

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID H. BRUMFIELD,

Defendant.

ORDER

03-C-0687-C

00-CR-0118-C-01

Defendant David H. Brumfield has filed a motion pursuant to 28 U.S.C. § 2255, in which he contends that his sentence is illegal because he had ineffective assistance of counsel when he entered a plea of guilty to an indictment charging him with conspiracy to distribute a controlled substance. Defendant says that counsel assured him that he would be held responsible for only the two grams of cocaine that he actually sold and that he would receive a sentence of not more than thirty months. Defendant alleges that his counsel was ineffective in another respect because he did not challenge the indictment charging defendant with conspiracy when defendant had only a buy-sell relationship with the other persons charged with conspiracy.

The second allegation requires only a brief discussion. Counsel could not have been constitutionally ineffective in failing to challenge the indictment because no court would allow a lawyer to bring such a challenge. The indictment charged a conspiracy; if defendant and his counsel believed that the evidence would not support such a charge, the only method they had for challenging the factual basis for the charge in the indictment was to proceed to trial. A court cannot make a pretrial determination of the sufficiency of an indictment when the challenge goes to the facts underlying the charge.

Returning to defendant's first challenge, I note that he has failed to submit the kind of detailed, specific affidavit he must file if he wants to have an evidentiary hearing on his claim. Merely alleging that his appointed counsel gave him inaccurate advice is not sufficient. In this case, however, even an affidavit would not help defendant.

Whatever defendant's attorney told defendant about what he could expect in the way of sentencing, he heard a different story in court. At his plea hearing, both the government and the court advised defendant of the maximum penalties to which he would be subject if he was found guilty and also that at sentencing he would be held responsible for *all relevant conduct*; defendant told the court that he understood both these things. The court asked him specifically whether anyone had told him he was going to receive a particular sentence; he answered "No."

At sentencing, defendant never indicated that he was surprised about the relevant

conduct for which he was being held responsible. The probation office notified him well in advance of sentencing that he would be held accountable for all relevant conduct. The presentence investigation report included a full description of defendant's relevant conduct. In affirming defendant's sentence, the Court of Appeals for the Seventh Circuit found that defendant had acknowledged his understanding at his plea hearing that the court would consider all relevant conduct. United States v. Brumfield, 301 F.3d 724, 732 (7th Cir. 2002). He had the opportunity to discuss the relevant conduct with his attorney and raise any objections to it at his sentencing hearing.

It is too late for defendant to assert that his counsel gave him bad advice that led him to enter a plea of guilty that he would not have entered otherwise. Having passed up at least two opportunities to advise the court of this bad advice, defendant is not credible when he asserts it after his appeal has been unsuccessful. It appears that defendant is trying to use a claim of ineffective assistance merely to support a second challenge to his sentence.

ORDER

IT IS ORDERED that defendant David H. Brumfield's motion for vacation or

modification of his sentence is DENIED.

Entered this 22nd day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge