

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

---

MARTIN J. APPLEBEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

MEMORANDUM AND ORDER  
06-C-327-S  
03-CR-159-S-01

Petitioner Martin J. Applebee moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed a response to the motion on July 20, 2006. Petitioner requested transcripts which were mailed to him on August 18, 2006. His reply to the motion was to be filed 14 days after receipt of transcripts which would have been on or about September 5, 2006. No reply has been filed to date.

FACTS

On November 20, 2003 a grand jury sitting in the Western District of Wisconsin returned a two-count indictment against petitioner Martin J. Applebee alleging that he had conspired with Dana Kallenbach to manufacture methamphetamine.

Petitioner moved to suppress evidence and statements obtained pursuant to his arrest. After holding an evidentiary hearing

United States Magistrate Judge Steven Crocker recommended that the motion be denied. Petitioner's counsel filed an objection to the recommendation. The Court affirmed the recommendation and denied petitioner's motion to suppress.

On February 23, 2004 petitioner appeared before this Court and pled guilty to Count 2 of the indictment. At the plea hearing petitioner testified under oath that he had fully discussed the charges and the case with his attorney Joel B. Winnig and that he was fully satisfied with the counsel, representation and advice provide by Attorney Winnig.

At the hearing the United States proffered evidence that petitioner had manufactured methamphetamine and also indicated that petitioner's co-defendant would testify that he and petitioner were driving around while manufacturing methamphetamine when they ran out of gas on County Highway A. Petitioner testified under oath that he had knowingly and intentionally helped Kallenbach manufacture methamphetamine. The Court accepted petitioner's guilty plea.

Prior to sentencing the Probation Office completed a Presentence Report for petitioner. Petitioner's counsel filed an objection to the report.

The sentencing guideline range for petitioner was 100-125 months. The Court sentenced petitioner to 115 months imprisonment

followed by three years of supervised release. Petitioner appealed his sentence based on Blakely v. Washington, 542 U.S. 296 (2004). After United States v. Booker, 543 U.S. 220 (2005) was decided, the Seventh Circuit Court of Appeals remanded the case for the Court to determine whether it would have imposed the same sentence using advisory guidelines. After considering the factors under 18 U.S.C. § 3553 this Court held that it would have imposed the same sentence. On June 17, 2005 the Court of Appeals affirmed the petitioner's judgment of conviction.

#### MEMORANDUM

Petitioner raises seventeen claims in his 28 U.S.C. §2255 motion. He claims that his conviction was obtained by use of evidence obtained pursuant to an unconstitutional search and seizure(a) and that he was denied effective assistance of counsel (b). He also claims that his conviction was obtained by the prosecution withholding exculpatory evidence from him (c).

Petitioner claims that his conviction was obtained by the known use of perjured testimony and hearsay during the Grand Jury proceedings ((d), (e), (p) and (q)). He also claims that his conviction was obtained by the unconstitutional use of hearsay testimony, testimony from the prosecutor and fraud at the evidentiary hearing ((f), (g) and (h)). He further claims that his conviction was obtained by the unconstitutional destruction of evidence, the known use of perjured testimony during pretrial

proceedings, and the use of information obtained in violation of the attorney client privilege ((I), (j) and (k)). Finally, petitioner claims that his sentence was unconstitutional ((l), (m), (n) and (o)).

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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1994).

Petitioner's claims concerning his sentence ((l), (m) and (o) were raised and rejected in petitioner's appeal and cannot be relitigated. Petitioner's claim that the Court failed to consider 18 U.S.C. § 3553(a) factors in reimposing his sentence (n) must fail because the factors were considered. These claims must be dismissed.

All petitioner's remaining claims with the exception of his ineffective assistance of counsel claim could have been raised in his appeal. Petitioner has failed to show either cause or

prejudice for failing to appeal these claims. Accordingly he is not entitled to raise these claims under 28 U.S.C. § 2255 and they will be dismissed.

The Court will address the merits of petitioner's ineffective assistance of counsel claim. 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 alleges that his counsel was ineffective in seventy ways. He alleges that his counsel failed to appeal the District Court's order reimposing defendant's sentence. The Court of Appeals affirmed the District Court's decision so no further appeal to that Court was necessary. This allegation does not support any deficient performance by petitioner's counsel.

Petitioner alleges that his counsel failed to obtain a transcript to prepare for appeal. He has submitted no evidence of this allegation or shown how he was prejudiced by this failure.

This allegation does not support an ineffective assistance of counsel claim.

Petitioner alleges that his counsel failed to object to prosecutor's testimony, failed to investigate facts surrounding search and seizure, failed to investigate facts set forth by the government, failed to interview or subpoena witnesses for suppression hearing, failed to appeal the use of hearsay evidence at the suppression hearing, stipulated to certain evidence, failed to inform client of a conflict of interest, failed to object to admission of evidence of Kallenbach's guilt, failed to object to prosecutor testifying at suppression hearing, failed to subject the government's evidence to any test at all, failed to introduce prior inconsistent statements, failed to notify the Court of a conflict of interest between Applebee and the government witness' counsel and failed to file a motion to dismiss based on the fact that the government had destroyed evidence. Petitioner has submitted no evidence to support the conclusion that any of these alleged decisions by counsel were deficient performance. Further, he has not shown that absent counsel's actions he would have received a shorter sentence.

Petitioner also alleges that his counsel failed to develop evidence of his own, prepared two fraudulent affidavits and failed to protect his client's rights. Petitioner has submitted no evidence to support these allegations.

Petitioner alleges that counsel failed to properly file and argue his motion to suppress. These allegations are not supported by the evidence in the record. Petitioner's counsel vigorously pursued the petitioner's motion to suppress. His performance concerning the motion to suppress was not deficient.

Petitioner also alleges that his counsel was ineffective when he counseled him to sign the plea agreement and failed to advise him of certain consequences of signing the agreement. These allegations are not supported by the record. At the plea hearing petitioner testified under oath that he was fully satisfied with his counsel's representation and advice.

Petitioner also alleges that his counsel did not object to the presentence report. The record does not support this allegation because petitioner's counsel did object to the presentence report.

Petitioner also alleges that his counsel failed to present Sixth Amendment challenges to his sentence. This allegation is not supported by the evidence because petitioner's counsel appealed his judgment of conviction on Sixth Amendment grounds.

Petitioner has submitted no evidence to support his allegations of his counsel's deficient performance. His subjective, vague and conclusory allegations are insufficient to support his claim of ineffective assistance of counsel. United States v. McCleese, 75 F.3e 1174, 1179 (7<sup>th</sup> Cir. 1996). In addition petitioner has not shown that absent any action or inaction by his

counsel that he would have received shorter sentence. According to Glover v. United States, 531 U.S. at 198, petitioner's claim that his counsel was ineffective must be dismissed.

Petitioner is not entitled to any relief under 28 U.S.C. § 2255. Accordingly, his motion 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 (7<sup>th</sup> Cir. 1997).

ORDER

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

Entered this 12<sup>th</sup> day of September, 2006.

BY THE COURT:

s/  
\_\_\_\_\_  
JOHN C. SHABAZ  
District Judge