IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-0918-C
01-CR-0032-C-03

v.

ROBERT D. SUTTON,

Defendant.

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Defendant Robert D. Sutton has moved to alter or amend the judgment entered in this case on April 27, 2005, denying his motion for relief pursuant to 28 U.S.C. § 2255. He wants the court to reconsider five of the issues he raised in his motion; he intends to appeal the remaining issues.

Defendant contends that the court erred in finding that his trial counsel was not ineffective for improperly challenging the admissibility into evidence in the federal court proceeding of a statement made to a Milwaukee police detective in connection with the investigation of a robbery of a tavern. (Issue I in defendant's § 2255 motion.) He says that the court erred in finding that he had admitted to the detective that he had participated in

the robbery, that he had used his gun and that Angela Cramer had acted as the getaway driver for the robbery and the court erred when it said that his trial counsel had not objected to the introduction of the statement. In fact, his counsel did object to the admission of the statement; it was error for the court to overlook that point. However, the correction undermines his assertion that his counsel was ineffective in this respect. In fact, a review of the transcript of the final hearing, dkt. #185 at pp. 42-51, shows that counsel argued vigorously to keep the statement out of evidence. The fact that he lost the argument does not mean that he was ineffective.

Defendant continues to argue that he never made the statement attributed to him by the Milwaukee police. I assume that he is arguing that it was error for the court to allow the statement into evidence. However, as I noted in the April 26, 2005 order denying defendant's motion, it is difficult to suppose that a motion to suppress would have succeeded in this court when defendant's state trial counsel had abandoned such a motion after raising it in the state court action. If the statement was one that could have been suppressed, why would defendant have abandoned his challenge to it and entered a plea of guilty to the tavern robbery in state court? (Defendant argues that he entered an Alford plea and not a guilty plea; an Alford plea *is* a guilty plea. It differs from an ordinary plea of guilty only because it allows a defendant to plead guilty without admitting the conduct underlying the charge against him.) In any event, the statement was only one piece of a whole tapestry of

evidence that the government had stitched together to show defendant's guilt in this court. He was not prejudiced by his attorney's failure to keep out the evidence of the statement. Even if it had been excluded, the jury would have found him guilty on the basis of all the other evidence adduced against him. Thus, even if it were error for the court to have admitted the statement, it was an error that caused defendant no prejudice.

Defendant contends that the court erred in deciding his Issue IV without deciding whether his counsel was ineffective for failing to request a limiting instruction with respect to Melissa Quamme's testimony about firing a gun in the country. I did overlook this ground for relief in the April 26 order, but the omission makes no difference. There was no reason to give a limiting instruction; the testimony was not evidence of a prior bad act but evidence that defendant's gun was a real gun.

Defendant thinks his counsel should have asked that the "dialogue be stricken as to Quamme and Cramer." Mot., dkt. #257, at 2. Apparently, he is alleging that the government disobeyed a court order when it introduced Cramer's testimony about the firing of the gun. If so, he is mistaken. The "order" to which he seems to be referring was not an order but a discussion about the government's obligations to turn over evidence favorable to the defendants. Trial Trans. 3-B-158. I did not tell the government that it had to turn over evidence about the firing of the gun; Melissa Quamme had already testified to this and had said that defendant and Angela Cramer were with her when the gun was fired.

Obviously, defendants were aware at that time that Cramer might testify to the firing of the gun.

Even if there had been an order in place, requiring the government to turn over all of its evidence regarding the firing of the gun in the summer of 1997, the government's alleged violation of such an order would not constitute a ground for overturning defendant's conviction. To prevail on a § 2255 motion, defendant would have to show that he has been denied a constitutional right. Brady v. Maryland, 373 U.S. 83 (1963), holds that it is a violation of due process for the government to fail to turn over evidence favorable to the defendant but the evidence about the firing of the gun does not fall into the category of favorable evidence. To the contrary, it incriminates defendant by helping to show that the gun used in the robberies was a real gun and that it was associated with defendant. If defendant is arguing that the Jencks Act required the government to turn over Quamme's and Cramer's statements to him, he is wrong. The statements were oral, not recorded, and therefore are not covered by the requirements of the Jencks Act.

Defendant asks for reconsideration of Issue V, in which he argued that trial counsel was ineffective for failing to object to the insufficiency of the government's evidence to establish that defendant had used a firearm in violation of 18 U.S.C. §924(c)(1) and (2) (use of firearm in connection with crime of violence or drug trafficking). In reviewing the original "Issues" defendant raised in his motion, it appears that defendant's motion for

reconsideration is directed at Issue VI rather than Issue V. He does not seem to be arguing a lack of evidence that the guns used in the robberies were real (Issue V) but that the government failed to prove that he used a gun himself or knew that his conspirators would use guns in the robberies (Issue VI). Whichever issue he is attacking, he fails to show any error requiring reconsideration. He cannot show that either his trial counsel or appellate counsel was ineffective for failing to object to matters on which they could not have prevailed.

Defendant wants reconsideration of Issue VII. He continues to argue that his trial counsel was ineffective in not objecting to the changes in testimony of certain witnesses who had testified differently before the grand jury. As I noted in the April 26 order, his trial counsel subjected the witnesses to vigorous cross-examination in the differences between their testimony at trial and before the grand jury. His failure to convince the jury that the witnesses were lying at trial is not a reason to find him ineffective.

Defendant's final contention is that the court erred in deciding that the government did not violate 18 U.S.C. § 201 when it offered plea agreements to witnesses Pete and Cramer after they had lied before one grand jury. He believes that the government should not be allowed to turn a blind eye to such conduct by giving a witness immunity from prosecution for perjury in return for her promise to testify truthfully at trial. His belief is misguided. The government can make such agreements if it believes they advance the public

interest by allowing prosecution of more serious offenders, so long as it does not underwrite perjured testimony at trial. The government did not hide from the trial jury the fact that both Pete and Cramer had lied before the grand jury; it was up the trial jury to decide whether to believe Pete and Cramer in light of the fact that the two had lied in the past. Defendant has no basis for arguing that his counsel should have moved to strike the testimony of these two witnesses. Such a motion would have been frivolous.

ORDER

Defendant Robert D. Sutton's motion for reconsideration is DENIED.

Entered this 31st day of May, 2005.

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