

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

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

04-C-0448-C

01-CR-0009-C-04

01-CR-0098-C-01

v.

RONNIE RAINES,

Defendant.

Defendant Ronnie Raines has filed a lengthy motion pursuant to 28 U.S.C. § 2255, in which he seeks to vacate the sentence imposed on him on May 2, 2003. Defendant sets out twelve grounds: (1) his trial counsel gave him ineffective assistance; (2) the court relied on false or inaccurate information to determine relevant conduct and drug quantities in sentencing him; (3) the court misinterpreted USSG § 3C1.1 in giving him an upward adjustment in his sentence for obstruction of justice; (4) the court relied on false or inaccurate information in finding that he possessed a gun during a crime; (5) the court used unreliable information in refusing to give him a downward adjustment for acceptance of responsibility; (6) the court failed to perform an adequate inquiry into the voluntariness of

his plea; (7) the government breached the plea agreement; (8) defendant's speedy trial rights were violated; (9) the court violated Fed. R. Crim. P. Rule 32(b)(6)(A) by not insuring that defendant received a copy of the presentence report 35 days before sentencing; (10) the court erred in finding him a manager or supervisor when sentencing him; (11) his appellate counsel gave him ineffective assistance; and (12) the court violated the principles set out in Blakely v. Washington, 124 S. Ct. 2531 (2004), when it enhanced his sentence using facts that had not been found by a jury. In his motion, he referred to certain exhibits that he did not attach. He advised the court that he would be sending the exhibits within a week but he never did so.

In an order entered on August 2, 2004, I ordered the government to file and serve a response to defendant's motion, except with respect to defendant's twelfth claim, which I held was premature. The government filed such a response and defendant replied to it.

BACKGROUND

In a 35-count indictment returned on February 1, 2001, defendant Ronnie Raines and ten other persons were charged with conspiracy to distribute cocaine base and possession with intent to distribute cocaine base. Defendant left Wisconsin before he could be arrested and was not arraigned here until August 1, 2001. He was ordered detained until trial, was placed in the Dane County jail and escaped from the jail on August 10. He was

apprehended ten days later; on August 29, 2001, the grand jury indicted him for escape. He was arraigned on this charge on September 12, 2001. The court's scheduling gave him until November 8, 2001, in which to file pretrial motions. On January 2, 2002, he pleaded guilty to one count of escape and one count of conspiracy to distribute and conspiracy to possess with the intent to distribute more than 50 grams of cocaine base. He was sentenced on April 11, 2002, to a life sentence on the drug charge and to a five-year concurrent sentence on the escape charge. He appealed his sentence, contending that he had been denied the effective assistance of counsel during his plea hearing, that the court erred in attributing more than 1.5 kilograms of cocaine base to him in determining his relevant conduct, that it erred in refusing to grant him a two-level reduction for acceptance of responsibility and that it erred in requiring him to carry the burden of proving that he did not possess a firearm in connection with the conspiracy. The court of appeals affirmed his sentence in all respects in an order issued on April 10, 2003. On May 5, 2003, his life sentence was reduced to 360 months on the government's motion.

OPINION

The first question is whether defendant is barred from pursuing his claim of ineffective assistance of counsel because he raised it on his direct appeal. Section 2255 is not intended to provide an opportunity to reargue matters decided on direct appeal.

Although principles of res judicata do not apply to post-conviction motions, the law of the case doctrine does. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). Moreover, § 2255 motions are limited to constitutional issues; they are not vehicles for raising challenges to rules of procedure or the sentencing guidelines. Scott v. United States, 997 F.2d 340, 342 (7th Cir. 1993) (time for defendant to argue application of sentencing guidelines is at sentencing and on direct appeal). There is an exception to the prohibition against raising non-constitutional issues. A defendant may raise such an issue if he can show that the error is so fundamental that a complete miscarriage of justice has occurred. Young v. United States, 124 F.3d 794 (7th Cir. 1997).

Even if a defendant wants to raise a constitutional issue, he cannot do so under § 2255 if he could have raised the issue on direct appeal but failed to do so. This prohibition has two exceptions. A defendant may raise a constitutional issue in a post-conviction motion if he can show both cause for the omission and actual prejudice resulting from his failure to raise the issue on direct appeal, Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996), or a fundamental error leading to a complete miscarriage of justice and he may raise a claim of ineffective assistance of counsel under § 2255. The Supreme Court has held that defendants have the right to wait to raise their claims of ineffective assistance, even if they could raise the claims on direct appeal but chose not to. Massaro v. United States, 123 S.Ct.

1690, 1694 (2003) (ineffective assistance claims may be brought in the first instance in timely motion in district court under § 2255 even if defendant could have raised claim on direct appeal; motion under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance).

_____ In this case, the question is a different one. Defendant *did* raise his claim of ineffective representation in his direct appeal. Having done so, is he allowed a second opportunity to raise it in a motion for post-conviction relief under § 2255? Massaro leaves this question unanswered. Id. at 1692 (noting that there may be occasions in which appellate counsel will raise issue on direct appeal when ineffectiveness of counsel is apparent from the trial court record; “[i]n such cases, certain questions may arise in subsequent § 2255 proceedings concerning the conclusiveness of determinations made on the claims raised on direct appeal; but these implementation matters are not before the Court”).

Until such time as the Supreme Court decides whether the determination of claims raised on direct appeal is or is not conclusive, district courts must follow the law of their own circuit. In this instance, the law is clear. The Court of Appeals for the Seventh Circuit has held repeatedly that matters raised on direct appeal may not be reargued in a post-conviction motion. E.g., Daniels, 26 F.3d at 711; Mazak, 789 F.2d 580. For whatever reason, in this case, defendant’s appellate counsel chose to raise on direct appeal a challenge to the effectiveness of the lawyers who had served as trial counsel for defendant. The court of

appeals found defendant's arguments unsupported by even "a shred of evidence" and denied the claim of ineffectiveness. United States v. Fudge (Raines), 352 F.3d 910, 924 (7th Cir. 2003). Unless the court of appeals were to change its mind on this point, trial counsel's effectiveness is not a matter that this court can reconsider.

In addition to the claim of ineffectiveness, defendant raised on appeal his claims that the court relied on inaccurate information to determine his relevant conduct, (2); that the court relied on inaccurate information in finding him in possession of a gun during a crime, (4); and that the court relied on inaccurate information in refusing to give him a reduction for acceptance of responsibility (5). On this motion, he tries to dress the same claims up as instances of ineffective assistance of counsel. Now that it is clear that he cannot challenge the effectiveness of counsel, the law of the case bars him from raising those issues again.

As to claim (3), that the court misinterpreted USSG § 3C1.1 in giving defendant an upward adjustment in his sentence for obstruction of justice, and claim (10), that the court erred in finding him a manager or supervisor when sentencing him, he is barred from raising these sentencing issues because he could have raised them on direct appeal and chose not to and has not shown any cause or prejudice for failing to do so. Moreover, as explained above, in Scott, 997 F.2d at 341-43, the court of appeals has held that courts cannot entertain challenges to the application of the sentencing guidelines raised in post-conviction motions, absent extraordinary circumstances. Defendant has not identified any extraordinary

circumstances in this case.

For the same reason that defendant is barred from raising challenges to the application of the sentencing guidelines, he is barred from raising his claim (6) that the court failed to perform an adequate inquiry into the voluntariness of his plea. The United States Supreme Court foreclosed collateral relief for errors in the plea colloquy in United States v. Timmreck, 441 U.S. 780 (1979), on the ground that such errors are neither jurisdictional nor constitutional. To obtain post-conviction relief for an error in the plea colloquy, a movant would have to show a complete miscarriage of justice or a proceeding “inconsistent with the rudimentary demands of fair procedure.” Id. at 784. Defendant has not made this showing.

Defendant’s claim (7) is that the government breached its plea agreement. He has adduced no evidence to support his assertion that the government promised him a sentence of no more than 24 years if he provided assistance. Mere assertions do not require an evidentiary hearing. Galbraith v. United States 313 F.3d 1001, 1008-09 (7th Cir. 2002) (mere unsupported assertions not sufficient for grant of hearing; petitioner must file detailed and specific affidavit showing he has actual proof of allegations) (citing Prewitt, 83 F.3d at 819).

In claim (8), defendant contends that his speedy trial rights were violated. The facts do not support this claim. Because of his flight from the district, his subsequent escape from

jail and the time allocated to him for filing pretrial motions, the seventy-day Speedy Trial time period did not start running until November 8, 2001. His guilty plea was entered less than 60 days later, on January 2, 2002. Even if there were a speedy trial question, however, defendant could not raise it in this motion. Statutory violations may be heard under § 2255 only if the alleged error resulted in a fundamental defect in the proceedings or a complete miscarriage of justice. Moreover, the time for raising a claim of such a violation is before entering a plea or beginning trial. Failure to raise the claim at the proper time constitutes a waiver of the right to object to the violation.

In claim 9, defendant contends that the court violated Fed. R. Crim. P. 32(b)(6)(A) by not insuring that he received a copy of the presentence report 35 days before his sentencing. First, the facts do not support the assertion that he did not have access to his presentence report in advance of sentencing. At the sentencing itself, he informed the court that he had read both the presentence report and the addendum to the report. Second, defendant's failure to raise this claim at the proper time (before or at sentencing when the error can be rectified by a continuance of the proceeding) constitutes a waiver of the right to raise it later.

Defendant's final claim is that his appellate counsel gave him ineffective assistance. Once again, he provides no support for his contention, simply a list of allegations to the effect that counsel did not perform a full investigation of possible claims, did not present all

the facts necessary to support the appeal and did not identify all of trial counsel's deficiencies. In addition, he says, appellate counsel did not make it clear to the court that defendant was not responsible for as much cocaine base as the court determined and that he did not call Aja Fudge to ask her to get rid of the drug paraphernalia in their apartment.

Defendant attached to his reply a set of exhibits that may be the ones that he referred to in his original motion. I have not considered those exhibits because the government did not have an opportunity to object to them before filing its brief in opposition to defendant's motion and also because nothing in the exhibits seems to be admissible evidence. Nowhere in any of the documents defendant has filed does he explain what appellate counsel would have found had he investigated the matters defendant he thinks he should have. In order to obtain an evidentiary hearing on an alleged failure to investigate thoroughly, a movant must provide the court "sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." Hardamon v. United States, 319 F.3d 943, 951 ((7th Cir. 2003). Defendant has not met this threshold requirement.

I conclude that defendant's motion must be denied for his failure to show any factual or legal basis for the claims he has raised.

ORDER

IT IS ORDERED that defendant Ronnie Raines's motion for post-conviction relief,

brought pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that he is in custody illegally.

Entered this 2nd day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge