IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

00-CR-0007-C-02

v.

VINETTE B. CROWLEY,

Defendant.

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Defendant Vinette Crowley has filed a timely motion pursuant to 28 U.S.C. § 2255, challenging her September 5, 2000 conviction for violation of 21 U.S.C. § 846 (attempting to possess with intent to distribute methamphetamine) and her resulting sentence. She challenges her conviction, alleging that the government induced her plea illegally by telling her that it would recommend a sentence of 70 months and never making such a recommendation, and she challenges her sentence, alleging that she was sentenced under the wrong guidelines manual. She contends that she was denied constitutionally adequate representation when her trial counsel did not object to the government's failure to keep its promise or to the use of the wrong manual.

I conclude that defendant has failed to show that she was denied adequate

representation with respect to her claim that the government made a promise to her about her sentence but that she has made the showing with respect to her claim that she was sentenced under the wrong guidelines manual. Therefore, I will grant her motion as to her second claim and schedule a re-sentencing hearing.

For the purpose of deciding defendant's motion, I find the following facts from the record.

RECORD FACTS

The grand jury returned an indictment against defendant Vinette Crowley on January 13, 2000, charging her with three counts of drug-related activity. Count 1 charged defendant with conspiracy to possess methamphetamine with intent to distribute and to distribute methamphetamine from a period running about November 1994 to on or about February 27, 1998; count 2 charged her and her two co-defendants with knowing and intentional possession of methamphetamine with intent to distribute on or about January 8, 1997, and count 3 charged the same defendants with attempt to possess with intent to distribute on or about June 30, 1997.

Defendant was arrested the day after the indictment was returned. On June 9, 2000, she and her court-appointed attorney executed a written plea agreement with the government in which defendant agreed to plead guilty to count 3 and the government agreed

it would dismiss counts 1 and 2, recommend a three-level reduction in the sentencing guideline calculations for acceptance of responsibility and a two-level reduction for minor participation in the scheme and recommend to the court that it find that the offense behavior included approximately 850 grams of methamphetamine.

On the same day that defendant signed the plea agreement, she appeared in court and pleaded guilty. The probation officer prepared a presentence report in which she recommended that the court find that the offense behavior involved 4,381 grams of methamphetamine, for an offense level of 34, that defendant receive a two-point enhancement for possession of a gun in connection with the offense (because it was reasonably foreseeable to her that her husband would have one and use it when he was distributing drugs) and that she receive a two-level reduction for being a minor participant because she was being held responsible for the entire quantity of methamphetamine distributed by defendant and her two co-defendants. In determining the offense level for the amount of methamphetamine, the officer used the 1998 guidelines, which were the ones then in effect. Defendant objected to the drug quantity and the gun enhancement, but said nothing about the use of the 1998 guidelines. The government objected to attributing 4,381 grams of methamphetamine to defendant, noting that defendant should be held accountable for 850 grams in approximately nine shipments that Kenneth Cowen had sent defendant's husband between Christmas 1996 and February 1998 but not the 3,180 grams that

defendant's husband obtained from Thomas Walker between November 1994 and June 1995. The government said nothing about the use of the 1998 guidelines.

In an addendum dated August 23, 2000, the presentence writer agreed that the drug quantity should be 850 grams, but withdrew her recommendation for a reduction based on defendant's minor participation in the offense because defendant was being sentenced only for her involvement in the arrangements for the packages from Kenneth Cowen and, as to that conduct, defendant was not a minor participant. Under the 1998 guidelines, the resulting base offense level was 32. Had the probation officer used the 1995 guidelines, the base offense level would have been 30. The probation officer continued to support a gun enhancement.

Neither the parties nor the presentence writer recognized the fact that the 1995 guidelines should have been used because the offense to which defendant had pleaded guilty ended in June 1997, before the proposed increases for the offense levels for methamphetamine possession took effect.

Defendant was sentenced on September 5, 2000, to a term of imprisonment of 97 months. I agreed with the probation office that the amount of methamphetamine attributable to defendant should be 850 grams and that defendant should not receive a reduction for minor participation because she could not be considered a minor participant with respect to the 850 grams. I disagreed with the recommendation that defendant receive

a two-level gun enhancement because I could not find that she could have reasonably foreseen that her co-defendant husband would be using one in connection with the offense. I used 32 as the base offense level for 850 grams of methamphetamine. With a three-point reduction for acceptance of responsibility, defendant's offense level was 29. She was in criminal history category II; the resulting guideline range was 97-121 months. I sentenced defendant at the bottom of the range.

Defendant appealed from her conviction and sentence but failed to persuade the court of appeals that any error had occurred. She was represented on appeal by the same lawyer who had represented her in this court. Counsel never raised the use of the 1998 guidelines or the alleged 70-month sentence promised by the government as issues on appeal. The court of appeals' mandate issued on April 22, 2002. Defendant filed this motion on March 31, 2003.

OPINION

Section 2255 is not intended to be a substitute for direct appeal. Theodorou v. United States, 887 F.2d 1336, 1338 n.2 (7th Cir. 1989). It cannot be used to reargue issues that were raised on direct appeal (except in the unusual case in which a prisoner can show changed circumstances), non-constitutional issues that could have been raised on direct appeal but were not or constitutional issues that were not raised on appeal but for which the

prisoner can show cause for the procedural default and consequential prejudice. Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992). Although non-constitutional issues cannot be raised, they can be evidence of ineffective assistance of counsel, which is a constitutional issue that can be raised. Id. n.1.

Defendant has brought both of her challenges as subsets of a claim of ineffective assistance of counsel. This is necessary for her claim of erroneous sentencing because sentencing errors are not constitutional issues that could otherwise be raised in a § 2255; it is necessary for her claim of an unkept governmental promise as well, even though the claim is a constitutional one, because it is the only way that she can show cause and prejudice for her procedural default on this claim. I note that it seems decidedly odd to start out by making the determination whether a person has been denied constitutionally adequate representation. Although this determination must be made in order to decide whether a movant has made the threshold showing of a claim that can be heard in a § 2255 motion *and* whether she has shown the requisite cause and prejudice that will permit the court to get to the merits of the claim, it is also the very claim that is at issue on the motion. However, that is the procedure a court must follow.

A successful claim of ineffective assistance of counsel requires a showing that trial counsel's performance was objectively deficient and that the deficient representation caused prejudice to the movant. Strickland v. Washington, 466 U.S. 668 (1984). Defendant's first

claim rests on her assertion that her counsel never objected on her behalf when the government failed to keep the promise that allegedly induced defendant's plea. This failure to object could not be inadequate representation if the government never made such a promise, so defendant must start by showing that it did.

Setting aside the unlikelihood that in this district the government would have made a promise to recommend a particular sentence when doing so is frowned on by the court, the record refutes defendant's assertion. It is devoid of any evidence that might support defendant's claim. See Key v. United States, 806 F.2d 133 (7th Cir. 1986) (movant alleging that counsel made promises to him must support allegation with identification of specific terms of promises, when, where and by whom such promises were made and the precise identify of any witnesses to promise and even those allegations may not be sufficient to warrant evidentiary hearing if they do not overcome presumption of record). Defendant has advised the court that she "believes" that tape recordings kept at the Dane County jail would support her allegation that the government made promises of a 70-month sentence to her. She has been unable to obtain the recordings. However, but she could have taken the simple step of swearing to an affidavit, setting forth a detailed description of the time, place and circumstances of the alleged promise. She did not do this.

Although defendant alleges now that the government promised her something it did not deliver, defendant told the court at her plea hearing that the plea agreement she had

signed incorporated all of the promises that had been made to her by anyone to persuade her to plead guilty. She never mentioned the omission of the promise to recommend a 70-month sentence, although she had the plea agreement in front of her while she listened to the government summarize it in detail in open court. Her failure to raise the point when she had the chance undermines the legitimacy of her present claim.

Moreover, to prevail on a claim of prejudice arising out of a guilty plea, a defendant must show that her counsel's ineffective performance affected the outcome of the plea process. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial," Hill v. Lockhart, 474 U.S. 52, 59 (1970); Galbraith v. United States, 313 F.3d 1001, 1008 (7th Cir. 2002) (in context of guilty plea, prejudice requires showing that movant would not have pleaded guilty in absence of counsel's deficient performance), and she must show a strong likelihood that she would have been found not guilty. United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991) (defendant must show more than that he would not have pleaded guilty if he had received correct advice but must show likelihood that he would not have been convicted and given sentence at least as severe as he received as result of plea agreement); Gargano v. United States, 852 F.2d 886, 891 (7th Cir. 1988) (same). Defendant has alleged that she would not have pleaded guilty had the government not promised her a 70-month sentence

but she has never made the corollary assertion that she would have insisted on going to trial and she has not made any effort to show how she would have fared better had she done so.

I conclude that defendant has failed to show that she entered her guilty plea without an adequate understanding of the consequences of her plea. Therefore, counsel's failure to raise this claim on her behalf could not have prejudiced her. Without prejudice, she has no constitutional claim of ineffective assistance of counsel on this issue. Strickland, 466 U.S. 680.

Defendant's second claim has considerably more substance. Her sentence was calculated inaccurately when the probation officer relied on the 1998 guidelines manual to determine the offense level for offense conduct that ended on or about June 30, 1997, more than four months before the increase in the methamphetamine offense levels took effect. Using the 1998 guidelines contravened the instructions in U.S.S.G. § 1B1.11, Application Note 2, that "the last date of the *offense of conviction* is the controlling date for *ex post facto* considerations." The result was that defendant received a longer sentence than she would have. Her adjusted guideline range was 97-121 months compared to the 78-97 month guideline range that should have been used.

It was objectively unreasonable for her counsel to overlook the error in the use of the guidelines manual. It could not have been a strategic decision or decision made in the exercise of reasonable professional judgment. Cf. Strickland, 466 U.S. at 690 (strategic

choices made after thorough investigation of law and facts are "virtually unchallengeable"). Although the probation officer made the original error, it was counsel's obligation to review the presentence report carefully and thoroughly. That the error prejudiced defendant is indisputable. Despite the fact that she might have received the same sentence she did had she been sentenced at the high end of the proper range, the likelihood is that she would have received a lower sentence. In any event, she was entitled to be sentenced on the basis of correct information. The Supreme Court has held that "any amount of actual jail time has Sixth Amendment significance." Glover v. United States, 531 U.S. 198, 203 (2001) (rejecting holding in Durrive v. United States, 4 F.3d 548 (7th Cir. 1993), that "prejudice" does not result from minor errors in guidelines ranges).

Having shown that she was not provided constitutionally adequate representation, defendant has demonstrated both that she is raising a constitutional issue in her § 2255 motion and that she has good cause for not raising her claim on direct appeal. Defendant's trial counsel represented her on appeal; courts do not expect that lawyers will raise their own inadequacies as a ground for appeal. Prewitt, 83 F.3d at 816 (having same attorney on trial and appeal enough to show cause for failure to raise issue of ineffectiveness of trial counsel on appeal); see also Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993) (as practical matter, person who has same counsel at trial and on appeal cannot argue ineffective assistance of counsel as a ground for reversal of his conviction on appeal). Defendant has

shown prejudice by showing the difference in sentencing ranges.

I conclude that defendant has shown that with respect to her sentencing guidelines claim, she was denied the effective assistance of counsel and prejudiced as a result. Accordingly, I will grant her motion as to this claim and schedule the case for re-sentencing.

ORDER

IT IS ORDERED that defendant Vinette B. Crowley's motion for vacation or modification of her sentence, brought pursuant to 28 U.S.C. § 2255, is GRANTED on her claim that her attorney did not provide constitutionally adequate assistance to her with respect to the use of the proper sentencing guidelines manual and DENIED on her claim that he provided inadequate representation by failing to raise a claim that the government had promised her a 70 month sentence and had failed to keep its promise. The clerk of court is directed to schedule this matter for re-sentencing.

Entered this 29th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge