

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BENJAMIN J. BIESE,

Defendant.  
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ORDER

04-C-0500-C

02-CR-0100-C-01

Defendant Benjamin J. Biese has filed a motion pursuant to 28 U.S.C. § 2255, alleging that his sentence should be vacated because his trial counsel provided him constitutionally ineffective assistance. He alleges that his counsel never informed him of the options for appeal and promised him that he would be able to go to the Federal Medical Facility at Rochester, Minnesota if he pleaded guilty to the indictment. He alleges also that he was no longer competent when he entered his plea of guilty and that he did not enter a voluntary and understanding plea.

Defendant has offered nothing but generalized allegations about his counsel's performance. Such allegations fall far short of requiring an evidentiary hearing on

defendant's motion. To go forward, defendant will have to submit an affidavit, setting out exactly what his trial counsel told him about appealing, where and when the discussion took place and whether anyone else was present. Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002) (citing Prewitt v. United States, 83 F.3d 812, 820 (7th Cir. 1996); Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir. 1989)). Furthermore, plaintiff must show that had it not been for his counsel's advice, he would not have entered a plea of guilty but would have gone to trial and would likely have been acquitted. United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991). Given the quantity of evidence against defendant, it is doubtful that he will be able to prove that the result of the proceeding would have been different had he received different advice from his attorney.

In addition to providing more specific details about the advice his attorney gave him, defendant must provide details about his alleged lack of competency and the involuntariness of his plea. At his plea hearing, defendant told the court on the record that he understood what he was doing, that no one had made him any promises beyond those incorporated into the plea agreement, that no one had threatened him or forced him to plead guilty and that he understood that he could be sentenced up to and including the maximum penalties set out in the plea agreement. Defendant will have to explain why he made those statements to the court if they were not true.

One final word. From this motion and one that defendant filed previously, it seems

obvious that defendant's primary goal is obtaining a sentence that will run concurrently with his state sentence but will be served in federal prison so that defendant can have the benefit of the mental health care available in the federal system. It is highly unlikely that defendant would obtain a concurrent sentence, in light of U.S.S.G. § 5G1.3, which requires the sentencing court to impose a *consecutive* sentence "[i]f the instant offense was committed while the defendant was serving a term of imprisonment." Defendant was in state custody when he committed the crime at issue.

Even if § 5G1.3 did not apply and defendant were to be re-sentenced to a concurrent sentence he would still be in state prison. This is because he has never been released from state custody. When he appeared in federal court, he was in the temporary custody of the United States and deemed to remain in the custody of the state of Wisconsin, subject to the state's jurisdiction. Interstate Agreement on Detainers, 18 U.S.C. App. 2, § V. Wisconsin is entitled to keep him until he has completed the sentence he owes the state.

#### ORDER

IT IS ORDERED that defendant Benjamin Biese may have until September 29, 2004, in which to file with the court an affidavit setting forth the specific facts that support his allegations that his attorney induced his plea of guilty unlawfully and refused to take an appeal for him and that he himself was incompetent when he entered his plea of guilty and

that he did not enter the plea understandingly or voluntarily. If defendant's affidavit is sufficient to require further proceedings, I will set the matter for briefing and a possible evidentiary hearing.

Entered this 8th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge