

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN SANDERS,

Defendant.

OPINION AND ORDER

06-C-0028-C

03-CR-0097-C-01

Defendant John Sanders filed a motion for post-conviction relief under 28 U.S.C. § 2255 on January 16, 2006, saying that he wished to preserve his right to raise any claims he might have under United States v. Booker, 543 U.S. 220 (2005), and stating that he would be amending his motion within 45 days to clarify the precise claims he intended to raise. After more than 45 days passed with no amendment from defendant, I denied his motion for his failure to show that either his conviction or sentence was illegal. Shortly thereafter, defendant wrote to say he had not understood that his motion would be denied if he failed to file his amendment within 45 days. He asked for more time to file his motion and was given until June 1, 2006. On June 5, 2006, he filed his amended petition. Applying the

“mailbox rule,” Houston v. Lack, 408 U.S. 266 (1988), I consider the motion timely.

In his amended motion, defendant has raised eight claims.

1) He was sentenced for a crime not charged in the indictment (which I understand to be a contention that because the indictment did not charge the amount of pseudoephedrine for which he was responsible, it was illegal for the court to sentence him for conduct involving more than 300 grams but less than one kilogram when the jury had not found this amount beyond a reasonable doubt);

2) His sentence violated the Fifth and Sixth Amendments because it represented an increase in his penalty that exceeded the otherwise maximum penalty;

3) His sentence was unconstitutional because the sentencing guidelines direct the court to violate the Sixth Amendment;

4) He was convicted on the basis of evidence seized from him unconstitutionally;

5) His 240-month sentence exceeded the statutory maximum for a Class C felony offense and therefore violated the Fifth Amendment;

6) The court erred in determining the amount of pseudoephedrine without taking into account the amount defendant would have diverted to his personal use;

7) The court erred in determining his guidelines range in reliance on a conviction for which the sentencing court had deferred sentencing; and

8) His counsel was ineffective because he failed to represent defendant adequately on

the motion to suppress evidence.

RECORD EVIDENCE

Defendant was charged with one count of possession of pseudoephedrine knowing it would be used to manufacture methamphetamine in violation of 21 U.S.C. 841(c)(2) and one count of possessing equipment, chemicals and materials that may be used to manufacture methamphetamine in violation of 21 U.S.C. § 843(a)(6). He filed an unsuccessful motion to suppress evidence seized from him during a traffic stop that he contended was pretextual. He went to trial; the jury found him guilty on both counts; and he was sentenced in April 2004 under the then mandatory sentencing guidelines. His base offense level was 34 because I found by a preponderance of the evidence that the offense involved more than 300 grams but less than one kilogram of pseudoephedrine and he received a two-level enhancement for being a leader or organizer. He did not qualify for a downward adjustment for acceptance of responsibility because he contested his guilt and went to trial. Defendant's sentence was 240 months on count 1 and 22 months on count 2, with the terms to run consecutively.

Defendant appealed his conviction and sentence to the Court of Appeals for the Seventh Circuit, alleging that the government had obtained evidence against him through an unlawful search and seizure, that the court had erred in admitting evidence that he had

manufactured pseudoephedrine previously and that the court had erred in sentencing him. The court of appeals found that the search and seizure were constitutional and that it was not error to admit evidence of prior involvement in pseudoephedrine involvement. As for defendant's sentencing challenges, the court noted that defendant was sentenced before United States v. Booker was decided and sent the case back to this court to determine whether the same sentence would be imposed under a guidelines scheme that was advisory only. I reviewed the case file, determined that I would have made the same sentencing decision and notified the court of appeals of the determination. The court of appeals affirmed defendant's conviction and sentence.

OPINION

Once a defendant has taken a direct appeal of his conviction and sentence, his opportunity for further judicial review is limited. The law of the case doctrine bars him from rearguing matters decided on direct appeal. Peoples v. United States, 403 F.3d 844 (7th Cir. 2005). This judicial doctrine conserves judicial resources by encouraging litigants to "marshal all of their facts and arguments so that a dispute may be resolved in one pass." Id. at 846. As a consequence, defendants litigating post-conviction motions cannot raise arguments they could have raised on direct appeal but did not. There is a narrow exception to this rule: if a defendant can show good cause for not raising the issue on direct appeal and

can show that he would suffer prejudice if not allowed to raise it in his post-conviction motion or if he can show that the court's refusal to entertain his claim would result in a fundamental miscarriage of justice. Prewitt v. United States, 83 F.3d 812, 816 (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 or if refusal to consider issue would lead to fundamental miscarriage of justice) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). See also Bousley v. United States, 523 U.S. 614 (1998).

Defendant raised his search and seizure claims in his direct appeal. Once the court of appeals affirmed this court's conclusion that he had not been subjected to an illegal search or seizure, its holding became the law of the case. Thus, I cannot reconsider the lawfulness of the search and seizure.

The law of the case doctrine does not bar defendant's related claim that his trial counsel provided ineffective representation with respect to the search and seizure issue. The court of appeals has held in numerous cases that claims of ineffectiveness of counsel should be preserved for post-conviction proceedings, when the record can be enlarged to add the evidence necessary for the courts to evaluate the adequacy of counsel's work. E.g., United States v. Banks, 405 F.3d 559, 567 (7th Cir. 2005) ("We have repeatedly stated that extrinsic evidence may not properly be introduced in connection with an ineffective assistance claim on direct appeal.") (citing Galbraith v. United States, 313 F.3d 1001,

1007-08 (7th Cir. 2002) (“A reviewing court on direct appeal is limited to the record of trial and cannot consider any extrinsic evidence that may be necessary to support the ineffective counsel claim.”)

However, avoiding the bar of the law of the case does not mean that defendant can succeed on his claims of ineffectiveness of counsel. He still must show that his counsel was ineffective in fact *and* that he was prejudiced. Strickland v. Washington, 466 U.S. 668 (1984). The instances of ineffectiveness that defendant alleges are (1) failing to assert that law enforcement officers were engaged in illegal conduct to violate defendant’s civil rights by creating probable cause to stop his car, arrest him and search his vehicle; (2) failing to assert that under Wisconsin law, a seat belt violation is not an offense for which the driver of a vehicle can be arrested or which a legal stop may be made; (3) failing to secure tape recordings that would have established the lack of any probable cause for stopping defendant’s car; and (4) failure to raise an immunity defense to the charge made because due process was not followed in the stop and search process.

In this case, the dichotomy between the two prongs of ineffectiveness and prejudice is blurred because the issues that defendant thinks his attorney should have raised are meritless. The failure to raise the issues defendant identifies was not ineffectiveness because no good lawyer would have wasted his own or the court’s time bringing them up and it did not prejudice defendant because raising them would not have changed the outcome of the

motion to suppress.

It is not a violation of the Fourth Amendment for law enforcement officers to stop and arrest a driver who violates the traffic laws, regardless of the real reason the officers had for the stop. Whren v. United States, 517 U.S. 806 (1996) (ulterior motives do not invalidate police stop for traffic violation). Therefore, defense counsel would have had no reason to try to show that the police were engaged in a conspiracy to violate defendant's civil rights by creating probable cause to stop his vehicle. With no need to show a conspiracy, he would have had no reason to secure tape recordings to support the existence of such a conspiracy. So long as the officers had probable cause to stop defendant, which they did, it is irrelevant whether they wanted to stop him for speeding or because they really wanted to talk to him about his purchases of pseudoephedrine.

As to defendant's claim that the officers had no ground to arrest him and his passengers for not wearing seatbelts, the arresting officer testified at the evidentiary hearing before the magistrate judge that he arrested the three for the violation because they had out-of-state licenses. It is true that Wis. Stat. § 347.48(gm) does not authorize an officer to take a person into physical custody solely for his failure to wear a safety belt in violation of § 347.48. Therefore, it may have been an error to take the passengers into custody, but it was legitimate to arrest defendant because his traffic violation was not limited to this infraction. The evidence at the hearing showed that he made an illegal U-turn and he was speeding.

It is not entirely clear what defendant means when he says that his lawyer failed to show that defendant had an immunity defense to the seizure because he was denied due process in the stop and arrest. From his citation to language in Johnson v. Zerbst, 304 U.S. 458 (1938), to the effect that a court may lose jurisdiction over a defendant if it does not comply with the Sixth Amendment's requirement to provide counsel to a defendant charged with a crime, it appears that defendant is asserting only that evidence cannot be used against him if the police did not act constitutionally when they stopped him. Because he was unable to show that the police did not act constitutionally, he never acquired any "immunity" and, as a result, his attorney never had any reason to assert the immunity as a defense.

I turn then to the first contention that defendant raised in support of his post-conviction motion, that he was sentenced for a crime not charged in the indictment. Defendant contends that it was error for the court to sentence him for conduct involving more than 300 grams of pseudoephedrine. This issue is barred by the law of the case doctrine because it was decided by the court of appeals.

Defendant is correct that the Supreme Court has held that under a mandatory sentencing scheme it is illegal for a judge to increase a defendant's sentence on the basis of facts not found by a jury beyond a reasonable doubt. In Booker, 543 U.S. 220, however, the Court held that so long as the guidelines were advisory only, a judge could consider matters not found by the jury, such as amounts of drugs involved in the offense or in related

conduct. Because defendant was essentially re-sentenced under the advisory guidelines following the court of appeals' limited remand, he cannot prevail on this claim that his sentence is illegal under Booker.

For the same reason, defendant cannot prevail on his second and third contentions that this court violated the Fifth and Sixth Amendments when it imposed a sentence that exceeded the maximum penalty to which defendant could have been subjected had the court not considered the drug quantity and defendant's role in the offense enhancements. Defendant would have had grounds for these contentions had his sentence not been re-imposed under an advisory guidelines scheme, but once that was done, the sentence no longer suffered from the deficiencies identified in Booker.

Defendant's fifth contention is that his sentence exceeded the statutory maximum for a Class C felony. Defendant could have made this argument on appeal but did not. He has not shown any cause for his failure to raise the issue or any prejudice resulting from the failure. Even if he could show cause and prejudice, his contention would not succeed.

His argument proceeds as follows. 18 U.S.C. § 3559 classifies offenses; a Class C felony is one in which the maximum term of authorized imprisonment is less than 25 but ten years or more, § 3559(a)(3); 18 U.S.C. § 3581 authorizes terms of imprisonment for different classes of crimes and provides in subsection (b)(3) that the authorized term for a Class C felony is not more than 12 years; defendant was convicted of a Class C felony (so

classified because it carries a maximum term of 20 years (less than 25 but more than ten years)); therefore, his maximum sentence cannot exceed 12 years. Under defendant's theory, his sentence of 20 years violates § 3581 and must be corrected.

At first glance, defendant's argument seems like a fair reading of §§ 3559 and 3581. However, a closer reading indicates that § 3581 was not intended to affect the maximum authorized sentence provided in the statute describing the offense. Section 3559 makes this clear in subsection (b) when it says that, with one exception irrelevant to this case, the classified offenses in § 3559 carry "all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense." All of the circuit courts of appeal that have considered the argument raised by defendant agree that § 3481 does not override any sentence authorized by the law describing the specific offense. *E.g.*, United States v. Avery, 15 F.3d 816, 819 (9th Cir. 1993); United States v. Gonzalez, 922 F.2d 1044, 1050 (2d Cir. 1991); United States v. Donley, 878 F.2d 735, 740 (3d Cir. 1990) (terms of imprisonment set out in § 3581(b) "were meant to apply only to those offenses that were assigned letter classifications in the statutes describing the offenses"). The statute under which defendant was charged, 18 U.S.C. § 841(c)(2), provides for a maximum term of 20 years, which is the sentence that defendant received.

Defendant's sixth contention is that the court erred when it determined the amount

of pseudoephedrine to be attributed to his relevant conduct because it did not consider how much defendant would have used himself. Again, this is an issue that could have been raised on appeal but was not, probably because counsel realized it had no chance of succeeding. When defendant was arrested, he was in possession of more than 12,000 pseudoephedrine pills containing 588.96 grams of pseudoephedrine, together with equipment and chemicals used to manufacture methamphetamine. Defendant's relevant conduct involved previous trips he had made with others to purchase ingredients for the manufacture of methamphetamine. Using a conservative approach, the probation officer recommended a finding that the relevant conduct amounted to slightly less than one kilogram of pseudoephedrine. Quantities of more than 300 grams but less than one kilogram of pseudoephedrine are assigned to offense level 36. Thus, defendant's conduct took him to the top of offense level 36.

To convince the court that the offense level should have been lower, defendant would have had to show that the amount of the pseudoephedrine he planned to use himself was more than 700 grams. Although the government did not introduce any evidence about personal use amounts, it is clearly improbable that 700 grams of pseudoephedrine would be a personal use amount.

Defendant's seventh contention is that the court erred in calculating his criminal history score by relying on a previous conviction for which sentencing had been deferred.

Again, this is an issue that defendant has forfeited by not raising it at the time of sentencing or on direct appeal. Even if he had raised it, however, he would not have prevailed upon it. The sentencing guidelines provide in § 4A1.2 that “[a] conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1(c).” Section 4A1.1 directs the court to add two points to a defendant’s criminal history score if the defendant committed the instant offense while under any criminal justice sentence. In November 2002, when he committed the offenses for which he was sentenced here, defendant was still subject to a sentence imposed on him in 1999, in the Circuit Court for Calloway County, Kentucky, which was deferred for five years.

Finally, defendant argues that he was denied the effective assistance of counsel, not only with respect to the search of his car and the seizure of the pseudoephedrine and manufacturing equipment, but because his counsel failed to challenge the federal sentencing procedures as unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000). As I have explained, defendant has no viable claim of improper sentencing now that he has been effectively re-sentenced as if the sentencing guidelines were advisory. Therefore, he was not prejudiced by his trial attorney’s failure to attack the court’s sentencing procedures on the ground that the court was increasing defendant’s sentence in reliance on factual matters not found by a jury beyond a reasonable doubt.

Defendant has asked for the appointment of counsel and for an evidentiary hearing.

If I had found that an evidentiary hearing was necessary to resolve any disputed issues, I would appoint counsel to represent defendant at such a hearing. However, no such disputed issues exist. Therefore, his requests for the appointment of counsel and for an evidentiary hearing will be denied.

ORDER

IT IS ORDERED that defendant John Sanders's motion for post-conviction relief, filed pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that he is in custody illegally. FURTHER, IT IS ORDERED that his requests for the appointment of counsel and for an evidentiary hearing are DENIED as unnecessary.

Entered this 13th day of June, 2006.

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