

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC GODWIN,

Defendant.

ORDER

00-C-0538-C

98-CR-0045-C-03

Defendant Eric Godwin has filed a timely motion to vacate his sentence and grant him a new trial, pursuant to 28 U.S.C. § 2255, and for appointment of counsel to represent him. Since filing his first motion, he has filed a motion to supplement and add additional information pursuant to Fed. R. Civ. P. 15(a). I will consider the supplemental information together with the original motion.

Defendant's motion addresses two concerns: the alleged ineffectiveness of his trial counsel and the insufficiency of the indictment brought against him. In support of his contention that he was denied the effective assistance of counsel, defendant alleges that his court appointed counsel never filed any motions on his behalf, did not have access to

potentially exculpatory information, did not have access to the presentence investigation reports of defendant's co-defendants, and did no outside investigation.

In order to prevail on a claim of ineffectiveness of counsel, a defendant must show both that his attorney performed below an objective standard of reasonableness *and* that there is a reasonable probability that the results of the proceeding would have been different had counsel performed in a professional manner. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). Even if I assume that defendant could prove his allegations that his counsel failed to perform reasonably, defendant has not shown that a harder working lawyer might have achieved a better result. He has said only that “had [his] attorney pursued a reasonable investigation, [defendant] would have had access to, and consultation about, evidence that tended to prove he was not guilty of the charge. Armed with this evidence, there is at least a reasonable probability that [defendant] would have chosen to go to trial.” This is far too vague an allegation to require the holding of an evidentiary hearing. To go forward on this claim, defendant will have to identify with more specificity how a more intensive investigation would have produced potentially exculpatory evidence that would not only have caused him to go to trial but would have created a reasonable probability that he would have been found not guilty or would have received a shorter sentence had he been convicted. See Hill v. Lockhart, 474 U.S. 52, 59 (1986); United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991)

(finding that if Rodriguez had proceeded to trial instead of pleading guilty, he would only have delayed sentencing process).

Because I am giving defendant an opportunity to supply more information concerning his challenge to the indictment, I will give him a second chance to advise the court of any specific examples of exculpatory evidence his counsel could have obtained or any motions he might have filed on defendant's behalf that could have changed the outcome of the case against defendant. (I cannot consider motions to suppress evidence in this connection; a lawyer's failure to file a motion to suppress evidence is not the kind of failure that will support the grant of a motion to vacate a sentence. See Holman v. Page, 95 F.3d 481, 490-92 (7th Cir. 1997).)

In support of his attack on the indictment, defendant argues that the indictment is defective for two reasons. First, it does not allege criminal intent and for that reason does not properly state an offense against the United States. It may be that defendant is using a motion prepared for someone else, because the indictment returned against him charges him explicitly with “knowingly and *intentionally*” conspiring with others to possess with *intent* to distribute cocaine base and with agreeing to knowingly and *intentionally* distribute cocaine base. The wording of the indictment does not bear out defendant's contention that the “court may only guess whether the grand jury received evidence of, and actually passed on, petitioner's intent. This court may never know if the grand jury would have been willing to ascribe[] criminal intent

to [defendant].” Second, defendant contends that the indictment is defective because it does not state all the elements of the crime. He does not explain what element he thinks is missing from the indictment and I cannot make it out from his motion to supplement. To insure that defendant has a fair chance to be heard on this claim, I will give him an opportunity to submit a written explanation of the alleged deficiency in the indictment.

ORDER

IT IS ORDERED that defendant Eric Godwin may have until September 29, 2000, in which to supplement his claims that he was denied the effective assistance of counsel at trial and that the indictment returned against him was constitutionally deficient. I will reserve a ruling on defendant's request for appointment of counsel until I have determined whether defendant has stated any claims in his § 2255 motion that require an evidentiary hearing.

Entered this 8th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge