IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

04-C-0885-C
01-CR-0032-C-01

v.

MICHAEL L. BROWN,

Defendant.

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Defendant Michael L. Brown has filed a "Memorandum in Support of Motion to Vacate, Set Aside or Correct Sentence" that I construe as including a motion to vacate, set aside or correct his sentence, brought pursuant to 28 U.S.C. § 2255. He contends that his counsel was ineffective in a number of respects: (1) failing to bring defendant's psychopathic condition and use of medication to the trial court's attention; (2) failing to investigate and subpoena witnesses whose testimony would have helped defendant; (3) failing to challenge the composition of the jury venire; (4) failing to object to the defective indictment returned against defendant and (5) advising defendant not to testify. In addition, he contends that the government failed to establish that he used a firearm as that term is defined in 18 U.S.C.

§ 924(c)(1). Defendant has filed a motion for appointment of counsel to represent him in prosecuting his post-conviction motion.

Because it is clear from the record and from defendant's motion that he cannot establish constitutionally ineffective assistance of trial counsel or any other constitutional error that would entitle him to vacation or modification of his sentence, the motion for post-conviction relief will be denied. Therefore, it is unnecessary to appoint counsel for defendant, hold an evidentiary hearing on the motion or even require a response from the government. 28 U.S.C. § 2255, ¶ 2.

BACKGROUND

Defendant Michael Brown was charged along with James H. Fleming and Robert D. Sutton in a 21-count indictment returned on March 15, 2001. Defendant Brown was charged in nine of the counts with robbery, bank robbery and use of a firearm in connection with a crime of violence. Fleming was named in 19 of the counts; Sutton was named in seven. All defendants were found guilty after a six-day jury trial that began on November 26, 2001.

The charges arose out of series of armed robberies that took place in Madison, Wisconsin, during 1997 and 1998. Other individuals were involved in the robberies but were not named in the indictment. They provided much of the evidence against defendant

and his co-defendants. Many of these witnesses were prosecuted in federal court and entered pleas of guilty in return for the government's agreement to recommend sentencing benefits if they testified against their confederates. One participant was not charged; another was prosecuted in state court.

Evidence at the trial showed that defendant ran an after hours club in Madison, where minors and others could find alcohol and drugs. He planned the majority of the robberies and received a cut of the proceeds although he rarely participated in the robberies. Fleming and others used the club as a place to plan robberies and meet young women.

Generally, the robbers used masks or other means of disguise, brandished both real and fake firearms and used cars owned and driven by the young women. For the most part, the women received only small shares of the robbery proceeds but were often taken on shopping sprees and to "hotel parties" in Milwaukee and Madison. One of the participants, Victor Caldwell, identified defendant as the leader of the men. (He identified Stacy Pete, one of defendant's girlfriends, as the leader of the women.)

Defendant appealed his conviction to the Court of Appeals for the Seventh Circuit, where he was represented by his trial counsel. He challenged his convictions under the Hobbs Act for lack of sufficient evidence of an effect on interstate commerce; he challenged the exclusion of the government's fingerprints reports; and he appealed the decision to allow Detective Dondurant to testify about Fleming's confession. The court denied the appeal;

defendant petitioned the United States Supreme Court for a writ of certiorari, which was denied on December 1, 2003. He filed this motion on November 22, 2004.

OPINION

A. Section 2255 Motions

Section 2255 motions are vehicles for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect resulting in a complete miscarriage of justice. Reed v. Farley, 512 U.S. 339, 353-54 (1994). They are not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). In short, they cannot be used for issues that were raised on direct appeal, in the absence of changed circumstances, for non-constitutional issues that could have been raised on direct appeal or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996).

A. Ineffectiveness of Counsel

Defendant's failure to raise his claim of constitutionally ineffective trial counsel does

not bar him from raising it at this time, for two reasons. First, he was represented on appeal by the same lawyer who represented him at trial. The law does not expect counsel to argue their own ineffectiveness. Prewitt, 83 F.3d at 819. Second, the United States Supreme Court has held that a defendant may raise ineffectiveness of counsel in a § 2255 motion even if he could have raised the issue on direct appeal. Massaro v. United States, 123 S. Ct. 1690 (2003).

The standard for assessing the effectiveness of counsel was established in Strickland v. Washington, 466 U.S. 688 (1984), in which the Court held that 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"). To show constitutionally ineffectiveness, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and the reasonable probability that but for counsel's objectively unreasonable performance the result of the proceeding would have been different. Id.

1. Failure to alert court to defendant's mental condition

Defendant asserts that his counsel gave him an inadequate representation when he failed both to advise the court that defendant was suffering from severe psychological problems and to investigate defendant's ability to understand the trial process and participate in his own defense. In support of this assertion, defendant has attached copies

of the medical notes made by persons who saw him at the Dane County jail.

Unfortunately for defendant, the medical notes doom his claim. Nothing in them comes close to showing that he was unable to understand what was happening in court or to make reasonable decisions about his defense. Rather, they show an anxious, somewhat depressed person with signs of mild paranoia, who was treated successfully with drugs that reduced both his anxiety and paranoia. Three weeks before the start of trial, his doctor reported that defendant's "affect seemed full range and appropriate to the content of the conversation. Thoughts were logical, coherent and goal-directed without overt signs of psychosis." Mem. in Support of Mot., dkt. # 234, Exh. A, at 3. Defendant's lawyer would not have been exercising good judgment if he had sought a psychiatric evaluation of defendant when the doctor, social worker and nurse who saw defendant were reporting that he was behaving rationally and thinking coherently.

2. Failure to investigate and subpoena witnesses

Defendant contends that his trial counsel could have called witnesses that would have offered favorable testimony had he been willing to subpoena the witnesses whose names defendant provided and had he not been more concerned about the trial strategies of defendant's co-defendants. As an example, defendant lists Brandy Sue McClernan, who, he says, would have exonerated defendant and given damaging testimony against his co-

defendants. He cites testimony to the effect that McClernan "knew Victor Caldwell, Sutton, and Fleming had robbed the Kohl's grocery store on East Washington Avenue " and that she knew "it was Fleming's plan." Mem. in Supp. of Mot., dkt. #234, Exh. B, at 2. Not only is this inadmissible hearsay, it does not exonerate defendant because the government never alleged that defendant participated in the robberies.

Defendant cites other testimony of similar ilk, including that of Fleming's wife, who stated that defendant was never involved in any of her husband's robberies and that her husband did not need anyone to plan robberies and had his own guns. The exhibit that defendant cites does not support his contention that she would have given the testimony he described; even if it did, her testimony would be inadmissible as to defendant's involvement because it does not appear that she would have had any personal knowledge of his involvement or lack of it. Moreover, if she chose not to testify against her husband, she could not be required to unless defendant could show that the information she had obtained from her husband was not covered by the marital privilege.

Defendant lists a number of other witnesses that he says could have provided additional testimony that he was not involved in the planning of the robberies. Much of this testimony would have been inadmissible as hearsay; none of it would have been helpful to him. He contends that Kim Fitzgibbon would have testified that he was not present at a meeting to plan the Great Midwest Bank robbery, but a review of her FBI interview shows

that she told her interviewer that she never hung out at defendant's after hours club and often went for long periods without seeing defendant, even though she was the mother of one of his children and was raising another one. She told the FBI that she had never been present when defendant discussed criminal activity or counted money, but that she might have been elsewhere in their residence. She said also that she would find it difficult to tell the truth if she were called as a witness because of her relationship with defendant.

3. Failure to challenge composition of jury venire

Defendant argues that his counsel should have challenged the jury venire as racially discriminatory. He does not explain the basis for his belief that the venire was the product of racial discrimination or why he thinks a challenge would have been productive. His speculative accusations do not require an evidentiary hearing. To obtain an evidentiary hearing, a movant must file a detailed and specific affidavit showing he has actual proof to support his accusation. Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002); Prewitt, 83 F.3d 812, 819 (7th Cir. 1996).

4. Failure to object to defective indictment

It was not ineffective assistance for counsel to fail to object to the indictment. Although defendant thinks that the indictment was defective as to counts 16 and 21 because

it did not specify the particular subsection of 18 U.S.C. § 2 (aiding and abetting) that applied, he is wrong. It was sufficient for the indictment to refer to § 2. That reference gave defendant adequate notice of the charge against him.

5. Advising defendant not to testify

Defendant contends that his counsel advised him not to testify solely out of concern for the co-defendants. He argues that he could have supported his defense by testifying to his whereabouts when the robberies were committed. As I have explained throughout this opinion, testimony of this sort would not have been exculpatory in light of the government's position that defendant's role in the crimes was that of planner and not participant. Moreover, if defendant had really wanted to testify, as he claims, he could have asserted his right to do so. It is more likely that he realized the good sense of his attorney's advice not to take the stand and open himself up to cross-examination about matters that would not have helped his cause, including his previous felony convictions.

C. Government's Failure to Prove Defendant's Possession of a Firearm

Defendant contends that his conviction for violation of 18 U.S.C. § 924(c)(1) (counts 11, 15 and 17) is invalid because the government failed to prove that the gun with which he was charged was a firearm within the meaning of § 924(c)(1). It is too late for defendant to

raise this issue at this time. Since it is not a constitutional issue, defendant could have raised it only on direct appeal. Having failed to do so, he has forfeited the issue.

ORDER

IT IS ORDERED that defendant Michael L. Brown's motion pursuant to 28 U.S.C. § 2255 for vacation or correction of his sentence is DENIED for defendant's failure to show that he is entitled to any relief from his sentence. Defendant's motion for appointment of counsel is DENIED as moot.

Entered this 3rd day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge