IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

06-C-109-C
97-CR-0053-C-01

v.

TONY L. SUTTON,

Defendant.

- -

On March 1, 2006, defendant Tony L. Sutton filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. On March 24, 2006, defendant filed a motion to amend an earlier motion he filed on March 1, 1999 (by replacing it with the March 1, 2006 motion).

This case has a lengthy procedural history. After he entered a guilty plea, defendant was sentenced in this court on December 5, 1997, for possession with intent to distribute methamphetamine. Prior to and at his sentencing, defendant was represented by attorney Thomas J. Coaty. Defendant appealed his sentence, contending that the sentence was imposed to run consecutively to a state sentence that he was serving, whereas it should have been made concurrent. On November 5, 1998, the Court of the Appeals for the Seventh

Circuit vacated defendant's sentence and remanded the case to this court, "for consideration of [the consecutive versus concurrent] issue, and any other that Judge Crabb deems appropriate." United States v. Sutton, 191 F.3d 457 (7th Cir. 1998).

Attorney Stacey Rios took over defendant's representation. On January 26, 1999, this court issued an order regarding the scope of the resentencing hearing. The order stated:

> The Court of Appeals left the scope of the resentencing hearing to Judge Crabb's discretion. . . . Sutton, by counsel, may have until February 5, 1999, within which to file a motion to expand the scope of issues to be considered on resentencing. . . . Thereafter, Judge Crabb will rule on the scope of the sentencing hearing.

Dkt. #145 at 2.

On February 10, 1999, defendant filed a motion entitled "Motion in Response to Court's Order for Notice of Defendant's Intent on Scope of Issues for Resentencing on Remand," in which he raised concerns that his former attorney had been negligent at his sentencing and argued that he would have withdrawn his guilty plea if his attorney had counseled him properly. On February 23, 1999, this court issued an order, stating:

> I have reviewed both briefs submitted by defendant, together with accompanying affidavits and exhibits, all of which are directed to defendant's effort to use the re-sentencing hearing to develop his motion to withdraw his plea of guilty. He will not be allowed to do so. He is free to challenge the validity of his plea through a post-conviction motion filed pursuant to 28 U.S.C. § 2255, but the hearing on re-sentencing will be limited to sentencing issues only.
>
> In my view, the only issue for the re-sentencing hearing is whether the court

> had any discretion to consider imposing a sentence on defendant that did not run consecutively to the sentence he was serving for revocation of his parole on June 15, 1995.

Dkt. #157 at 1-2.

On March 1, 1999, defendant filed two motions in this court. One was a motion for reconsideration of the court's February 23 order (dkt. #158). The other was entitled "Motion and Brief To Set Aside Defendant's Guilty Plea for Ineffectiveness of Trial Counsel" (dkt. #160). The court did not rule on either of these motions.

On March 5, 1999, this court held a resentencing hearing and issued an order modifying defendant's sentence so that it ran concurrently with defendant's state sentence (dkt. #163). Defendant appealed the court's March 5 order. The court of appeals affirmed the judgment on August 25, 1999, stating:

> Upon remand, Judge Crabb decided that Sutton's federal sentence should be served concurrently with the remaining portion of his state sentence. The district court refused to consider a host of other issues, some fresh and some stale, that Sutton attempted to raise on remand. Sutton now appeals the district court's failure to consider those issues.
>
> The district court resolved, in Sutton's favor, the single issue that sparked our remand. Though our order gave Judge Crabb the option to consider other issues, she was not obligated to consider any and all issues Sutton chose to raise.

United States v. Sutton, 1999 U.S. App. LEXIS 20368.

Defendant paid Rios $2,000 to pursue a § 2255 petition on his behalf. However,

some time after September 16, 2000, Rios refunded defendant's $2,000 without having pursued the § 2255 petition. On September 26, 2000, this court sent defendant a letter stating:

> This will acknowledge your letter of September 12, 2000, in which you asked about your § 2255 appeal. Apparently you have become concerned that Ms. Rios has not filed this appeal on your behalf and you ask whether the court would appoint counsel to represent you in filing a § 2255 motion.
>
> Although the law provides for appointed counsel for criminal defendants at trial and on appeal, there is no provision for providing counsel for the filing of a § 2255 motion. Only if the § 2255 motion required an evidentiary hearing would I consider appointing counsel to represent you. Therefore, if you decide to proceed without Ms. Rio's help, you will have to file your § 2255 motion on your own.

Some time in late 2000 the Wisconsin Office of Lawyer Regulation commenced an investigation of Rios's performance in connection with her representation of defendant. The investigation resulted in the discipline of Rios and the temporary suspension of her license to practice law. On March 8, 2005, the Wisconsin Supreme Court issued an order stating:

> In the Spring of 2000, [defendant] privately retained Attorney Rios to file a petition for writ of habeas corpus on his behalf, pursuant to 28 U.S.C. § 2255. The deadline for filing the motion was August 25, 2000. Attorney Rios received $2,000 from [defendant's] family to pursue this matter. [Defendant] never received a fee agreement from Attorney Rios and Attorney Rios failed to file the motion on [defendant's] behalf by the deadline. [Defendant] attempted to contact Attorney Rios after the deadline passed, but Attorney Rios refused to accept [defendant's] telephone calls.
>
> Attorney Rios apparently advised the Office of Lawyer Regulation (OLR) that her "strategy" was to purposely not file the motion on the deadline and that

> she intended to assist [defendant] in filing a *pro se* motion claiming lawyer negligence.

Office of Lawyer Regulation v. Rios (In re Rios), 2005 WI 22 (Wis. 2005).

Rios did not return defendant's legal file to him until April 2005.

A. March 1, 2006 § 2255 Motion

Defendant identifies four grounds to support his present § 2255 motion: (1) ineffective assistance at sentencing by Coaty, his first attorney; (2) breach of non-prosecution agreement by the government prior to or at sentencing; (3) this court's refusal (and appellate court's approval of the refusal) to entertain defendant's request to withdraw his guilty plea at the resentencing hearing; and (4) ineffective assistance by Rios in failing to raise appropriate issues on appeal and failing to file a § 2255 motion.

Section 2255 has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; or (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; or (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and made retroactively applicable to cases on collateral review; or (4) the date on

which the defendant could have discovered the facts supporting his claims through the exercise of due diligence.

Defendant's March 1, 2006, § 2255 motion is not timely because (1) more than one year has passed since defendant's conviction became final; (2) no government-created impediment actually prevented the defendant from filing his motion; (3) defendant is not asserting a right recently recognized by the Supreme Court; and (4) more than one year has passed since the date on which the defendant knew all the facts supporting his present claims.

Defendant argues that the doctrine of equitable tolling renders his March 2006 petition timely. Defendant's argument is unpersuasive. In the first place, it is not clear that courts have the authority to grant extensions of time from the statutory one-year filing period. In theory at least, § 2255 is subject to equitable tolling. Although the cases have not been as clear as they might have been, a close reading shows that the court of appeals has consistently held that "2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling." United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (citing Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999)). However, equitable tolling of the statute of limitations is such exceptional relief that the court of appeals has "yet to identify a circumstance that justifies equitable tolling in the collateral relief context." Modrowski v. Mote, 322 F.3d 965, 967 (7th Cir. 2003) (citing

Lloyd v. VanNatta, 296 F.3d 630, 633 (7th Cir. 2002)).

Defendant argues that "this was a case of an attorney stone-walling an ethics board while the board was trying to obtain a complaining client's files, the attorney moving out from her office without any forwarding notice, and the attorney absconding with the client's files." Dft.'s Br., dkt. #185 at 6. According to defendant, Rios's failure to give him his file prevented him from obtaining the facts necessary to prepare an adequate § 2255 motion. Defendant reasons that because he did not receive his file until April 2005, his deadline to file a § 2255 motion should be April 2006. His reasoning is flawed. He could have filed a § 2255 petition on his own in a timely manner. If he needed to include any information of which he did not have personal knowledge and could obtain only from his legal file, he should have notified this court that attorney Rios was refusing to return his file. Because I find that defendant could have proceeded with his § 2255 petition in a timely manner, I conclude that this is not an exceptional situation that merits equitable tolling. Accordingly, I will deny defendant's March 1, 2006 § 2255 petition because it was not timely filed.

B. March 1, 1999 § 2255 Motion

On March 1, 1999, defendant filed a motion entitled "Motion and Brief To Set Aside Defendant's Guilty Plea for Ineffectiveness of Trial Counsel." Defendant has now alerted the court that this motion was not ruled on. Inexplicably, that appears to be true. It is also

curious that defendant did not pursue the motion in 1999 when the court failed to act on it. Nonetheless, because this motion was timely filed and never ruled on, I will rule on it now. Although the motion was not labeled as a § 2255 petition, it is apparent that it is one and I will treat it as such.

Defendant contends that his first attorney (Coaty) provided him with ineffective assistance. The standard for assessing the effectiveness of counsel was established in Strickland v. Washington, 466 U.S. 688 (1984). To show constitutionally ineffective assistance, a defendant must prove that counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that but for counsel's objectively unreasonable performance the result of the proceeding would have been different. Id. If it is clear that prejudice did not result from counsel's act or omission, a court may deny a claim of ineffective representation without determining whether the representation was constitutionally ineffective in fact. Counsel are presumed effective. Id. at 688-89 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

1. Failure to obtain a 10-year sentence

Defendant alleges that Coaty promised him that if he pleaded guilty he would be sentenced to ten years at most (in fact defendant was sentenced to more than seventeen

years). Defendant's allegations are not sufficient to establish an ineffective assistance claim; he must do more than simply allege that his trial counsel had made certain promises to him. I will give plaintiff an opportunity to submit an additional affidavit to the court showing that he has actual proof to support his allegations. Defendant must state exactly what Coaty said to him, when, where and whether there were any witnesses to the promises.

Not only has defendant failed to adduce any evidence in support of his allegations, he has not explained the effect on his claim of his statements to the court during his plea hearing. Relevant portions of the plea hearing are excerpted below:

> THE COURT: Do you understand if I accept your plea and adjudge you guilty that you would be subject to penalties up to and including those that Mr. Wszalek went over . . . ? That is, a minimum of 10 years in prison, a maximum of life, a $4,000,000 fine, five years of supervised release?
>
> DEFENDANT SUTTON: Yes, I do understand that.
>
> * * *
>
> THE COURT: The government has agreed to recommend that you get a three point reduction in your offense level because you have accepted responsibility by pleading guilty. The government has agreed to make a motion for a downward departure. If the government does that, then if I grant it, I'm no longer bound by the 10-year mandatory minimum sentence. Then the government has agreed that there is a dispute about the amount of methamphetamine involved and we will have to determine that, but from my review of the plea agreement, the government has not made any other promises about recommended sentences. I want to make sure that you understand exactly what the plea agreement does provide and what it does not provide.

DEFENDANT SUTTON: Okay, I understand that. I just – it was my understanding that he would at sentencing, he would recommend the low end of whatever the guidelines fall under or whatever. That would be his recommendation.

THE COURT: I don't see that in the agreement. Mr. Wszalek [Assistant United States Attorney], was it part of your agreement?

MR. WSZALEK: I am taking no position as to where he should be sentenced in whatever guideline range the Court determines to be applicable.

THE COURT: So you agreed you are not going to recommend the high end and you are not going to recommend the low end?

MR. WSZALEK: Correct.

THE COURT: Do you understand that?

DEFENDANT SUTTON: Yes.

THE COURT: Okay, with that clarification then this letter does conform to your understanding of the agreement, is that correct?

DEFENDANT SUTTON: Yes, it does.

THE COURT: Okay, has anyone made any other promises to you to get you to plead guilty?

DEFENDANT SUTTON: No, Your Honor.

THE COURT: Has anyone told you you are going to get a particular sentence?

DEFENDANT SUTTON: No.

Dkt. #101, at 5, 16-17.

In response to questions from the court, defendant stated that no one had made any

promises to him other than those covered in the written plea agreement and that no one had told him he would be given a particular sentence. The presumption is that a defendant's statements to the court are true. This presumption is not overcome by mere allegations. Key v. United States, 806 F.2d 133 (7th Cir. 1986) (allegation that counsel made promises to defendant must be supported by allegations specifying terms of alleged promises, when, where and by whom such promises were made and precise identity of any witnesses to promise and even these allegations may not be sufficient to warrant evidentiary hearing if they do not overcome presumption of record). The extensive plea colloquy in which defendant participated is not intended to be a ritual without meaning. It is an opportunity to test the voluntariness of the plea and the defendant's understanding of what he is doing. If a defendant holds something back and does not answer the questions honestly, then he cannot complain if the court accepts his plea as a knowing and voluntary one. See, e.g., United States v. Rice, 116 F.3d 267, 268 (7th Cir. 1997) ("The judge told Rice that the sentence could be as high as 405 months' imprisonment; Rice did not reply that this was inconsistent with his understanding (under which the maximum is 262 months). When Rice learned that the sentencing calculations were unfavorable, he began to sing a new song. Too late, the court held — properly so."). In his affidavit, defendant will need to explain convincingly why he did not speak up at his plea hearing when he was asked specifically whether anyone had made him any promises to get him to plead guilty or had promised that

he would get a particular sentence.

2. Failure to investigate facts and interview witnesses

Defendant makes broad allegations that Coaty did not investigate his case properly, but does not explain what counsel could have learned had he investigated more thoroughly. The Court of Appeals for the Seventh Circuit has held that a mere allegation that counsel did not investigate thoroughly does not raise a claim under § 2255. Rather, a defendant must allege "sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003). Defendant has not identified any witnesses that might have given testimony favorable to him or that could have impeached the government's witnesses. He confines himself to his simple allegation that his counsel did not do anything to investigate the case. If defendant wishes to pursue this claim, he should specify in his affidavit exactly what he alleges Coaty should have investigated, what facts such an investigation would have produced and how those facts would have affected the outcome of his case.

3. Failure to file appropriate pre-trial motions

Defendant alleges that Coaty failed to file effective pre-trial motions. In particular, defendant objects to Coaty's failure to file a motion to dismiss "based on the CI agreement"

and also alleges that Coaty "consistently refused to raise the issue of the CI agreement." I presume the "CI agreement" is a confidential informant agreement defendant entered into with the government.

As for defendant's allegation that Coaty failed to file effective pre-trial motions, defendant has not specified what motions counsel should have filed and what those motions might have accomplished. Likewise, defendant has not specified what was in the confidential informant agreement that would have rendered it the subject of a successful motion to dismiss or worthy of raising later in the proceeding. Without these showings, defendant's allegation is meritless. I will allow defendant to develop this claim in his affidavit.

4. Failure to maintain adequate communication

Defendant contends that Coaty did not respond to defendant's letters and requests for legal information and refused to accept defendant's collect calls. For this claim to succeed, defendant will need to specify what legal questions he asked and when he asked them and will need to show that if Coaty had responded to his requests for information the result of the proceeding would have been different. Although defendant faces an uphill battle to prove this claim, he may submit proof of his allegations, if he has any, in his affidavit.

5. Failure to adequately object to sentencing enhancers

______Defendant contends that Coaty did not properly object to the government's motion for the court to impose sentencing enhancements based on defendant's conduct involving reckless endangerment and obstruction. Also, defendant contends that Coaty did not communicate to him the effect these enhancements could have on his sentence.

The record before the court at sentencing showed that while in Las Vegas, defendant drove off the road while driving at speeds of 50 to 60 miles an hour, went through a stop sign, went through a red light, struck a car, struck a van and collided with a brick wall. There was nothing Coaty could have argued to dissuade me that this was reckless behavior. Therefore, even if Coaty's performance was inadequate, defendant was not prejudiced because I would have imposed the reckless endangerment enhancement no matter what Coaty might have argued.

I also increased defendant's sentence because I concluded that he assisted Jeffrey Manor and Mary Rasmussen in escaping from Wisconsin. Although defendant contends that Coaty did not properly object to the obstruction enhancement, the record shows otherwise. Coaty cross-examined the government's witnesses vigorously and examined defendant's witnesses at the sentencing, in an attempt to cast doubt on the government's assertion that defendant had been involved in Manor and Rasmussen's escape. I found Manor's testimony to be credible and concluded that defendant played a part in the escape

and enhanced his sentence accordingly. Just because the outcome was not favorable to defendant does not mean his lawyer performed inadequately. A lawyer is expected to present his client's case competently, but he is not expected to win every argument.

There is no merit to defendant's contention that Coaty was constitutionally ineffective when he failed to communicate to him the effect the enhancements could have on his sentence. Even if true, the outcome of defendant's case was not affected by this alleged lack of communication. Even if defendant had fully understood the potential impact of the enhancements on his sentence, there was nothing he could have done to affect the decision to impose both enhancements. I will deny defendant's motion for postconviction relief with respect to defendant's claim that his attorney performed inadequately regarding the sentence enhancements.

6. Failure to file docketing statement and delay in transferring file

It is difficult to see how defendant was prejudiced by Coaty's alleged failure to file a docketing sheet and delay the transfer of defendant's file to the appellate attorney. Defendant contends that his "appellate rights had been compromised because of the dilatory tactics of trial counsel." Before I dismiss this claim I will give defendant an opportunity to explain in his affidavit what precise appeals rights he lost and to show that this loss was due to a delay on Coaty's part.

7. Failure to enter a conditional plea

Defendant contends that Coaty "failed to preserve any of the jurisdictional or evidentiary issues by entering an unconditional plea . . . without reserving any objections." Defendant has not stated what issues Coaty should have reserved or that he would have likely succeeded in an appeal of any such issues. To avoid dismissal of this claim defendant must specify in his affidavit exactly what Coaty failed to do and must show how he was prejudiced by Coaty's actions or omissions.

8. Failure to object to testimony

Defendant contends that Coaty should have objected to the testimony of Mary Rasmussen and Investigator Russell Cragin at his sentencing because their testimony violated discovery rules. Even if defendant is correct, his argument fails because I find that he was not prejudiced by the testimony of either party. Cragin testified regarding defendant's cooperation with the investigation and regarding defendant's role in Manor's and Rasmussen's escape. Despite Cragin's opinion that defendant did not fully cooperate with the investigation at all times, I still gave defendant a sentence reduction for substantial assistance.

Rasmussen testified about her and Manor's escape from Wisconsin. I increased defendant's sentence because I concluded that defendant assisted in Manor's and

Rasmussen's escape. However, the testimony of Cragin and Rasmussen regarding the escape was not critical to my decision. I would have concluded that defendant participated in the escape even if Cragin and Rasmussen had not testified at all, or if their testimony had been striken, because it was Manor's testimony that I found most helpful and convincing.

I will deny defendant's motion for postconviction relief with respect to defendant's claim that his attorney performed inadequately when he failed to object to the testimony of Cragin and Rasmussen.

C. Motion to Amend

Defendant argues that his § 2255 petition of March 1, 2006, should be construed as an amendment to his March 1, 1999, motion. Federal Rule of Civil Procedure 15(a) provides that "a party may amend [its] pleading once as a matter of course at any time before a responsive pleading is served" and that otherwise amendments are permissible "only by leave of court." In addition, the rule provides that "leave shall be freely given when justice so requires." In the present case, defendant could amend the 1999 motion only by leave of court. A party's motion to amend a pleading may be denied if the amendment would be futile. See, e.g., Michaels v. Mr. Heater, Inc., 2004 WL 1234122 (W.D. Wis. June 1, 2004). Granting defendant leave to amend in the present case would be futile. Therefore, I will deny defendant's motion.

Fed. R. Civ. P. 15(c) provides that "an amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Defendant's purported amendment (the March 1, 2006 petition) sets forth four grounds for relief. Three of those grounds (breach of non-prosecution agreement by the government; court's refusal to entertain defendant's request to withdraw guilty plea at resentencing hearing; and ineffective assistance by Rios) are unrelated to the "conduct, transaction, or occurrence" set forth in the 1999 motion (which dealt only with Coaty's alleged ineffectiveness). Therefore, these three claims would not relate back to the 1999 filing date. Because these claims would be dismissed as untimely, it would be futile to allow defendant to amend the 1999 motion to include them.

The fourth claim in defendant's 2006 petition, regarding Coaty's ineffectiveness, does arise out of the "conduct, transaction, or occurrence" set forth in the 1999 motion. However, most of what defendant alleges in the 2006 motion concerning Coaty is duplicative of what he wrote in the 1999 motion and thus does not warrant an amendment. There are only two allegations against Coaty that were raised for the first time in the 2006 petition. The first concerns Coaty's alleged ineffectiveness in failing to raise the matter of a concurrent sentence. Even if Coaty's performance regarding this issue was inadequate, defendant cannot show prejudice because the matter was addressed and his sentence was

modified in a separate appeal. Second, defendant alleges in the 2006 petition that Coaty failed to challenge "the wrong year's guidelines application." At the sentencing hearing in December 1997, I told defendant I was adopting the guidelines calculations prepared by the Probation Office using the 1995 manual (dkt. #134 at 110). Defendant's sentence would have been no different if I had used the 1997 manual, so defendant cannot show that he was prejudiced by the use of the 1995 manual. Even if I granted defendant permission to amend his 1999 motion to include these two allegations against Coaty, the allegations would be dismissed. An amendment would be futile and the motion will be denied.

D. Motion for Reconsideration

On March 1, 1999, defendant also filed a motion for reconsideration which the court did not address (dkt. #158). In the motion, defendant asked the court to reconsider its order narrowing the scope of the re-sentencing hearing (dkt. #157). Had I ruled on defendant's motion prior to the re-sentencing hearing on March 5, 1999, I would have denied it. In the interest of tying up the loose ends, I will rule on defendant's motion for reconsideration now and will deny it as moot.

ORDER

IT IS ORDERED that

1. Defendant Tony L. Sutton's motion for postconviction relief filed on March 1, 2006, is DENIED as untimely.

2. Defendant's motion for postconviction relief filed on March 1, 1999, is DENIED with respect to defendant's claims that his sentence is unconstitutional because (1) his attorney did not adequately object to sentence enhancements and (2) his attorney failed to object to the testimony of Mary Rasmussen and Investigator Russell Cragin. On all other claims, defendant may have until May 12, 2006, to submit an additional affidavit.

3. Defendant's motion to amend the March 1, 1999 petition filed on March 24, 2006, is DENIED because the amendment would be futile.

4. Defendant Tony L. Sutton's motion for reconsideration filed on March 1, 1999, is DENIED as moot.

Entered this 18th day of April, 2006.

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