's claim of ineffective assistance merges with her first claim; she argues that her counsel was ineffective because he did not advise her to go to trial so that the government would have had to prove the nature of the cocaine. If she thinks that she would have been better off going to trial, she is badly mistaken. Had she done so, the government would have had no trouble proving that she was dealing crack cocaine, given the quantities it had seized during a stop of a car driven by Jeff Domke as part of the conspiracy, the quantities of crack cocaine obtained by undercover officers, the unprotected information provided by co-defendant Ricky Petty (defendant's housemate and the father of her child), and the number of other co-defendants and customers involved in the trade who could have testified about the nature of the cocaine.

In these circumstances, advising defendant to go to trial would have been clear ineffectiveness. Not only would she have been bound to lose on the issue of the nature of the cocaine, she would have lost her safety valve reduction in her guidelines range, as well as her reduction for acceptance of responsibility. Her guideline range would have been 121-151 months and she would have been subject to the mandatory minimum sentence of 120 months. Instead, by pleading guilty, she had the benefit of the safety valve and the reduction for acceptance of responsibility and her guideline range dropped to 87-108 months. On top of this reduction, she was given a variance from the guidelines, which brought her sentence down to 60 months.

Defendant makes a number of other claims about her counsel's supposed

ineffectiveness but they are conclusory only. She says that her counsel failed to mitigate or challenge the statements made in the indictment and at sentencing but she does not say what counsel should have done that he failed to do. In fact, at the sentencing counsel called two witnesses and examined them thoroughly in an effort to show that defendant was forced into drug distribution by Ricky Petty and that, since leaving him, she had changed her life for the better.

Defendant says that counsel failed to investigate all aspects, witnesses and circumstances of the case, but she does not identify any aspect, witness or circumstance that he failed to investigate. Moreover, her accusation is belied by the record and the sentencing transcript in particular, with counsel's extensive examination of the witnesses whose testimony was helpful to defendant.

Defendant alleges that her counsel failed her by not aggressively invoking any legal principles stated in recent case law and guideline rules. If she is talking about his failure to require the government to prove that the cocaine was crack, I have explained why this would have been a dead-end venture. If she is talking about something else, she has not explained what it might be.

In summary, defendant has failed to show that she has any basis on which to challenge her sentence. She admitted at her plea hearing that she had been involved in the distribution of the crack form of cocaine and she has not shown that any aspect of her attorney's representation was ineffective.

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 Jennifer M. Chaney'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 27th day of June, 2012.

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