IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD BRISCO,

Defendant.

OPINION AND ORDER

02-CR-0027-C-02

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On March 4, 2005, defendant Bernard Brisco filed a timely motion for post conviction relief pursuant to 28 U.S.C. § 2255. Later, I allowed defendant to amend and supplement his original motion to add new claims. I disposed of all of the claims raised in both the original and supplemental motion, finding that defendant had failed to prove that he was in custody illegally. The clerk entered judgment denying defendant's motion on September 12, 2005.

On December 2, 2005, defendant filed a "Pro Se Motion for Reconsideration of Court's Denial of His 2255 and 59(e) Motions and Expansion of the Court Record . . ." in which he stated that he was proceeding under Fed. R. Civ. P. 60 to seek reconsideration of the denial of his § 2255 motion on the basis of new evidence that he could not have

discovered earlier. In support of the motion, defendant asserted that his defense attorneys had withheld transcripts of the grand jury proceedings from him before and during trial, that he had only recently obtained copies of the grand jury proceedings in his case and that these records disclosed the suborning of perjury by the government. Attached to his "Pro Se Motion" was a request for a certificate of appealability.

In his motion, defendant alleges that the government knowingly and intentionally introduced false and fabricated testimony to the grand jury in an effort to secure an indictment of defendant. As an example of the fabricated testimony, defendant quotes the testimony of case agent Jason Salerno that Matthew Matticx arrived in Madison in the latter part of 1999 and started to work for defendant both in dealing narcotics and engaging in gun violence. He contrasts this testimony with that of Matticx's trial testimony to the effect that Matticx came to Madison with his daughter's mother to try to change his environment. Additionally, Salerno told the grand jury that the two men grew up in the same block in Chicago; Matticx testified at trial that they lived a couple of blocks from each other. Salerno told the grand jury that he and other agents pursued Matticx because they thought he would give them an idea of how defendant's operation worked, yet at trial, Matticx testified that the only controlled substance he sold was heroin and he did not buy it from defendant.

Defendant alleges that Salerno made inflammatory statements to the grand jury about other criminal acts of defendant and implied that defendant was involved in gang activities

and in firearms offenses. He alleges that the statements' implication was false as shown by Matticx's trial testimony that although a lot of former gang members were in Madison, they were not gang-banging.

Defendant alleges that Salerno lied under oath when he told the grand jury that defendant was Ernest Brooks's only source of drugs and that the government as a whole failed to supervise its informants properly by allowing them to participate in other drug-related crimes with other known drug dealers in Madison.

As other alleged improprieties, defendant cites his appointed attorneys' failure to object to the perjured testimony before the grand jury, failure to call Salerno to the stand and failure to object to the prosecutor's impermissible vouching for the credibility of each cooperating witness.

Defendant's motion raises a number of interesting questions, including the applicability of Rule 60(b) to motions brought pursuant to § 2255, whether such a motion must be treated as a second or successive motion that requires advance permission of a panel of appellate judges before it can be filed with the district court and whether resolution of this second question requires a preliminary determination of the relationship of the "newly discovered evidence" to claims raised in the original motion. However, it is not necessary to reach these questions because defendant's newly discovered evidence does not raise any issue of substance.

It is well established that a trial jury's verdict of guilty renders harmless any possible error in the grand jury proceedings. United States v. Mechanik, 475 U.S. 66, 72-73 (1986). See also United States v. Morgan, 384 F.3d 439, 443 (7th Cir. 2004); United States v. Knight, 342 F.3d 697, 713 (7th Cir. 2003). Even if Salerno did and said all of the things defendant attributes to him, whatever effect they had on the grand jury's decision to indict defendant was erased once the trial jury determined that defendant had committed the acts charged against him by the grand jury. Therefore, it is irrelevant whether defendant had access to the grand jury transcripts before or during his trial. Having them would not have affected the outcome of his trial or of his post conviction motion.

The only other issue that defendant raises is the government's allegedly improper vouching for their witnesses at trial. It is too late for him to raise this now. He was present at trial; he heard everything the government said. He cannot say that the alleged withholding of the grand jury transcripts kept him from knowing about the vouching.

Turning to defendant's request for a certificate of appealability, I note that he has not filed a notice of appeal from the denial of his § 2255 motion or paid the $255 fee for filing his notice of appeal which is required if he is to take an appeal from the denial of a § 2255 motion. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. It is likely that defendant has waited too long to file a notice of appeal but decisions on the timeliness of appeals are for the court of appeals to make, not the district court. I will construe defendant's notice as

including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915. According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed." Defendant had appointed counsel during his criminal proceedings and I do not intend to certify that the appeal is not taken in good faith. Defendant's challenges to his sentence are not wholly frivolous. A reasonable person could suppose that they have some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that "are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S 880, 893 n.4 (1983). "[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000).

Defendant has not identified any particular issues that he wishes to challenge on

appeal. I assume they include all of the matters he raised, including the one discussed in this opinion relating to allegedly perjured testimony before the grand jury. None of defendant's challenges to his sentence meet the demanding standard for a certificate of appealability. In the numerous orders I have entered denying defendant's § 2255 motion, I explained clearly why each of the allegations defendant made against his trial and appellate counsel did not constitute ineffective counsel and why, in any event, defendant was not prejudiced by his counsel's actions. Because the issues defendant wishes to raise on appeal are not debatable among reasonable jurists, a court could not resolve the issues differently and the questions are not adequate to deserve encouragement to proceed further, I am declining to issue a certificate of appealability.

Defendant has the right to appeal this order denying him a certificate of appealability.

ORDER

IT IS ORDERED that defendant Bernard Brisco's motion for reconsideration of the judgment entered in this case on September 12, 2005, is DENIED; his request for leave to proceed in forma pauperis is GRANTED; and his request for a certificate of appealability is

DENIED.

Entered this 4th day of January, 2006.

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