IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

12-cv-850-bbc
11-cr-66-bbc

v.

MICHAEL LUMBERT,

Defendant.

- -

After defendant Michael Lumbert was charged in a three-count indictment with distributing and possessing crack cocaine, counsel was appointed to represent him. Defendant pleaded guilty to one count of the indictment and was sentenced on December 2, 2011, to a term of 188 months, the bottom of the advisory guideline range for a career offender. He did not appeal his sentence but he has filed a timely post conviction motion under 28 U.S.C. § 2255 in which he contends that his appointed counsel was constitutionally ineffective in defending him.

Defendant alleges that his attorney did not speak for him in court, lied to him about subjects he was going to bring up in court at sentencing and failed to file motions, including a motion to require the United States Attorney to move the court to credit defendant for his testimony before the grand jury. In addition, he alleges that after sentencing, his counsel failed to answer phone calls and letters from defendant and defendant's family. The

government responded to defendant's motion on December 13, 2012, pointing out that defendant had made no specific allegations of ineffectiveness, but defendant did not file a reply. Instead, he filed an affidavit in which he averred that counsel told him he was going to ask the court at sentencing for a lower sentence on the ground that defendant had never served a sentence longer than nine months and that he was also going to try to find other sentences of career offenders in which the court had imposed a sentence below the guidelines. Despite these promises, he declined the opportunity to speak on defendant's behalf at sentencing and made no argument of any kind to the court. Dkt. #9 (case no. 12-cv-850).

OPINION

To succeed on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's representation was so deficient it 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)).

At the outset, defendant says that he could not appeal his claims of ineffectiveness

because his attorney did not speak with him after sentencing. It is not necessary to determine whether this is true or not. Ordinarily, issues that were not raised on direct appeal may not be litigated in a § 2255 motion, but this rule does not apply to allegations of ineffective counsel. In Massaro v. United States, 538 U.S. 500, 509 (2003), the Supreme Court held that a defendant challenging a federal conviction under § 2255 could raise a claim of ineffective assistance of counsel in that § 2255 proceeding, even if he had not raised the claim on direct appeal when he could have. The Court noted that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." Id. at 504. This is primarily because the trial record is rarely developed for the object of litigating such a claim; it would not reflect actions that take place outside the courtroom.

Although defendant's failure to appeal does not bar him from litigating his claim of ineffectiveness of counsel, his failure to develop his claim does. (I will assume for the purpose of this decision that defendant's claim raises a question of constitutional or jurisdictional magnitude or one that would constitute a complete miscarriage of justice, Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991), as questionable as that seems.) It is well established that a court need not hold an evidentiary hearing on a § 2255 motion unless the motion is accompanied by a detailed and specific affidavit showing that the movant has actual proof of his allegations. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996). In this case, defendant has done no more than aver generally in his affidavit that his attorney misled him into thinking he would speak for him at sentencing and lied to him

about finding other cases in which courts had sentenced career offenders below the guideline range. (With respect to his claim that his attorney should have filed a motion requiring the United States Attorney to credit defendant for his testimony before the grand jury, he is mistaken if he thinks that would have helped his case. The United States Attorney has no duty to ask the court to give a defendant such credit, unless it is part of the plea agreement, which in this case it was not. In addition, it is not a basis for a claim that a defendant's counsel refused to speak to him or to family members after the sentencing, unless the defendant is alleging that he asked counsel to take an appeal and defendant refused to do so. Defendant has not made such a claim.)

Defendant cannot succeed on his claim that counsel misled him into thinking that counsel would present a sentencing argument unless he can show that there were matters counsel could have raised on his behalf that would have made a difference in his sentence. Under Strickland, 466 U.S. at 687, a person challenging the effectiveness of his trial counsel must show both that his counsel's work fell below an objective standard of reasonableness, that is, "he made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," *and* that "the deficient performance prejudiced the defense." Id. In other words, the defendant must show that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. Id. at 694.

Defendant has not made the necessary showing. He has not identified anything in his background or in the nature of the case that his counsel could have relied upon to convince the court that he should have been given a lower sentence. As it was, he was

sentenced at the bottom of the advisory guidelines for his offense of possessing 33 grams of crack cocaine as a career offender. He does not suggest that he had any grounds for challenging his four prior offenses of delivery of cocaine that made him a career offender as qualifying offenses and that his counsel failed to raise them; his only argument is that counsel should have pointed out to the court that he had never before served more than nine months. It is true that the quantities with which defendant was charged in the four previous cases were all under five grams, but the number of previous cases gives a strong impression that defendant had not been deterred by the shorter sentences imposed on him. It is highly unlikely that if counsel had made the argument defendant's sentence would have been shorter.

The same analysis applies to defendant's allegation that his counsel promised to find cases in which the court had sentenced offenders below the guideline range. It is doubtful whether counsel could have found any from this court that involved offenders with as many prior offenses as defendant had accumulated. In any event, defendant has failed to show that he was prejudiced by his counsel's failure to make the two arguments he had alleged promised to make at sentencing. Therefore, his motion for post conviction relief must be denied.

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.

One loose end remains. After defendant filed his motion on November 19, 2012, a briefing schedule was set and the government filed a timely brief in opposition to defendant's motion. Defendant was unable to file his brief in reply, because he was in transit at the time it was due, so he requested and was granted an extension of time until February 28, 2013, in which to file the brief. Dkt. #5. On February 7, 2013, he submitted a letter, saying he would like to withdraw his motion for post conviction relief and file a complete one after he had researched the details of his claims. Dkt. #6. In a letter dated February 19, I advised defendant that he was free to withdraw the motion, but warned him that he might find his time for filing another motion had expired. On February 24, 2013, defendant wrote to the court to say that he had prepared "the paperwork for the court," by which I understood him to referring to his reply brief. Dkt. #8. On March 5, 2013, he filed an affidavit supporting his claim of ineffective assistance

of counsel. Dkt. #9. I am assuming from this filing that he does not wish to proceed with his motion to withdraw his post conviction motion.

ORDER

IT IS ORDERED that defendant Michael Lumbert's motion for post conviction relief under 28 U.S.C. § 2255, dkt. #1, is DENIED for his failure to show that he did not have the effective representation of counsel at his sentencing. FURTHER, IT IS ORDERED that defendant's motion to withdraw his post conviction motion, dkt. #6, is DENIED as moot. 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 14th day of March, 2013.

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