IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY R. HALLGREN,

Defendant.

ORDER

03-C-0541-C

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Defendant Jerry R. Hallgren has filed a timely motion pursuant to 28 U.S.C. § 2255 in which he contends that his trial counsel was constitutionally ineffective. In support of his unsigned and unsworn motion he asserts that his attorney failed to investigate the "entire facts of the hostilities between" defendant and his former girl friend, Brenda Johnson. Defendant believes that a more thorough investigation would have revealed that Johnson was lying about the threat he allegedly made to her in the summer of 1999. Defendant maintains that the alleged threat was made before he knew he was under investigation, that Johnson waited six months to report it to law enforcement officers, that even if defendant threatened Johnson, he had many reasons to do so other than the possibility that she would be a witness against him, that the "Daley murder" to which he referred in his alleged threat

had occurred before defendant had turned 15, that Johnson had reported a threat made to her by defendant's sister and co-defendant, Vinette Crowley, that had been discredited by Crowley and by witnesses present at the time the alleged threat was made, and that Johnson had been in contact with defendant and his family many times during the period she told the grand jury she was afraid for her life because of defendant and his family and had been in hiding for five years.

In order to show that counsel was constitutionally ineffective, a movant must show both that the assistance provided fell below the minimum expected of defense counsel and that the ineffectiveness prejudiced the movant. Strickland v. Washington, 466 U.S. 680, 688 (1984). It is not clear from defendant's motion whether he is seeking a vacation of his conviction, as the government seems to believe, or whether he is seeking merely a correction of his sentence on the ground that the court erred in enhancing his offense level by two points because of his threat against Johnson. Even if his challenge is limited to the two-point enhancement, he may raise it on a § 2255 motion. The cases the government cites to the contrary have been overruled by the United States Supreme Court. Glover v. United States, 531 U.S. 198 (2001) (holding that any increase in sentence constitutes "prejudice" under Strickland).

To be entitled to an evidentiary hearing on his claim of ineffective assistance, defendant would have to file a detailed and specific affidavit supporting the claim. He has

not done so. Even if he were to correct the omission and submit an affidavit setting out the allegations he makes in his motion, his averments would not show ineffectiveness.

It may be that defendant's attorney failed to go into all of the hostilities between defendant and Brenda Johnson, but the picture presented at trial showed very clearly that Johnson had many reasons to want to cause trouble for defendant, even to the point of perjury. She testified that she and defendant had had a serious altercation that led to their breakup; defendant's wife testified that Johnson had told her never to touch Johnson's daughter when she visited defendant (her father) and his wife, suggesting that Johnson bore considerable animosity toward defendant's wife; and Johnson reported defendant's drug dealing to law enforcement authorities as early as 1997.

As for the delay between the threat and Johnson's report of it, defendant has shown no reason to think that this fact would have any significance, assuming defendant could prove it. Also, it was clear from the evidence adduced at trial that defendant had many reasons to threaten Johnson other than his knowledge that she had talked to law enforcement authorities.

It is not relevant that defendant made his threat to Johnson came before he knew that he was a target of law enforcement. He knew that the Crowleys were targets; Vinette Crowley is his sister; and William Crowley is a close friend and partner in the drug distribution business. Defendant had almost as much reason to threaten Johnson in order

to protect the Crowleys as he did to prevent her from talking about *him*. He had to know that if law enforcement was looking at the Crowleys they would be looking at him next, particularly if Johnson kept talking. It is irrelevant also that the Daley murders occurred when defendant was still a child. Obviously they made a distinct impression on him. He could threaten Johnson with becoming another "Daley" without having been the Daleys' murderer himself.

Whether Johnson was wrong about the threat she reported from Vinette Crowley is of only minimal relevance in determining whether defendant made a threat. Johnson testified at trial. Both the jury and I had the opportunity to observe her and to evaluate her credibility.

Finally, defendant argues that his counsel should have shown the jury that Johnson had misled the grand jury when she told it that she was so afraid of defendant and his family that she had been in hiding for the previous five years. It is unlikely that counsel could have adduced this evidence at trial, in light of Fed. R. Evid. 608(b), which prohibits proof of specific instances of a witness's conduct for the purpose of attacking her credibility, except in specific circumstances.

Defendant wishes that the jury and the court had chosen to disbelieve Johnson and thinks that it his attorney's fault that this did not happen. However, he has failed to show that his attorney's representation fell below the minimal standard of representation.

Supporting his allegations with an explicit affidavit would not enable him to prove ineffectiveness. (He says that his attorney told him he had no experience in federal court and had never tried a federal drug case but defendant must have misunderstood what his attorney was saying. Defendant's counsel had had extensive experience in federal court at the time he represented defendant in this case.)

To the extent that defendant is contending that it was error for the court to allow Johnson to testify to defendant's threat, he is barred from raising that issue in this motion because he raised it on appeal.

ORDER

IT IS ORDERED that defendant Jerry R. Hallgren's motion for vacation of his conviction and sentence is DENIED.

Entered this 18th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge