

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD BRISCO,

Defendant.

ORDER

05-C-0139-C

02-CR-0027-C-02

Defendant Bernard Brisco filed a timely motion for postconviction relief pursuant to 28 U.S.C. § 2255 on March 4, 2005, contending that his sentence and conviction were invalid for a number of reasons. In an order entered on March 14, 2005, in which I denied all of his contentions with two exceptions and gave him an opportunity to file an affidavit setting forth with particularity the facts underlying his claims that his court-appointed counsel had given him constitutionally ineffective advice about accepting a plea agreement and that some of his prior convictions were invalid and therefore should not have been used to enhance his sentence. Shortly after the order was entered, defendant filed a motion to amend and supplement his original motion for postconviction relief to add a claim that he

had been denied the effective assistance of counsel because his attorney had failed to object to the court's determination for sentencing purposes that defendant had distributed crack cocaine and not another form of cocaine base. Defendant argued that the government had charged him with conspiracy to distribute "cocaine base" and five substantive charges of distributing cocaine base but had failed to show that the cocaine base was in fact "crack cocaine," the one form of cocaine that would subject defendant to a higher sentence.

In a second order entered on May 9, 2005, I granted defendant's motion to amend his motion, denied the remaining two claims of his original motion because he had failed to make the showing required of him and denied his newly asserted motion on the ground that on the conspiracy charge against him, the jury had found explicitly that the conspiracy had involved more than 5 kilograms of cocaine, as well as 50 grams of cocaine base. Once the finding of 5 kilograms had been made, the life sentence followed automatically given defendant's previous convictions. Therefore, it was unnecessary to decide whether the cocaine base with which he was charged was crack cocaine or some other form of cocaine. I denied defendant's motion in all respects; the clerk entered judgment against him; and defendant moved promptly to alter or amend the judgment. I granted the motion in part to give defendant an opportunity to argue that he was deprived of constitutionally effective representation because his attorney did not object to the court's enhancing his sentences on the basis of an unsupportable factual finding that the cocaine base charged in those counts

was crack cocaine, although I noted that a favorable decision would be unlikely to make any practical difference to defendant because of the life sentence on the conspiracy count. The issue is now before the court.

From my reading of defendant's supplemental motion, I believe that he is arguing that he should not have received the higher sentences for distributing crack cocaine because the government did not prove that the substances he was distributing were crack and not some other form of cocaine base. (Although the statutes speak of "cocaine base," without making any distinction among forms of cocaine base, the Sentencing Commission has determined that the only form of cocaine base subject to the higher penalties is the form known as crack. U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (C): "'Cocaine base,' for the purpose of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." The Court of Appeals for the Seventh Circuit holds that the Sentencing Commission's definition of cocaine base applies to the statutes as well as to the guidelines. United States v. Edwards, 397 F.3d 570 (7th Cir. 2005); United States v. Booker, 70 F.3d 488 (7th Cir. 1995)). Defendant may also be raising a separate and distinct argument that the jury should have determined the nature of the cocaine base, rather than the court.

As for the first argument, defendant has failed to prove that it was ineffective

assistance for his counsel not to object to the alleged lack of proof that the substances defendant was distributing were crack cocaine. Defendant's counsel had no reason to object to the court's consideration of the crack cocaine guidelines in sentencing defendant. The record is replete with evidence that defendant was cooking, storing and selling crack. A number of witnesses testified to watching him cook the crack and described the cooking process; some of them testified that they stored the cooked product; and others testified that they had helped distribute it. Uniformly they described the cooked product as hard, lumpy, rocklike and yellowish white in color. Most of them referred to the substance as crack or used the term crack interchangeably with cocaine base. Those who referred to it as cocaine base described it in terms that make it clear that it was the crack form of cocaine base to which they were referring.

Defendant argues that this case is governed by Edwards, 397 F.3d 570, but he is wrong. Not only was Edwards not decided until three years after defendant's trial but in Edwards, the court acknowledged that it lacked sufficient evidence to conclude that the substance at issue was crack cocaine rather than another form of cocaine base. No such lack of evidence exists in this case. In Edwards, the question was whether the Sentencing Guidelines' definition of cocaine base governed the definition of cocaine base under statutes providing for enhanced sentences for offenses involving cocaine base; the court of appeals held that it did.

Under Booker, 70 F.3d 488, a court cannot sentence a defendant to the enhanced penalties without adequate proof that the defendant was involved with crack cocaine and not another form of cocaine base. In this case, the government adduced ample proof that the cocaine base at issue was crack. Therefore, it was neither ineffective assistance nor a source of prejudice to defendant for his attorney to fail to object to the court's finding that defendant had distributed crack cocaine in counts 2 and 4-7 when it is obvious that objections would have been futile.

I turn then to defendant's second argument, that his attorney was ineffective for failing to object because the court and not the jury made the determination that the drug at issue was crack. In late 2002 and early 2003, when defendant was tried and sentenced, no lawyer would have anticipated the holdings in Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005), to the effect that under a mandatory sentencing system, juries rather than courts must make determinations of sentencing factors. In failing to raise an objection on this ground in early 2003, counsel's representation of defendant did not fall beneath the minimum standard of effectiveness for trial counsel.

In summary, I cannot find that defendant has shown that he did not have constitutionally effective assistance of counsel. This finding disposes of the last of the claims defendant has raised. His original and supplemental motions for postconviction relief will

be denied in full.

ORDER

IT IS ORDERED that defendant Bernard Brisco's original and supplemental motions for postconviction relief pursuant to 28 U.S.C. § 2255 are DENIED. The clerk of court is directed to enter judgment and close this case.

Entered this 9th day of September, 2005.

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