

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARLAND LIGHTFOOT, JR.,

Defendant.

OPINION AND ORDER

02-C-0318-C

98-CR-0133-C-01

Defendant Garland Lightfoot, Jr. has filed a timely motion to vacate his sentence pursuant to 28 U.S.C. § 2255, contending that he was sentenced illegally, in violation of the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). His motion will be denied because he has failed to show cause for his failure to raise this challenge to his sentence on his direct appeal.

RECORD FACTS

In 1998, defendant was charged with possession with intent to distribute cocaine and cocaine base. A jury found him guilty on February 17, 1999, and he was sentenced to a term of imprisonment of 315 months. He appealed both his conviction and sentence to the Court

of Appeals for the Seventh Circuit, which denied his appeal on August 9, 2000. He did not argue on appeal that the trial court should have asked the jury to determine how much cocaine and cocaine base he had possessed or that the indictment was insufficient because it did not allege the quantities of drugs he allegedly possessed. He filed a petition for a writ of certiorari to the United States Supreme Court, in which he did raise these claims. The Court denied his petition on April 19, 2001. He filed this motion for collateral relief on March 29, 2002.

OPINION

After defendant was convicted and sentenced but before his direct appeal had been denied by the Court of Appeals for the Seventh Circuit, the United States Supreme Court decided Apprendi, 530 U.S. 466, in which it held that sentencing factors other than prior convictions that raise a sentence beyond its statutory maximum must be charged in the indictment and decided by a jury, rather than by the judge. If defendant were being tried today, he would be entitled to an indictment that charged him with possessing more than five grams of cocaine base and to a jury determination that this amount had been proven beyond a reasonable doubt. The question he raises on this motion is whether his failure to receive these procedural protections in 1999 makes his conviction invalid.

Before that question can be reached, however, defendant must establish “cause and

prejudice” for his failure to argue at trial and on direct appeal that his indictment was defective because it did not allege his possession of more than five grams of cocaine base (an amount that would have warranted a sentence in excess of twenty years, 21 U.S.C. § 841(b)(1)(B), but less than forty years) and that only the jury could make the determination of drug quantity. See United States v. Frady, 456 U.S. 152 (1982) (movant cannot bring collateral challenge to sentence that he failed to raise on direct appeal unless he can show cause for the default and prejudice resulting from it). Defendant argues that it would have been “frivolous” for him to have raised either issue before Apprendi was decided because all of the circuits had rejected similar contentions on numerous occasions. He is wrong; however frivolous the argument might have seemed at the time, he was required to make it if he wanted to preserve it for consideration. United States v. Smith, 241 F.3d 546, 548 (7th Cir. 2001) (citing Bousley v. United States, 523 U.S. 614, 622-24 (1998); Engle v. Isaac, 456 U.S. 107, 130 n.35 (1982) (unpersuasiveness to a given court of particular argument does not constitute “cause” for failure to make argument)). He does not argue that any outside impediment prevented him from raising the challenge he is raising now. Id., at 548. (It is not relevant that defendant raised the issue in his petition for a writ of certiorari; he could not appeal an issue to the Supreme Court he had not raised in the lower courts.)

Defendant argues that he can satisfy the “cause” requirement by showing that his

counsel was ineffective for not arguing on appeal the insufficiency of the indictment and the need to submit drug quantities to the jury. This argument is “not tenable.” Smith, 241 F.3d at 548. Failing to anticipate and make such an argument would not constitute constitutionally inadequate representation under Strickland v. Washington, 466 U.S. 668 (1984). Valenzuela v. United States, 261 F.3d 694, 700 (7th Cir. 2001) (“Sixth Amendment does not require counsel to forecast changes or advances in the law”) (quoting Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993)).

Defendant makes the additional argument that the court lacked jurisdiction to try him because of the deficiencies in the indictment. The United States Supreme Court foreclosed this argument last month in United States v. Cotton, — U.S. —, 122 S. Ct. 1781 (2002) (defects in indictment do not deprive court of jurisdiction to hear case; conviction is valid even if indictment omits facts that raise maximum penalty).

In summary, I conclude that defendant is precluded from raising his challenge to the validity of his 1999 conviction because he cannot show he had cause for not challenging it on direct appeal.

ORDER

IT IS ORDERED that defendant Garland Lightfoot, Jr.’s motion to vacate his

sentence, filed pursuant to 28 U.S.C. § 2255, is DENIED.

Entered this 9th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge