

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN JACQUES,

Defendant.  
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OPINION AND ORDER

12-cv-904-bbc

08-cr-51-bbc

Defendant John Jacques has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel when he was charged with the crime of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He alleges that his appointed counsel should have moved to suppress the computer seized from his house, should not have asked for a five-month extension in which to investigate the case and should have moved for dismissal of the case for Speedy Trial Act violations. He alleges that he entered a plea of guilty rather than going to trial only because he was intimidated by the length and conditions of his pretrial custody. Defendant cannot show that any of counsel's alleged errors or omissions were errors in fact. Therefore, his motion must be denied.

## RECORD FACTS

Defendant John Jacques was charged in a one-count indictment returned on April 2, 2008, charging possession of child pornography. The charge arose out of a routine investigation by an undercover police officer of online sexual exploitation of children. Defendant initiated contact with the officer, thinking he was a 14-year-old female, and engaged in sexually explicit conversation. Eventually, the online chats led to a proposed meeting with the supposed 14-year-old at a local Burger King, where defendant was arrested and taken into custody. The police obtained a warrant to search defendant's home and seized his computer, web camera and other items. They then sought and obtained a second warrant for a search of the computer. The evidence obtained from the computer led to defendant's conviction in state court for using a computer to facilitate a child sex crime. He was sentenced on May 5, 2008 to 15 years in state custody.

Defendant was arraigned in federal court on May 13, 2008. Assistant Federal Defender Erica Bierma was appointed to represent him. At a July 7, 2008 scheduling conference, she told the court that defendant would not be filing any motions. Trial was scheduled for September 2, 2008, although it appeared from the lack of any motions that defendant would be entering a guilty plea. However, on July 23, 2008, the magistrate judge held a scheduling conference at the request of defendant's counsel and rescheduled the trial for January 5, 2009 so that counsel could retain a forensic consultant and prepare for trial. The magistrate judge excluded the time from July 23 to January 5, 2009 from the Speedy Trial Act.

Defendant then decided to enter a plea of guilty, which he did on August 20, 2008. During the plea hearing, defendant admitted that he had taken steps to have the explicit images sent to him, that he knew the images were on his computer and that he intended to view them. Plea Hrg. Trans., dkt. #22 (08-cr-51-bbc), at 4, 13-14. He admitted that his receipt of the images was not accidental and that he had used a program on his computer intended to access such images. Id. at 14. He admitted that he knowingly possessed sexually explicit images and that he intended to look at them. Id. He never said that he was not guilty, that he was entering a plea only because he could not endure the conditions of his confinement, that he disagreed with his counsel about entering a plea or that he wanted her to file motions to suppress the evidence from the computer. His guilty plea was accepted and sentencing was scheduled for October 29, 2008.

On October 16, 2008, defendant's counsel filed an objection to the presentence report, saying that neither of his prior convictions triggered the ten-year mandatory minimum sentence. The probation office filed an addendum on October 22, taking the position that the prior convictions qualified as predicate offenses under 18 U.S.C. § 2252.

On October 29, defendant moved for appointment of new counsel. The motion was granted. After his new counsel refused to file a motion to withdraw defendant's guilty plea, defendant filed a motion on his own, dkt. #26 (08-cr-51-bbc), raising two issues: (1) he entered his guilty plea only because he was intimidated by the other inmates at the jail and feared injury at their hands and (2) he could not be found guilty because he looked at the images only once and then only to delete them. Id. His motion was denied on February 13,

2009, on the ground that his statements at his plea hearing refuted his claims. During the plea hearing, he had told the court he understood the charges against him, his plea was not coerced and he agreed with his counsel that his possession of illegal images could not have been accidental. Dkt. #37 (08-cr-51-bbc).

In the meantime, the probation officer had undertaken additional investigation of defendant's prior crimes and had decided defendant was correct when he argued that they were not qualifying crimes for the ten-year mandatory minimum sentence. Dkt. #39 (08-cr-51-bbc). On March 18, 2009, defendant was sentenced to 78 months in prison, with a lifetime period of supervised release to follow.

Defendant appealed and the court of appeals directed additional briefing on the legality of certain conditions of supervised release. After the parties moved jointly to remand the case for resentencing, the conditions of supervised release were modified slightly and additional findings were made about the need for the conditions. Dkt. #70 (08-cr-51-bbc). Defendant appealed but the court of appeals affirmed the conviction and sentence on June 2, 2011. Defendant petitioned for a writ of certiorari; the Supreme Court denied the petition on December 5, 2011.

#### OPINION

The test for constitutional ineffectiveness of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984). The test has two components. The defendant must show both that counsel's representation fell below an objective standard of reasonableness,

id. at 688, and that there exists a reasonable probability that the result of the proceeding would have been different had it not been for counsel's unprofessional errors. Id. at 694.

In this case, defendant's first task is to show that his counsel failed to take any action that a reasonably competent lawyer would have taken. When it comes to his claim that counsel failed to challenge the search warrant on Fourth Amendment grounds, defendant has failed completely to make the necessary showing. He has not identified any reason why the search and resulting seizure would have been subject to attack. He has not even suggested why the affidavit in support of the search warrant for the search of his home was defective or why the second warrant for the search of the computer fell short of constitutional standards. All he has done is attach the face sheet of the warrant to his motion and make the claim that the warrant was inadequate. Nothing about this sheet suggests any impropriety. To the contrary, a review of the warrant and supporting affidavit attached to the government's brief, dkt. #4 (12-cv-904-bbc), shows that the affiant set forth facts sufficient to establish probable cause to search defendant's Toshiba laptop computer for evidence of state crimes.

It is defendant's responsibility to provide a detailed and specific affidavit showing that he has actual proof of the allegations he is making that go beyond mere unsupported assertions. Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002). Defendant has not done that in this instance, which means that it is unnecessary to discuss the allegations about the inadequacy of the search warrant further.

As for defendant's claim that his counsel should have moved to dismiss the case

against him for the government's violation of the Speedy Trial Act, 18 U.S.C. § 3161, all he has alleged is that his counsel asked for a continuance of the September trial date to allow her to retain a computer forensic expert. He has not alleged any facts to support his claim that the time allowed for trial under the Speedy Trial Act had run as of July 23, 2008, which is when he says counsel should have moved for dismissal of the indictment.

Defendant adds that his counsel should have objected to the five-month continuance as unnecessarily long and more time than she needed to retain an expert witness, but again, he has alleged no facts to support his opinion that the delay was excessive under the circumstances. In any event, counsel's failure to raise such an objection does not come close to showing that she was constitutionally ineffective. Therefore, defendant's motion will be dismissed as to this claim.

Defendant's third claim is that he entered a guilty plea only because he remained in custody longer than he should have and was subjected to harsh conditions and the threat of injury from other prisoners. However, he does not say that he would have gone to trial had the conditions been less severe and the trial date had remained the original one of September 2. He says only that "a reasonable probability existed that he would have insisted on a trial." Dft.'s M., dkt. #91, at 13. This is not enough to state a claim. More to the point, he never said anything to the court at his plea hearing to suggest that he was pleading guilty because he could not tolerate his conditions of pretrial confinement. Finally, he raised this issue in a motion to withdraw his plea, dkt. #26 (08-cr-51-bbc), and appealed the denial of the motion to the court of appeals, which did not find it necessary to address the issue. He is

barred by law from raising it again unless he can show changed circumstances, which he has not done. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007) (issues raised on direct appeal may not be reconsidered on a § 2255 motion absent changed circumstances). See also Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996); Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992).

In summary, I conclude that defendant has shown no reason why his motion for post conviction relief under § 2255 should be granted.

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). In this case, defendant has not made the necessary showing, 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 John Jacques's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. 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 February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge