

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

In an order entered on May 18, 2004, I denied all of defendant Mark J. Wright's motion for § 2255 relief from his sentence, with one exception. I gave defendant until June 2, 2004, in which to file an affidavit setting forth specific allegations about his claim that his attorney had refused to allow him to testify at his trial. Defendant was to explain what kind of discussion he had had with his counsel about his testifying, whether his counsel advised him not to testify or actually refused to let him testify and what testimony he would have given that would have persuaded the jury not to find him guilty.

In response to this order, defendant filed a document entitled "All Writs Act Rule 60(b) Voiding of Judgment due to Fraud," in which he raises new arguments about why the

court lacked jurisdiction to hear the government's case against him and why his counsel was ineffective. The new arguments are beyond the scope of the May 18 order. Even if I were to address them, they would not succeed. Defendant's "jurisdiction" defense is based on an inaccurate understanding of the power of the United States to prosecute crimes when authorized to do so by Congress. His ineffectiveness of counsel argument is barred because he could have raised it as part of his direct appeal and failed to do so, as I explained to him in the May 18 order.

At the very end of defendant's submission, he declares under penalty of perjury that if he had testified at his trial, he would have proven that he was neither a manager nor recruiter [in relation to the conspiracy] and that the weight of his co-conspirators' purchases should not be used against him; he would have testified that two witnesses before the grand jury, including his former wife, were both under the influence of crack cocaine when they appeared before the grand jury; his attorney refused to challenge drug weights and "statements"; and he would have told the jury of the threats and coercion employed against his former wife.

This affidavit does not comply with the May 18 order. Defendant omits the information crucial to his claim that his attorney "refused to allow him to testify," which is what his attorney said to him. If defendant is not prepared to swear to the truth of his basic allegation that he was not allowed to testify, then no evidentiary hearing is required.

No evidentiary hearing would be necessary in any event because the testimony defendant has described would be insufficient to persuade a jury that he was not guilty. First, his statement that “he would have proven that he was neither manager or recruiter” is only a conclusory and probably wishful statement. He does not identify what exactly he would have said that would have led the jury to make this finding and he does not explain why the testimony would have made any difference to the jury’s verdict. The jury did not have to find that defendant was a manager or recruiter; all it had to find was that he was a willing member of a conspiracy and that conspiracy was responsible for the distribution and possession with the intent to distribute more than 5 kilograms of cocaine.

As to the proposed testimony that the grand jury witnesses were under the influence of crack cocaine when they appeared before the grand jury, defendant has not said how he would have had personal knowledge of this. Even if he could show such personal knowledge, it would have been irrelevant. The jury did not need to know anything about the witnesses’ ability to testify before the grand jury. It had to base its decision upon the evidence adduced in the courtroom, not before the grand jury.

Defendant would not have been allowed to testify about his attorney’s alleged refusal to challenge weights or statements. What his attorney said to defendant about trial strategy would have been irrelevant to the jury’s determination of defendant’s guilt or innocence.

Finally, defendant could have testified about the threats and coercion used against his

former wife only if he had personal knowledge of them. It is unlikely that he would have such knowledge. If, as he alleges, the government made threats against his wife to persuade her to testify against defendant, it probably did not make the threats in defendant's presence. In any event, defendant's attorney explored the subject of threats and coercion thoroughly in his cross-examination of defendant's former wife. Although she did not admit to threats or coercion of a type that would have cast doubt on the truthfulness of her testimony, counsel did succeed in making the point that the government agents had not told her that she had any right to refuse to answer questions about her relationship with her husband or events that had occurred during their marriage.

Defendant has attached to his submission an affidavit from his former wife, in which she avers that he government threatened her with the loss of her children if she did not testify against defendant. This affidavit does not add to defendant's case. Defendant's former wife had an opportunity to give this same testimony when she was on the stand at his trial. The jury did not find it probative of defendant's innocence.

In light of defendant's inability to identify with any specificity statements by his attorney refusing to allow defendant to testify on his own behalf and defendant's inability to identify any testimony he could have given that would have been helpful to his defense, I conclude that defendant's motion to vacate his sentence must be denied in full.

ORDER

IT IS ORDERED that defendant Mark J. Wright's motion for post-conviction relief brought pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that his custody is illegal in any respect.

Entered this 3rd day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge