IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY J. PHILLIPS,

Defendant.

OPINION AND ORDER

04-C-0565-C
03-CR-0040-C

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Defendant Gregory J. Phillips's motion for postconviction relief pursuant to 28 U.S.C. § 2255 is before the court for determination. In defendant's original motion, he asserted among other things that his court-appointed counsel had been constitutionally ineffective in two respects: failing to advise him that if he pleaded guilty he would be subject to a guideline range of between 262-327 months because of his status as a career offender under the Sentencing Guidelines and failing to take an appeal from his sentence after defendant had asked him to do so.

Defendant was indicted on April 3, 2003, on one count of conspiracy to possess with intent to distribute 50 grams or more of cocaine base and one count of possession with

intent to distribute 50 grams or more of cocaine base. He remained in detention pending the resolution of his case. Before his arraignment, John Smerlinski was appointed to represent him. On May 20, 2003, defendant entered a plea of guilty to the conspiracy count, pursuant to a written plea agreement. Three weeks later, he asked that Smerlinski be relieved of his representation. His request was granted and new counsel was appointed to represent him for sentencing purposes.

At sentencing, defendant's base offense level was 34 because he conspired to possess between 150 grams and 500 grams of cocaine base; this offense level became 37 because defendant's two previous violent felonies made him a career offender under the Sentencing Guidelines. U.S.S.G. § 4b1.1. After he received a three-point reduction for acceptance of responsibility, his adjusted offense level was 34. With his status as a career offender, his criminal history category was VI, making his guideline range 262-327 months. He received the lowest possible sentence of 262 months.

Defendant filed his § 2255 motion on August 11, 2004. In an order entered on August 19, 2004, I denied most of the claims he had raised in his motion but allowed him to file an affidavit supporting his two claims of ineffectiveness of counsel. After I determined that he was entitled to an evidentiary hearing on the failure to appeal claim, I appointed Thomas Wilmouth to represent defendant.

After the first hearing, I ruled that defendant had asked his court-appointed counsel

to take an appeal and that counsel had failed to do so. In response to a motion by defendant, I re-opened the question of the adequacy of the advice that Smerlinski gave to defendant before he entered his plea and scheduled a second evidentiary hearing on that specific question. (In the same motion, defendant's counsel was granted leave to amend the § 2255 motion to argue that it was illegal for the court to have sentenced defendant on the basis of a drug quantity determination that the jury did not make beyond a reasonable doubt. Although the United States Supreme Court decided in United States v. Booker, 125 S. Ct. 738 (2005), that it is impermissible for sentencing courts to rely on facts that have not been found by a jury if the courts are operating under a mandatory guideline system, the Court of Appeals for the Seventh Circuit has held that Booker has no retroactive application to cases such as defendant's that were not on direct appeal when Booker was decided. McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005). Presumably, the McReynolds decision persuaded defendant's counsel not to pursue this sentencing claim.)

The evidentiary hearing on Smerlinski's assistance has been held and the parties have filed post-hearing briefs. The matter is before the court, together with the question of the proper remedy for defendant's counsel's failure to take an appeal.

From the evidence adduced at the second evidentiary hearing, I find the following facts.

FACTS

John Smerlinski is a lawyer in good standing in the state and federal courts of Wisconsin and has been since 1992. He is a member of this court's Criminal Justice Act panel. Over the years, he has handled a variety of federal criminal cases from initial appearance to appeal. He is familiar with the Sentencing Guidelines and the enhancements that can be applied in sentencing. He knows the importance of negotiating over possible enhancements with the United States Attorney's Office before his client enters a plea of guilty.

Smerlinski was appointed to represent defendant before defendant was arraigned on April 17, 2003. It is his practice to obtain a copy of his client's bond study and review it to determine whether his client has a prior criminal record and how extensive it is. Within a week of the arraignment, the government tendered defendant a plea agreement. Subsequently, Smerlinski had discussions with Paul Connell, the Assistant United States Attorney about how the guidelines would affect his client and what enhancements might apply.

Smerlinski met with his client at the Dane County jail approximately six times before defendant entered his plea on May 20, 2003. He provided defendant the discovery in the case. During the same time period, he met also with Leslyn Spinelli, who wrote defendant's presentence investigation report and went over defendant's criminal history with her so that

he could give defendant an accurate idea of what he might be facing under the guidelines. Smerlinski believed that defendant was looking at career offender status. This prompted Smerlinski to try to amend one or more of his prior convictions.

Smerlinski told defendant about his probable career offender status and what the resulting guidelines would be if Smerlinski did not succeed in getting one of defendant's prior convictions changed to a misdemeanor from a felony. He discussed the career offender topic on most of his visits with defendant. He investigated the prior convictions to verify that they were what they were purported to be and he talked to people in the district attorney's offices in both La Crosse County and Jefferson County, where the sentences had been imposed. La Crosse County refused to consider changing the prior conviction; an assistant district attorney in Jefferson County gave Smerlinski reason to believe that a change might be possible. However, at the time defendant entered his plea of guilty, Jefferson County had made no definite commitment to change the conviction. Despite this uncertainty and Smerlinski's warning that he should not count on getting the conviction amended, defendant wanted to proceed with the plea to avoid the possibility of a life sentence. (Smerlinski had advised him that if he went to trial he ran the risk of an offense level of 40, given the amount of cocaine base and a possible enhancement for obstruction of justice or for a managerial role in the offense.)

Neither Smerlinski nor defendant was surprised when the presentence investigation

report showed a 262 to 327 sentencing range. Defendant's focus was on the possibility of amending the Jefferson County conviction. When Smerlinski was unable to accomplish this, defendant asked for a new lawyer.

OPINION

In evaluating the testimony at the evidentiary hearing, I found Smerlinski's to be credible. I did not believe defendant because his testimony was fatally inconsistent and because he had the greater incentive to shade the truth. Even if I had believed defendant's testimony, however, I would deny his motion. He testified that Smerlinski had told him he could face as much as 360 months to life if he went to trial. So long as he knew this, he had enough information to make a knowing and intelligent decision to plead guilty, even if he did not know exactly how long a sentence he would be likely to receive if he entered a plea of guilty. Although his actual sentence was higher than he says he had been led to believe, it was still almost 100 months shorter than the minimum he thought he would receive if he went to trial. This penalty differential makes it difficult, if not impossible, for defendant to argue that if he had been accurately advised, he would have chosen to go to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985) (to meet prejudice prong of constitutional ineffectiveness of counsel claim, defendant must show reasonable probability that had it not been for counsel's errors he would not have pleaded guilty and would have insisted on going to trial).

In any event, I believe Smerlinski when he says that defendant understood exactly what the possible sentencing options were if he went to trial, if he pleaded guilty without any amendment of his prior convictions and if he pleaded guilty and the Jefferson County conviction were amended. I will deny defendant's motion for postconviction relief on his claim that Smerlinski gave him constitutionally ineffective counsel before he entered his plea of guilty.

The only remaining question is the remedy for defendant's counsel's failure to take an appeal from defendant's sentence. Castellanos v. United States, 26 F.3d 717, 720 (7th Cir. 1994), holds that once the court finds that counsel has denied a defendant's request to appeal or failed to honor it, the defendant "receives the right to an appellate proceeding, as if on direct appeal, with the assistance of counsel." Such a resentencing is not necessary in this case because the court of appeals has made it clear that it is prepared to treat defendant's belated appeal as if it were timely filed.

ORDER

IT IS ORDERED that defendant Gregory J. Phillips's motion for postconviction relief, filed pursuant to 28 U.S.C. § 2255, is GRANTED as to his claim that he was denied the effective assistance of counsel and his right to appeal from his sentence when his counsel failed to file the appeal he had requested. Defendant may take an immediate appeal of his

sentence. Thomas Wilmouth is to continue to represent defendant on appeal unless and until he is relieved of that obligation by the court of appeals. FURTHER, IT IS ORDERED that defendant's motion for postconviction relief is DENIED in all other respects.

Entered this 20th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge