

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

DARRELL G. HEDGES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
06-C-009-S
03-CR-106-S-01

Petitioner Darrell G. Hedges moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision.

FACTS

On December 3, 2004 petitioner pled guilty to possessing pseudoephedrine knowing it would be used to manufacture methamphetamine in violation of 21 U.S.C. §841(c)(2). At his plea hearing petitioner admitted that the amount of pseudoephedrine recovered from his van was 690 grams. His attorney argues that this amount should not be used to determine the guideline range because it would be assuming a theoretical yield of 100% of pseudoephedrine to methamphetamine. The parties decided to argue the issue of quantity at sentencing.

A presentence report was prepared which recommended the guideline range be based on 695 grams of pseudoephedrine.

Petitioner's counsel objected. The report also recommended that petitioner receive an enhancement for possession of a firearm. The report concluded petitioner had a criminal history of II based on his conviction for unlawful use of a weapon for which he was on conditional discharge when he committed the offense in this case. Petitioner also had pending charges in Illinois which were not used to determine his criminal history. Petitioner filed a written objection to the gun enhancement but did not object to the criminal history calculation.

At his sentencing on February 11, 2004 petitioner's counsel continued to object to the drug quantity calculation and the gun enhancement. The Court ruled in the government's favor but noted that the alternative drug quantity suggested by petitioner's counsel would not change the applicable guideline range. The Court sentenced petitioner to 188 months in prison.

Petitioner appealed his sentence arguing that his motion to suppress evidence should not have been denied and that his sentence was impermissibly enhanced. The United States Court of Appeals for the Seventh Circuit affirmed the denial of the motion to suppress and remanded the case to this Court to determine whether it would have imposed the same sentence had the guidelines been advisory. This Court held that it would have imposed the same sentence. On August 1, 2005 the Court of Appeals held that petitioner's sentence was reasonable and affirmed the sentencing in all respects.

MEMORANDUM

Petitioner claims that his counsel was ineffective because

Three types of issues cannot be raised in a 28 U.S.C. § 2255 motion: issues that were raised on direct appeal absent a showing of changed circumstances; non-constitutional issues that could have been raised but were not raised on direct appeal and constitutional issues that were not raised on direct appeal unless defendant demonstrates cause for procedural default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 813, 816 (7th Cir. 1996). Issues raised and decided on direct appeal may not be raised again in a 28 U.S.C. § 2255 motion pursuant to the "law of the case". See Daniels v. United States, 26 F.3d 706, 711-12 (7th Cir. 1994).

To demonstrate ineffective assistance of counsel, petitioner must show that his counsel's representation fell below an objective standard of reasonableness and the deficient performance so prejudiced his defense that it deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 688-94 (1984). In the context of a guilty plea defendant must show that but for the deficient advice of counsel he would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Where a petitioner is challenging his sentence he must show that but for counsel's action or inaction he would have received a shorter sentence. Glover v. United States, 531 U.S. 198 (2001).

Petitioner contends that his counsel was ineffective because Accordingly, petitioner was not denied effective assistance of counsel and his motion under 28 U.S.C. § 2255 will be denied.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion under 28 U.S.C. § 2255 must be denied. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 23rd day of March, 2006.

BY THE COURT:

s/ _____
JOHN C. SHABAZ
District Judge