

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GIORGIO R. BEARD,

Defendant.  
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ORDER

12-cv-920-bbc

09-cr-139-bbc

Defendant Giorgio R. Beard has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel on appeal from his sentence. He alleges that counsel failed to appeal the sentencing court's decision to include three "recency points" in the calculation of his criminal history score. I conclude that the motion must be denied.

When defendant was sentenced in April 2010, the sentencing guidelines directed courts to add points to a defendant's criminal history score if the defendant had committed a crime within a short time of his release from custody or while on supervised release or probation, on the theory that an offender's prompt return to criminal activity was an indication of his dangerousness. Later in the same year, the Sentencing Commission voted to amend the guidelines to eliminate these points for recently committed crimes. It issued Amendment 742, incorporating its decision not to rely on such crimes in calculating an

offender's likelihood to commit more crimes in the future. That amendment took effect on November 1, 2010 and has never been made retroactive.

Defendant was indicted on September 30, 2009 on a charge of unlawfully possessing a firearm and ammunition. He entered a plea of guilty and was sentenced on April 1, 2010 to a term of imprisonment of 72 months, 12 months below the bottom of the guidelines range. He was assessed two criminal history points because he had been serving a term of extended supervision at the time he committed the charged crime and he was assessed another point for committing the offense within one year after his release from the custody of the Wisconsin Department of Corrections. When added to the points he was assessed for other criminal activity, his score was 12, putting him into criminal history category V. His trial counsel did not object to the criminal history score on the ground that it included points for recency but he did object to finding that defendant's criminal conviction for fleeing from an officer constituted a crime of violence.

Defendant appealed his conviction, arguing that fleeing from an officer is not a crime of violence. The court of appeals denied his appeal in light of Sykes v. United States, 131 S. Ct. 2267 (2011), in which the Supreme Court held that a knowing and intentional flight from law enforcement is a violent felony for purposes of a punishment enhancement under the Armed Career Criminal Act. (Although defendant was not sentenced as an armed career criminal, the courts have held that "violent felony" has the same definition under that Act as it does when used in the Sentencing Guidelines. E.g., United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008).) He did not appeal the application of recency points in

determining his criminal history score, although he says now that he asked his counsel to raise the issue and he tried to file a brief of his own on the subject but the court of appeals refused to accept it.

Defendant accuses his appellate counsel of being constitutionally ineffective for not raising the matter of the change in the guideline amendments but he has no basis on which to do so. Unless and until the Sentencing Commission determines that an amendment should have retroactive effect, it cannot be a reason for challenging a sentence imposed on a defendant before the amendment became effective. Counsel cannot be held to be ineffective for failing to argue a claim for which there is no support in the law.

In sum, defendant's motion for post conviction relief must be denied because he has not shown that he was denied the constitutionally effective assistance of counsel.

#### ORDER

IT IS ORDERED that defendant Giorgio R. Beard's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 26th day of December, 2012.

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