IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

05-C-0139-C
02-CR-0027-C-02

v.

BERNARD BRISCO,

Defendant.

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Defendant Bernard Brisco has filed a motion pursuant to 28 U.S.C. § 2255 in which he contends that his conviction and sentence are invalid on 15 different grounds. A closer look at the motion reveals ten separate grounds plus defendant's contention that the cumulative effect of the separately enumerated errors deprived him of a fair trial. Because defendant had an opportunity to raise most of his challenges on direct appeal, for the purpose of his collateral attack he is framing them in terms of alleged ineffectiveness of counsel.

Defendant was charged in an indictment returned on May 16, 2002 with one count of conspiracy to distribute controlled substances and six counts of distribution of cocaine or

cocaine base. The court appointed counsel for him but defendant had difficulty working with the lawyer who was appointed; after several attempts by counsel to withdraw from the representation, the court allowed the withdrawal on September 17, 2002 and appointed new counsel. The change in counsel required a continuance of the trial to November 2002. The jury found defendant guilty on all counts; he appealed unsuccessfully to the Court of Appeals for the Seventh Circuit, which affirmed his conviction in an unpublished order issued on December 29, 2003. Defendant filed this timely motion for post-conviction relief on March 4, 2005, contending that his counsel was constitutionally ineffective in the following respects:

1. Failing to challenge the legal insufficiency of the indictment prior to trial.
2. Failing to challenge the court's authority to impose enhanced sentences on him and the government's failure to file a motion seeking enhanced penalties before the trial began, in violation of 21 U.S.C. § 851.
3. Failing to point out the court's error in not imposing a term of supervised release upon him.
4. Giving him constitutionally ineffective advice about accepting a plea agreement, thus keeping him from accepting the government's offer of a twenty-year sentence.
5. Failing to interview and call alibi witnesses.

6. Not allowing defendant to direct the examination and calling of witnesses and suggesting to the court that defendant would perjure himself if he took the witness stand.

7. Failing to move for judgment of acquittal pursuant to Fed. R. Crim. P. 29 and waiving any challenge to the sufficiency of the evidence underlying defendant's conspiracy conviction.

8. Allowing defendant to be sentenced in reliance on facts that were neither found by the jury beyond a reasonable doubt nor admitted by defendant.

In addition, defendant contends that even if none of counsel's specified shortcomings was sufficient to deny him a fair trial, the cumulative effect did. He adds that he was denied the effective assistance of counsel on direct appeal.

A. Ineffective Assistance of Counsel at Trial

To prove constitutionally inadequate representation, a defendant must show that his counsel's performance was deficient, that is, that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). He must also show that the deficient performance was prejudicial to his defense and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court considering an ineffective assistance challenge can begin by analyzing either prong of the required showing. It "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697.

1. Failure to challenge insufficiency of indictment

Defendant's first claim can be disposed of readily. His trial counsel's failure to challenge the indictment was not an error and it did not prejudice the outcome of the trial. Defendant argues that the indictment was legally insufficient because it failed to state the location of the alleged crimes and it omitted the word "possess" in counts 2-7. The indictment alleged that each of the charged acts occurred in the Western District of Wisconsin. This was sufficient to advise defendant of the location of the crimes; he does not need any more specific description to enable him to defend against the charges. As to the omission of "possess" from counts 2-7, 21 U.S.C. § 841(a)(1) makes it a crime to "manufacture" or "distribute" or dispense" or "possess with intent to distribute." The government may choose to charge any one or more of these acts, depending on the evidence. In defendant's case, the evidence showed that he distributed cocaine and cocaine base through his associates and took care not to possess it himself; therefore, it made sense to

charge him with distribution only.

The indictment charged every element of the crimes of conspiracy and distribution of controlled substance: in the case of the conspiracy charge, it charged defendant with conspiring with others to knowingly and intentionally distribute and possess with intent to distribute controlled substances, specifically more than 5 kilograms of cocaine and more than 50 grams of cocaine base, plus marijuana, in the Western District of Wisconsin from August 1999 to February 22, 2002; in the case of the substantive distribution counts, it charged the knowing or intentional distribution of controlled substances, namely cocaine and cocaine base, in the Western District of Wisconsin and on specified dates. This was sufficient to apprise defendant of what he had to defend against and to bar a subsequent federal prosecution against him for the same acts. No more is required of an indictment. Fed. R. Crim. P. 7(c)(1); United States v. Sandoval, 347 F.3d 627, 633 (7th Cir. 2003). Contrary to defendant's assertion, the government was not required to allege the effect of defendant's acts upon interstate commerce because the crimes with which he was charged do not require a showing of such an effect.

2. Failure to challenge imposition of enhanced sentences

Prior to the impanelment of the jury in defendant's case on November 18, 2002, the government filed a notice of enhanced sentence pursuant to 21 U.S.C. § 851, setting out

four prior convictions for felony drug offenses. Trial Transcript, I-4, dkt. #179. The notice was captioned "United States of America v. Bernard A. Brisco" and the four drug offenses it listed all involved defendant Brisco (two of them under aliases), as he concedes in his Memorandum of Fact and Law, dkt. #198, at 18. However, in the body of the notice, the government referred to "Ernest E. Brooks" (a co-defendant of defendant, who had pleaded guilty some time before defendant's trial began), instead of to defendant. Defendant argues from this typographical error that he was never given proper notice under § 851 and that his counsel's failure to note the error and object to it was ineffective representation as a matter of law.

The typographical error in the notice did not deprive defendant of the notice that § 851 requires. The document apprised him of the government's intent to use his four prior convictions against him to justify an enhanced sentence. It had his name on the caption, it was introduced at the start of his trial and it listed four of his prior convictions. It might have been error for trial counsel (and the two prosecutors, the court and defendant's appellate counsel) not to notice Ernest Brooks's name in the body of the notice where defendant's should have been, but it was not an error that deprived defendant of a fair trial or a fair sentence.

Defendant has two other challenges to the court's reliance on the prior drug offenses to sentence him to a life term (and his trial counsel's failure to object to the reliance). First,

he argues that his prior offenses were not "serious drug offenses" under 18 U.S.C. § 3559. (Section 3559(c)(1) requires life imprisonment for certain persons who have prior convictions of two or more serious violent felonies or one serious violent felony and one serious drug offense. Subsection (2)(H) provides the definition of a serious drug offense.) Defendant's argument is without merit because he was not sentenced under § 3559. His life sentence was mandated by § 841(b) and not by § 3559. Section 841(b)(1)(a) refers to "felony drug offenses," not to "serious drug offenses," so it was not necessary to consider whether defendant's prior convictions met § 3559's definition of serious drug offenses.

Second, defendant maintains that at least six of his prior convictions are invalid because he does not remember having been advised by the courts involved of his right to have counsel appointed to appeal the convictions. As stated, this assertion does not raise an actionable claim. To avoid the consequence of a life sentence, defendant would have had to prove that at least three of his prior felony drug convictions were obtained in violation of the Constitution, 21 U.S.C. § 851(2). Not only is it highly improbable that three different courts in Illinois and Wisconsin failed to advise him of his right to appeal, defendant has not filed a detailed and specific affidavit swearing to the omission of the advice and identifying the courts and the convictions at issue. Mere unsupported allegations are not enough to entitle a defendant to a hearing; on a § 2255 motion, a defendant must file a detailed and specific affidavit showing that he has actual evidence of his allegations. Galbraith v. United

States, 313 F.3d 1001 (7th Cir. 2002); Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996).

3. Failure to object to court's failure to impose term of supervised release

It was not error on counsel's part to fail to object to the omission of a term of supervised release from defendant's sentence. 18 U.S.C. § 3583 requires imposition of a term of supervised release only if "such a term is required by statute" or if the person has been convicted for the first time of a domestic violence offense. Defendant was sentenced under 21 U.S.C. § 841, which does not require such a term. To the contrary, it specifies that a person who commits a violation of the statute after two or more prior convictions for a felony drug offense have become final "shall be sentenced to a mandatory term of life imprisonment without release."

4. Ineffective advice on plea agreement

Defendant alleges that he would have accepted the government's proposed plea agreement of a term of 20 years had he not been relying on his counsel's estimate that he would receive a sentence of 40 years if found guilty at trial, his hope that he might be acquitted at trial and his reliance on his experience in state court, where the terms of imprisonment had always included parole. Although he had the advice of two different

lawyers in succession, he alleges that neither ever told him of the possibility that he could get a sentence longer than 40 years and without parole.

From my own observations of defendant throughout trial and from my reading of the transcripts of hearings held before the magistrate judge to consider the requests to withdraw filed by defendant's first trial counsel, I find it preposterous for defendant to assert that he would have pleaded guilty had he received better advice or a clear indication that he faced more than 40 years in prison. Defendant rejected every bit of advice he received from his lawyers. Indeed, it was his unwillingness to listen to his first lawyer that led to that lawyer's withdrawal from the case. Moreover, even if defendant is correct in saying that his counsel never warned him of a life sentence or told him he would not get a sentence longer than 40 years, a 40-year sentence is not so far from a life sentence for a 33-year-old as to suggest that defendant did not have sufficient warning of the risk he was running in refusing to consider a plea agreement.

All of this discussion is extraneous, however, because defendant has not filed an affidavit setting forth with specificity exactly what his two lawyers told him, both about the possible length of sentence he was facing and the availability of parole or supervised release, and what kind of plea agreement the government offered him. Unless and until he files such a motion, his claim cannot proceed.

5. Failure to call trial witnesses

Defendant contends that his trial counsel was ineffective because he failed to call co-defendant Ernest E. Brooks as a witness to testify that defendant was not the source of the cocaine or cocaine base that Brooks distributed to undercover officer Bernard Gonzales and that made up the conduct charged in counts 2-7. He argues that the jury could not have found him guilty of a conspiracy involving more than five kilograms of cocaine or fifty grams of cocaine base had it had the benefit of Brooks's testimony. Attached to his brief is a copy of an affidavit supposedly sworn to by Brooks, in which Brooks avers that had he been called, he would have testified that defendant was not the source of the cocaine and cocaine base he distributed.

When defendant was tried, Brooks had not yet been sentenced for the crimes he was accused of committing in tandem with defendant. Although his plea agreement provided specifically that he did not have to testify at defendant's trial, it provided also that he would jeopardize his plea agreement if he were called at trial and testified untruthfully. No sensible defense lawyer would have called him to the stand under these circumstances. Brooks might have done one of three things, two of which would have been unfavorable to defendant. He might have testified truthfully that defendant was his source for the controlled substances he distributed. He might have testified truthfully that defendant was not his source. Finally, he might have testified untruthfully that defendant was his source simply because he wanted

to get the best deal possible at his own sentencing. It was not evidence of ineffectiveness for defendant's attorney not to call Brooks in defendant's case.

Defendant does not stop with Brooks. He argues in addition that his attorney should have called an "alibi" witness, Sean Nance, and others to provide trial testimony favorable to defendant. Defendant does not identify the "others" that would have provided the favorable testimony. From Nance's affidavit attached to defendant's memorandum as Exhibit P, it appears that Nance would have testified, not about an alibi for defendant, but about statements made to him by trial witnesses that were inconsistent with statements they made at trial.

The record does not disclose why defendant's attorney did not call Nance after having subpoenaed him to appear. Since Nance avers in his affidavit that he had been arrested in 2002 for possession of cocaine and a firearm and was brought to the courthouse in the custody of the United States Marshal, it is reasonable to assume that he had been convicted of crimes and for that reason, might not have been a credible witness in defendant's behalf. Moreover, counsel may have assessed the value of his testimony and concluded that it would not be particularly helpful to defendant. The only potentially admissible testimony Nance could have given consisted of a prior inconsistent statement that Sara Weyer had allegedly made to him about her trips to California, to the effect that she had not gone to California to obtain drugs for defendant, as she testified at trial, but had gone "to meet men, smoke

marijuana, and to party with [defendant's] nephew, Sershawn Nicholson." Nance Aff., Exh. P to Dft.'s Mem., dkt. #198, at 2. If defense counsel had asked Weyer whether she ever made such a statement, she would have had a chance to deny it or to explain why she had made it. Given the uncertainty of trying to impeach one convicted witness with another, particularly when the first witness has been candid about admitting her previous charged and uncharged criminal activity, I cannot say that it was ineffective assistance for defendant's attorney to choose not to call Nance. The evidence of trips to California on defendant's behalf did not depend solely on Weyer. She was not the only female witness who testified that she had made trips to California to pick up drugs for defendant or who testified that she had seen defendant providing drugs to others for distribution.

Defendant refers to "others" who might have had been called as witnesses to give testimony favorable to him but he has neither identified them nor explained what evidence they might have given. I conclude that he has fallen short of proving that his trial counsel failed to provide adequate assistance when he did not call Brooks or Nance to testify at trial.

6. Not allowing defendant to direct the examination of witnesses and suggesting to court that defendant would perjure himself on stand

Defendant blames his attorney for not letting him direct the examination of the witnesses, but this is no reason to find that his attorney gave him inadequate assistance. As

I explained to defendant on several occasions during the course of the trial, it is the lawyer's job to ask questions and determine trial strategy, not the client's. I advised defendant that if he had questions he wanted asked, he should wait until his attorney had finished questioning witnesses and then consult with him about additional questions. I told defendant that his attorney would have the final call on what questions would be asked and that if he disagreed with this approach, he could proceed pro se. Defendant never chose that option.

As to defendant's counsel's advising the court that he had concerns about the truthfulness of defendant's testimony, this was an appropriate way to deal with a perceived problem. Nix v. Whiteside, 475 U.S. 157 (1986). Counsel followed a careful line between his ethical obligation not to assist a client who is going to testify untruthfully, id. at 173, and his responsibility to his client. (On a technical note, counsel did more questioning of defendant than might have been appropriate, given his concerns about defendant's truthfulness. If anything, this questioning prejudiced the government and not defendant.)

7. Failing to challenge sufficiency of evidence at close of trial

Defendant was not prejudiced by his attorney's failure to challenge the sufficiency of the evidence on the substantive counts of the indictment after all the evidence had been presented. He had made a motion for acquittal at the close of the government's case, at which time I held that if the evidence was viewed in the light most favorable to the

government, it was sufficient to allow a jury to find defendant guilty of the counts. Tr. Trans., 4-59, dkt. #184. The evidence that defendant adduced during his case did not change my view of the evidence. There was no likelihood that defendant was deprived of an acquittal by his attorney's failure to renew the motion. The evidence was more than sufficient to find him guilty of all the counts of the indictment.

8. Failing to challenge defendant's sentencing on facts not found by the jury

This challenge makes no sense because defendant was not sentenced under the guidelines, which at the time of defendant's trial required the sentencing judge to make findings on certain issues related to sentencing, such as role in the offense and acceptance of responsibility. Defendant was sentenced under § 841(b). This statute makes a life sentence mandatory when a defendant is convicted of a charge of distributing 5 kilograms or more of cocaine or 50 grams or more of cocaine base and has two or more prior convictions for a felony drug offense. The only "fact-finding" that was done was a determination that defendant had at least two prior convictions for felony drug offenses. Even after the Court's decisions in United States v. Booker, 125 S. Ct. 738 (2005), and Blakely v. Washington, 124 S. Ct. 2531 (2004), sentencing courts are still authorized to consider prior convictions as sentencing factors. Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

9. Cumulative effects of ineffectiveness

It is unnecessary to consider this claim because defendant has failed to show that his counsel was ineffective in any way that would have deprived him of a fair trial.

B. Ineffective Assistance of Appellate Counsel

All that defendant says in support of this claim is that his appellate counsel was ineffective because he failed "to raise on appeal the same issues raised within this § 2255 Motion (incorporated herein by reference and made a part hereof)." Dft.'s Mem., dkt. #198, at 54. Defendant believes that if counsel had raised all of these issues, his conviction and sentence would have been reversed on direct appeal. The belief is ill-founded. As this review of the issues should make clear, defendant has no claims on which he would be granted relief, with the possible exception of his allegation that neither of his two trial counsel advised him that any term of imprisonment that he received would not include parole.

C. Summary

All of defendant's challenges to his conviction will be dismissed with the exception of his claims that his counsel never told him that he would not be eligible for parole under a federal sentence so that he lacked the information he need to make a knowing decision to reject the plea agreement that the government offered him and that at lest three of his four

prior drug felony convictions were constitutionally infirm and could not have been used to support a mandatory life sentence under § 841 had counsel investigated them properly. As to the two remaining claims, defendant must file an affidavit, setting out specifically what his counsel did and did not tell him about a possible federal sentence and when and where those conversations took place, and setting out exactly which prior felony drug convictions were invalid and in precisely what respect, when they were entered and in which courts.

ORDER

IT IS ORDERED that defendant Bernard Brisco's motion for relief under 28 U.S.C. § 2241 is DENIED, except as to defendant's claims that his attorney gave him constitutionally inadequate advice about a potential federal sentence and in failing to investigate his prior drug felony convictions for constitutional errors. Defendant may have until April 6, 2005, in which to submit an affidavit setting forth with particularity the facts supporting his two remaining claims. If by April 6, 2005, he fails to file such an affidavit, his motion will be denied in all respects.

Entered this 14th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge