IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-0150-C
02-CR-0089-C-02

v.

CHARMAYNE COOK,

Defendant.

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Defendant Charmayne Cook's motion for vacation or modification of her sentence is before the court following briefing. Defendant is challenging her 71-month sentence for conspiracy to distribute methamphetamine; the government contends that her challenge is without merit.

In her motion, defendant listed a number of reasons why she thought her sentence was illegal. In an order entered on April 5, 2004, I denied her motion as to all of her claims with one exception on the ground that defendant could have raised all of these claims on direct appeal but chose not to do so. I excepted her claim of ineffective counsel because this is one claim that a defendant is not barred from bringing in the form of a motion for post-

conviction relief even if she could have brought it on direct appeal. Massaro v. United States, 500 U.S. 500 (2003) (defendant challenging federal conviction under § 2255 may raise ineffective assistance of counsel claim in collateral proceeding even if he could have raised it on direct appeal but did not).

Defendant alleged in her motion for post-conviction relief that she would not have pleaded guilty but for her attorney's erroneous advice. According to defendant, her attorney told her that if she did not sign the plea agreement, she would get a minimum ten-year sentence and that if she did sign it, she would get no more than a one to three-year sentence. He based the one to three-year recommendation on his belief that she would be eligible for the safety valve provision in U.S.S.G. § 5C1.2. In the April 5 order, I explained to defendant that in order to prevail on her post-conviction claim, she would have to do more than simply allege that her trial counsel had made certain promises to her. Instead, she would have to file a detailed and specific affidavit showing that she has actual proof to support her allegations. She would have to say exactly what allegations were made, when, where and by whom and whether there were any witnesses to the promises. In addition, she would need to show not only that she would not have pleaded guilty had she received correct advice but would have to show that it was likely she would not have been convicted and given a sentence as severe as the one she did receive. These requirements track the holding in Strickland v. Washington, 466 U.S. 680 (1984), that a claim of constitutionally ineffective

counsel requires two showings: first, that the assistance counsel provided fell below the objective standard of reasonable performance required of lawyers and second, that the defendant was prejudiced by the ineffective assistance.

In response to this order, defendant has submitted an affidavit of her own, one from her mother and a third from her co-defendant, Kevin Hellerman. None of these affidavits supplies the critical information that defendant must have to show that her conviction was obtained unconstitutionally. Hellerman's averments concern only defendant's involvement in the conspiracy; he has nothing to contribute to defendant's contention that she did not receive adequate representation. Defendant's mother avers that she attended most of the meetings that her daughter had with trial counsel, that defendant tried to explain her involvement in the conspiracy to counsel but was unsuccessful in getting him to hear her out and that counsel told defendant she would be eligible for the safety valve and would therefore not be subjected to the minimum mandatory sentence for her criminal conduct. Defendant avers that she met with her attorney at his office on "a few occasions," Aff. of Cook, dkt. # 120, at 2, that he accompanied her to her debriefing by law enforcement agents, that she wanted to go to trial because she believed she was not part of the conspiracy and that her attorney advised her strongly to plead guilty instead of contesting the charges. According to defendant's averments, her attorney warned her that going to trial meant risking a ten-year sentence whereas a plea agreement might result in a sentence below the

mandatory minimum sentence because she was eligible for the safety valve provision under U.S.S.G. § 5C1.2. She believes that her attorney did not negotiate strongly enough for her interests, argue vigorously enough for her rights or undertake an adequate investigation of her case.

From the affidavits that defendant has filed, it appears that her complaint is not that her representation was inadequate but that her attorney was unable to secure a sentence of less than three years for her. Defendant confuses reasonable and practical advice with coercion. Despite her own admission that she did distribute drugs, rode along with co-defendant Hellerman when he made drug-related trips and helped to support him financially while he was distributing drugs, she believes now that she would have received a much lighter sentence had she gone to trial because she was not as heavily involved as the court found her to be.

Defendant is misguided. In fact, defendant's attorney gave her excellent advice about her choices. He was right when he warned her that she might receive a ten-year sentence if she went to trial because she would lose her three-point reduction for acceptance of responsibility. She has not shown any reason for thinking she could have been acquitted. Her co-defendants were all available to testify. Most of them, including Kevin Hellerman, had already given statements to the government concerning her involvement in the conspiracy.

Defendant contends that her attorney could have argued more vigorously in her behalf at sentencing. In retrospect, she says that she wanted him to argue for a lower drug weight, a minimal role in the conspiracy, fewer criminal history points and diminished capacity but that he refused because the government had reduced the drug weight attributable to defendant to 191.52 grams and he was afraid that defendant would lose her three points for acceptance of responsibility if he pursued the motions. She continues to maintain that the correct drug weight should not have been more than 50 grams because of her limited involvement in the drug distribution.

Even relying exclusively on defendant's version of the events and ignoring the affidavit of trial counsel that the government has submitted, it is clear that defendant's attorney was acting well within the range of competency when he advised defendant on the course she should take. He erred if he promised defendant the safety valve without knowing that defendant's state conviction for driving while intoxicated would be treated as a prior conviction under the guidelines. (Defendant's attorney denies that he ever made such a promise and in her affidavit, defendant averred only that her counsel indicated that she might get a sentence below the mandatory minimum.) However, a mistaken prediction is not enough in itself to show deficient performance. United States v. Barnes, 83 F.3d 934, 940 (7th Cir. 1996). To prove constitutional deficiency, a defendant has to show that her "attorney did not make a good-faith effort to discover the facts relevant to [her] sentencing,

to analyze those facts in terms of the applicable legal principles and to discuss that analysis with [her]." Id. (citing McMann v. Richardson, 397 U.S. 759, 769-71 (1970)). Defendant alleges that her attorney was wrong in promising her a certain result but she has not alleged facts to support a finding that he did not make a good faith effort to discover the facts relating to her eligibility for the safety valve.

Moreover, defendant has not explained convincingly why she did not speak up in court at her plea hearing when she was asked specifically whether anyone had made her any promises to get her to plead guilty. The extensive plea colloquy in which she participated is not intended to be a ritual without meaning. It is an opportunity to test the voluntariness of the plea and the defendant's understanding of what she is doing. If a defendant holds something back and does not answer the questions honestly, then she cannot complain if the court accepts her plea as a knowing and voluntary one. See, e.g., United States v. Rice, 116 F.3d 267, 268 (7th Cir. 1997) ("The judge told Rice that the sentence could be as high as 405 months' imprisonment; Rice did not reply that this was inconsistent with his understanding (under which the maximum is 262 months). When Rice learned that the sentencing calculations were unfavorable, he began to sing a new song. Too late, the court held— properly so.").

I conclude that defendant has not presented enough factual evidence to support her claim that her attorney failed to provide effective assistance to her. She fails to meet the first

prong of the Strickland test. The second prong sets up a greater obstacle. Defendant cannot prove that were it not for her attorney's alleged omissions and mistakes she would have gone to trial and would have been acquitted. The government's evidence against her was voluminous; she admits she was responsible for the distribution of *some* methamphetamine. This admission dooms her argument. Had her co-defendants testified to what she herself has admitted, it is highly likely that the jury would have found her guilty. Unless the evidence at trial had been significantly different from the co-defendant's statements to law enforcement agents, the probation officer could have prepared a presentence report much the same as the one she wrote in 2003, finding defendant responsible for distributing at least 191.57 grams of methamphetamine. Defendant's base offense level would still have been 27, but she would have lost the three-point reduction for acceptance of responsibility because it is denied to defendants who contest their guilt except in rare cases in which the defendant is challenge the constitutionality of a statute or the statute's applicable to his conduct. U.S.S.G. § 3E1.1, cmt. 2. Her adjusted offense level would have been 30. With a criminal history category of III, her guideline range would have been 121-150 months, or the ten-year plus range that her lawyer warned her about.

In summary, even if I accept defendant's allegations as true, she cannot show either that her privately retained counsel did not provide her constitutionally effective assistance or that if he was ineffective, his ineffectiveness prejudiced her case. Therefore, it is

unnecessary to hold an evidentiary hearing on her allegations. Her motion must be denied for her inability to show that her sentence is unconstitutional in any respect.

Defendant has mentioned in some of her submissions that she would like to raise a claim under the Blakely-Booker line of cases but she has made no argument to that effect. If the Supreme Court should find that the sentencing guidelines are unconstitutional *and* if it should be found that the Court's decision applies retroactively, defendant can file a new motion to raise her claim that she was illegally sentenced because the court relied in sentencing her on facts not found by the jury beyond a reasonable doubt.

ORDER

IT IS ORDERED that defendant Charmayne Cook's motion for relief pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that her sentence was imposed in violation of the Constitution or laws of the United States.

Entered this 21st day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge