

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

UNITED STATES OF AMERICA

Plaintiff,

v.

MARK J. WRIGHT,

Defendant.

ORDER

03-C-0709-C

00-CR-0098-C

Defendant Mark J. Wright has filed a motion pursuant to 28 U.S.C. § 2255. (Earlier, defendant identified his motion as one brought under a plethora of other acts, such as the All Writs Act and the Jencks Act. In response to questioning by the court, he has chosen to label his motion as one brought under § 2255, because he is seeking relief that he can obtain only under that statute.) Defendant moved for and was granted leave to amend his motion, provided that he did not add any new claims after the time for filing a § 2255 motion had expired. See Order entered Feb. 6, 2004. That time expired without any new filings by defendant. On May 17, 2004, he wrote the court to say that he did not intend to file an addendum. Accordingly, I will address the motion in its original form.

It is not easy to make out the claims defendant is raising. As best I can tell, he objects

to the weight of the drugs attributed to him at sentencing, the ineffectiveness of his counsel, the government's use of informants and "unfulfilled copies of The Jencks Act Grand Jury Records." Pet. at third unnumbered page. He fleshes out his assertion of ineffectiveness by saying that his counsel did not allow him the opportunity to testify on his own behalf and failed to impeach the adverse witnesses. He does not explain what he means about unfulfilled copies of grand jury records but he adds a request for the "entire grand jury hearing" on the ground that he believes it will vindicate him in his quest to prove his innocence. Id. at ninth unnumbered page. Defendant says that the use of hearsay at trial was improper, "as is the 'threats' made to witnesses." Id. However, he does not identify any specific instance of improper hearsay or provide any information about any alleged threats. Therefore, I will ignore these allegations. Also, I will ignore defendant's passing reference to the government's use of informants. Defendant has not explained what if anything might have been unconstitutional about the government's use of informants in this case.

Defendant cannot challenge the drug weight in this motion because he challenged it on direct appeal and it was decided against him. That ruling is "the law of the case," not subject to re-argument. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994).

To the extent that defendant intends to argue that the jury lacked sufficient evidence to find him guilty of conspiracy, he is barred from raising this issue because it is one he could have raised on direct appeal but did not. Therefore, the issue is forfeited unless defendant

could show good cause for not raising it on appeal and prejudice if he is not allowed to raise it now. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (no collateral review absent showing of both good cause for failure to raise claims on direct appeal and actual prejudice from failure to raise claims unless refusal to consider issue would lead to fundamental miscarriage of justice) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). Defendant has made no showing of either cause or prejudice.

There remains the alleged ineffectiveness of defendant's trial counsel. Defendant says that counsel was ineffective in two respects. The first is in not allowing defendant to testify and the second is in "refus[ing] to impeach witness[es] Peterson, Castaneda, Kowalski and Polo." Pet. at seventh unnumbered page. As to the first claim, it is the kind that defendant can raise in a postconviction motion because it concerns a matter that cannot be resolved by review of the trial proceedings. However, it cannot be raised in its present form. Defendant has not set forth his allegations with sufficient specificity to trigger the court's obligation to consider them, much less to hold a hearing at which defendant would have an opportunity to prove them. Mere unsupported assertions are not enough to require a hearing; defendant must file a detailed and specific affidavit showing he has actual proof of allegations. Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002).

If defendant wants to pursue his assertion that his trial counsel refused to allow him to testify, he will have to file an affidavit setting forth specific allegations and swearing to the

truthfulness of those allegations. He should explain the nature of his discussion with counsel on the issue, state whether his counsel advised him not to testify or whether he refused to allow defendant to testify and identify what testimony he could have given that would have helped his defense and persuaded the jury not to find him guilty. Once that affidavit has been filed, I will determine whether it is sufficient to require a response from trial counsel and the holding of an evidentiary hearing.

Defendant could have raised on appeal his assertion that trial counsel was ineffective because he did not “impeach” the adverse witnesses. (I assume that defendant means that his counsel did not do an adequate job of cross examination.) Defendant was not represented on appeal by his trial counsel, so his counsel would not have been in the awkward position of second guessing his own performance. Therefore, defendant cannot establish any cause for not raising the issue on appeal. United States v. Taglia, 922 F.2d 413, 418 (7th Cir. 1991) (failure to take direct appeal is bar to postconviction proceeding if extrinsic evidence not necessary to resolution of claim). Moreover, I have reviewed the transcript of the trial to see whether appellate counsel would have had any ground for challenging trial counsel’s performance on cross examination. I am satisfied that no such ground existed. Defendant’s trial counsel’s performance was exemplary. He cross examined the government’s witnesses expertly. That he did not undermine the credibility of their cumulative testimony is not attributable to his lack of skill or effort but to the overwhelming

weight of the evidence against defendant. When most of one's co-conspirators testify on behalf of the government, it is not easy to avoid a finding of guilt beyond a reasonable doubt. Therefore, defendant would be unable to show that he would be prejudiced if he is not allowed to appeal this issue.

As to defendant's request for grand jury transcripts, defendant has show no reason why the request should be granted. "To obtain grand jury material, despite the presumptive secrecy imposed by Fed. R. Crim. P. 6(e), a litigant must show that the information 'is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed.'" United States v. Campbell, 324 F.3d 497, 499 (7th Cir. 2003) (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979)). Defendant has said only that the records of the grand jury that returned the indictment against him might vindicate him in his quest to prove his innocence. This is not sufficient to breach the presumption of secrecy. Rather, it is "the kind of fishing expedition that Rule 6(e) forbids." Id.

ORDER

IT IS ORDERED that defendant Mark J. Wright's motion for postconviction relief is DENIED, with the exception of his claim that his trial counsel was constitutionally

ineffective because he refused to allow defendant to testify. As to that one claim, defendant may have until June 2, 2004, in which to file an affidavit with the court setting forth specific details about his discussion with his trial counsel about testifying and identifying what testimony he could have given that would have been useful to his defense.

Entered this 18th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge