IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

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

v.

TONY L. SUTTON,

Defendant.

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In response to this court's order of April 18, 2006, defendant Tony L. Sutton has filed a supplemental affidavit concerning his trial lawyer's alleged ineffective assistance. In his motion for post-conviction relief filed on March 1, 1999, defendant raised eight different grounds for concluding that his trial lawyer, Thomas Coaty, provided him ineffective assistance. In the April 18 order I denied defendant's motion as to two of those grounds (failure to adequately object to sentencing enhancers and failure to object to testimony) and allowed him to file an affidavit with supplemental information regarding the remaining six grounds, although I warned him that he faced an uphill battle to prove his claim. I will deny defendant's motion for post-conviction relief in its entirety because nothing in his

supplemental affidavit indicates that the sentence he is serving is illegal in any respect.

As I explained in the April 18 order, 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

In the April 18 order I advised defendant that he would need to explain why he stated at his plea hearing 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 explanations defendant set forth in his supplemental affidavit are not compelling. First, defendant contends that he did not speak up at the plea hearing concerning his attorney's alleged promise that he would be sentenced to no more than ten

years because he feared that if he did so he would lose personal responsibility points. Second, defendant suggests that he did not speak up at the plea hearing because he did not think it was appropriate to reveal to the court that some form of agreement had been reached between the parties outside of court. Defendant's line of reasoning ignores the very purpose of the questions I asked him at his plea hearing. As I stated in the April 18 order, those questions are not intended to be a ritual without meaning; their purpose is to ensure that defendant is fully aware of the potential ramifications of entering a guilty plea. If a defendant deliberately chooses not to avail himself of the opportunity to discuss any concerns at his plea hearing, he cannot later complain that his attorney is responsible for an undesirable sentence. The system has certain procedural safeguards to ensure that defendants are not misguided. Defendant disregarded these safeguards and now he has no recourse.

Moreover, I note that even if defendant had not entered a guilty plea (which he suggests he did only because Coaty assured him his sentence would not exceed ten years), defendant has not adduced any evidence to suggest he would have gone to trial and either been acquitted or received a lesser sentence.

2. Failure to investigate facts and interview witnesses

Defendant argues that Coaty did not fully investigate Jeff Manor's and Mary

Rasmussen's stories implicating defendant in their escape. In particular, defendant is concerned that Coaty did not explore alleged contradictions in Manor's testimony of September 1994 and April 1995. Besides defendant's general suggestions that he had no involvement in the escape, he has not pointed to any concrete evidence to impeach Manor's and Rasmussen's testimony. I am not persuaded that Coaty could have discovered any useful information to discount the testimony. Defendant insists that Coaty should have discovered "the ultimate disposition of the alleged vehicle, by way of records of its seizure and impoundment (***or lack of any such record to show it never existed***)." (Dft.'s Supp. Aff., dkt. #188 ¶ 10). Even if Coaty had produced such evidence it would not have outweighed Manor's and Rasmussen's testimony about defendant's participation in their escape or changed the outcome of defendant's case.

3. Failure to file appropriate pre-trial motions

Defendant has three complaints against Coaty in this regard. First, defendant argues that Coaty should have corrected the pre-sentence report. This argument is without merit because defendant does not state what was wrong in the report and how a correction might have affected the outcome of his case. Second, defendant complains about Coaty's failure to object to the sentence enhancers. I already addressed and dismissed this claim on page 14 of the April 18 order, noting that there was nothing further Coaty could have done to

dissuade me from imposing the enhancers. Defendant's third argument is difficult to follow. He appears to believe that in exchange for cooperating with the government he should not have been prosecuted and Coaty should have pursued this defense. Defendant has produced no evidence that the government promised not to prosecute him. Therefore I cannot conclude that Coaty erred in not pursuing this defense.

4. Failure to maintain adequate communication

Defendant's chief complaint regarding Coaty's failure to communicate with him is that defendant missed the opportunity to review "discovery materials" earlier and to gather evidence to show that he was not involved in Manor's and Rasmussen's escape. This argument fails because defendant once again failed to identify what evidence he would have produced and how it would have altered the outcome of his case.

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

Defendant's argument that Coaty should have told the appellate lawyer what issues to raise on appeal (including Coaty's own ineffectiveness) is meritless. That is not the trial lawyer's job. As for defendant's argument that if Coaty had delivered his files to the appellate lawyer sooner, then "more time could have been devoted to addressing the merits of [his] appeal," Dft.'s Supp. Aff., dkt. #188 ¶ 11, defendant has not shown what evidence

would have been discovered or how the outcome of his case would have been different if his appellate lawyer had received his file sooner than she did. The bare allegation that his trial lawyer is somehow responsible for the outcome of his appeal is unfounded.

6. Failure to enter a conditional plea

In support of his argument that Coaty erred in advising him to enter an unconditional plea, defendant states that "It seemed to me then and now that Attorney Coaty could have made some reservation of rights about the plea, that there was some kind of plea agreement, even if we could not explicitly make a public record about an informant deal to prosecute or not made with the governments." (Dft.'s Supp. Aff., dkt. #188 ¶ 11). Although this statement is far from clear, defendant appears to be revisiting his argument that he had a secret agreement with the government that it would not prosecute him. Without any evidence of such an agreement, I cannot conclude that Coaty provided ineffective assistance when he failed to pursue this argument on defendant's behalf.

ORDER

IT IS ORDERED that

1. Defendant Tony L. Sutton's motion for post-conviction relief filed on March 1, 1999, is DENIED because he has not shown that he is in custody illegaly.

2. The clerk of court is directed to close the file.

Entered this 14th day of June, 2006.

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