

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DOUGLAS E. CAMPBELL,

Defendant.

ORDER

00-C-0275-C

95-CR-0063-C-07

Defendant Douglas E. Campbell has filed a motion for a certificate of appealability, which he needs if he is to appeal the denial of his motion for postconviction relief brought pursuant to 28 U.S.C. § 2255. See 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Such a certificate shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2).

Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that “are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

Defendant states that he wishes to appeal this court's rulings on five claims: 1) his Sixth Amendment right to effective assistance was violated when his counsel failed to object to the characterization of defendant as a career criminal or argue for a downward departure because defendant's criminal history category overrepresented the seriousness of his criminal history; 2) his right to effective assistance was violated when his counsel failed to object to the quantity of drugs attributed to defendant for sentencing purposes; 3) his Fourth and Sixth Amendment rights were violated when counsel failed to move for suppression of illegally obtained evidence; 4) his right to effective assistance was violated when counsel failed to point out that the government had violated its agreement to charge defendant with one count of the indictment only; and 5) his Fifth Amendment rights were violated when the court failed to respond to grounds raised in defendant's § 2255 motion. He adds as a sixth ground, the court's refusal to hold an evidentiary hearing on his other five grounds.

In arguing his entitlement to a certificate of appealability, defendant challenges the determination I made that the age of prior convictions was irrelevant in determining the propriety of his career offender status and that his counsel was not ineffective in failing to argue for a downward departure on the ground that the career offender status over-represented defendant's actual criminal history and his likelihood of recidivism. I am persuaded that defendant is correct in contending that such an argument is not futile as a matter of law, as I

held in the order denying his § 2255 motion. In United States v. Fletcher, 15 F.3d 553, 556-57 (6th Cir. 1994), the court upheld a district court's decision to grant the defendant a downward departure after finding that the defendant's career offender status over-represented his likelihood of future criminal activity. The court of appeals noted that the defendant had argued the remoteness of the previous criminal conduct, the long intervals between his two previous crimes, the efforts he had made to overcome his drug and alcohol addictions and his extraordinary family responsibilities. It found that the district court had acted reasonably in granting a one-category departure in these circumstances.

Although defendant has the better of the argument as to the availability of a downward departure under the guidelines, he cannot convince me that he was prejudiced by his retained attorney's failure to make the argument in his particular case. Although defendant's first conviction for a crime of violence was imposed thirteen years before his involvement in the methamphetamine conspiracy, he had two more recent crimes of violence, committed only six years before his involvement. Defendant's oldest crime was for armed robbery in 1981; the second of his later crimes of violence was for aggravated assault. In both cases, defendant inflicted physical harm on a victim. In the first instance, he threw the victim to the ground and held a knife to his neck, while threatening to kill him if he did not produce all his money and drugs; in the second case, he stabbed his victim in the chest. He was still on probation for this

crime when he joined the conspiracy. Even if defendant's counsel had made the argument for downward departure, I would not have found that defendant's placement in career offender status over-represented the seriousness of his criminal conduct and entitled him to a downward departure, particularly in the absence of any evidence of unusual efforts at rehabilitation, any significant work history or assumption of family responsibilities that would bolster a contention that defendant was unlikely to offend again.

Defendant's second challenge is without merit. I explained at great length in the July 17 order why defendant was not prejudiced by his counsel's failure to contest the drug quantities. Even if all the questionable amounts are eliminated from the calculation, the remainder is sufficient to support defendant's placement in offense level 34.

There is no merit to defendant's third contention that his attorney was ineffective when he failed to challenge allegedly illegally obtained evidence. As noted in the July 17 order, even if defendant had prevailed on such a motion, I could have taken into consideration in computing drug quantities the methamphetamine found when defendant's vehicle was seized.

Defendant's fourth challenge raises several questions that require some additional discussion. Defendant claims that his attorney was ineffective for failing to protect him from an enhanced sentence under 21 U.S.C. § 841(b). As I now understand the first prong of this argument, it is that it was illegal to raise defendant's initial offense level under the Sentencing

Guidelines from 34 to 37 solely on the basis of his status as a career offender pursuant to U.S.S.G. § 4B1.1. Defendant refers to this as a “§ 841(b) enhancement,” and in a sense he is correct: pursuant to § 4B1.1, if defendant's statutory maximum sentence on his drug conviction was governed by 21 U.S.C. § 841(b)(1)(C), then his maximum possible sentence of imprisonment would be twenty years and his offense level as a career offender would be not less than 32. If, however, defendant's maximum sentence were governed by § 841(b)(1)(A) because of the amount of methamphetamine involved, then his maximum possible sentence of imprisonment would be life and his offense level as a career offender would be not less than 37.

Factoring in the point deductions that I awarded defendant at sentencing, this swing would have made a significant difference in the guideline range of imprisonment; more important, the 245 month sentence that I imposed is above the statutory maximum allowed by § 841(b)(1)(C). Thus, there is a causal connection between the amount of drugs involved in defendant's conviction and his guideline range under § 4B1.1. This seems to fall within the holding of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), which requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to the jury and proved beyond a reasonable doubt. Id. at 2362-63. It does not appear that defendant waived this particular argument by pleading guilty, since a guilty plea is knowing and voluntary only if the defendant understands all of the elements of the offense to which he is

pleading and admits to them. See United States v. Ranum, 96 F.3d 1020, 1024 (7th Cir. 1996).

Defendant, however, cannot obtain relief because he pled guilty and was sentenced before the Court decided Apprendi. The Supreme Court has not yet declared whether the rule of Apprendi should be applied retroactively; until it does, defendant cannot obtain relief on his claim. See Hernandez v. United States, ___ F.3d ___, Case No. 00-3038, 2000 WL 1253528 at *1 (7th Cir. 2000). Defendant's attorney could not have been ineffective for having failed to raise this issue at sentencing because prior to Apprendi, there was no legal support for it. Defendant is not entitled to a certificate of appealability on this aspect of his fourth claim.

Defendant also argues that the government breached the plea agreement because it promised that there would be no penalty enhancements under § 841(b). The written plea agreement contains no such clause; as I stated in my order denying defendant's substantive motion, reference to a charge under § 841(a) must incorporate § 841(b), because (b) is the clause containing all of the penalty provisions. Counsel could not have been ineffective for having failed to make the unsupportable argument now advanced by petitioner.

Additionally, when defendant sought to withdraw his guilty plea prior to sentencing, I scheduled an evidentiary hearing at which defendant testified about the various oral promises he alleged the government had made to him. This was not among them. Before the

government's witnesses could testify at the continued hearing, defendant withdrew his motion. What was left, then, was the written plea agreement, which did not limit the government's reliance on the enhanced penalties allowed by § 841(b)(1)(A). At the sentencing itself, where the issue of sentencing enhancements was squarely presented, defendant did not alert the court to the alleged existence of this oral agreement. This record belies the existence of any such oral agreement and petitioner's post-hoc attempt to lay this at the feet of his attorney is unsupported. Defendant is not entitled to a certificate of appealability on this claim.

Defendant's fifth challenge is to the court's failure to respond to a ground he raised in his § 2255 motion. This appears to be another aspect of his claim that his attorney was ineffective in failing to seek a downward departure based on the over-representation of his criminal history. Defendant argues that his 1981 Wisconsin conviction should not have been used because he was denied a direct appeal from that conviction. Unfortunately for defendant, the Court of Appeals for the Seventh Circuit has held definitively that a defendant may not use a post-conviction motion to attack the validity of a state conviction used to enhance his federal sentence. See Ryan v. United States, 214 F.3d 877 (7th Cir. 2000). So long as the prior conviction remains uncorrected by the system in which it was imposed, the enhanced federal sentence is immune from collateral attack.

Defendant argues also that because two of his crimes of violence were consolidated for sentencing purposes, they should have been counted as only one conviction for sentencing guideline purposes. He is incorrect. It is not necessary to decide whether the “related cases” treatment prescribed for computing criminal history scores, see U.S.S.G. § 4A1.2(A)(2), is even applicable to this question. Assuming that it is, defendant has not shown that his two 1988 crimes should be considered as related. Under Application Note 3 to § 4A1.2, the Sentencing Commission advises sentencing courts that “prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense”). Defendant was arrested for indecency with a child on April 29, 1988; on May 27, 1988, he was arrested for aggravated assault. Thus, even if the 1981 armed robbery conviction is disregarded, defendant has two prior violent crimes, making him eligible for career offender status.

In sum, none of defendant's claims are debatable among reasonable jurists, a court could not resolve the issues in a different manner, and defendant should not be encouraged to proceed further with them.

ORDER

IT IS ORDERED that defendant Douglas E. Campbell's request for a certificate of appealability is DENIED.

Entered this 26th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge