

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

SHANE BRADLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
05-C-344-S
03-CR-171-S-01

Evidentiary hearing came on before the Court in the above entitled matter on August 8, 2007, the petitioner having appeared in person and by Kevin Cloutier; respondent by Erik C. Peterson, United States Attorney for the Western District of Wisconsin, by Jeffrey M. Anderson and Alice H. Green, Assistant United States Attorneys. Honorable John C. Shabaz, District Judge, presided.

The United States Court of Appeals for the Seventh Circuit vacated this Court's previous order denying petitioner's 28 U.S.C. § 2255 motion and remanded for said hearing as to whether counsel failed to file a notice of appeal and whether counsel's advice induced Bradley's plea.

FACTS

Attorney William Weeden represented petitioner beginning in 2001 when he received a target letter from the government. On December 10, 2003 a grand jury in the Western District of Wisconsin returned a three count indictment charging petitioner with three

counts of distribution of a mixture or substance containing heroin. Between December 2003 until March 30, 2004 Attorney Weeden met in person with petitioner seven or eight times.

Attorney Weeden advised petitioner that he could be sentenced to three 30 year terms of imprisonment consecutive for a total of 90 years if convicted on all three counts of the indictment. This information was incorrect because Attorney Weeden had misread §5G1.2 of the Sentencing Guidelines.

On March 30, 2004 petitioner pled guilty to Count 1 of the indictment.

At the plea hearing petitioner testified that he was fully satisfied with the counsel, representation and advice given to him by his attorney William Weeden. At the August 8, 2007 evidentiary hearing petitioner testified that he was not satisfied with his counsel's representation because he now realizes the information Attorney Weeden provided was inaccurate.

At the plea hearing petitioner also testified that he and his counsel had negotiated with the government concerning the plea agreement and that he had discussed the agreement with his counsel. Petitioner further testified that no one had made any other or different promises or assurances to him to persuade him to plead guilty and that he not been forced to plead guilty.

At page 7 of the plea hearing transcript the Court advised petitioner that he was charged with a violation of 21 U.S.C.

§841(a)(1) which carried a maximum penalty of 30 years in prison, a \$2 million dollar fine, a six-year period of supervised release, \$100 special assessment and the entry of an appropriate restitution order. The Court also advised petitioner that a document had been filed in his case which is known as a 21 U.S.C. § 851 information based on his prior convictions which informed him that he faced 30 years in prison.

When asked by the Court at the August 8, 2007 evidentiary hearing Attorney Weeden testified that prior to sentencing he had advised petitioner that the sentencing guidelines applicable to him were 188-235 months for the count of the indictment to which he had pled guilty.

On June 9, 2004 the Court sentenced petitioner to 223 months in prison. After sentencing petitioner's uncle, Greg Klug, talked with Attorney Weeden. It was Mr. Klug's impression that petitioner could not appeal his judgment of conviction.

Petitioner did not ask Attorney Weeden to appeal his judgment of conviction. Nor did anyone else.

In February 2005 petitioner wrote a five page letter to Attorney Weeden. He did not refer to any incorrect information that he had received from Attorney Weeden which he had learned about in the summer of 2004.

On August 3, 2005 this Court reduced petitioner's sentence to 188 months for substantial assistance.

MEMORANDUM

Petitioner first claims that his counsel was ineffective because he failed to file an appeal after being instructed to do so by petitioner. This would be ineffective assistance of counsel according to United States v. Nagib, 56 F.3d 798, 801 (7th Cir. 1006); United States v. Castellanos, 26 F.3d 717, 718 (7th Cir. 1994).

At the evidentiary hearing petitioner testified that he did not tell Attorney Weeden to file an appeal. Petitioner's uncle testified that he did not tell Attorney Weeden to file an appeal. Attorney Weeden testified that no one told him to file an appeal. There was no evidence presented at the hearing that anyone told Attorney Weeden that petitioner wanted to appeal his judgment of conviction.

It is undisputed that Attorney Weeden was not instructed by his client to file an appeal. Accordingly, petitioner's 28 U.S.C. § 2255 motion on this ground will be denied.

Petitioner also claims that his counsel was ineffective because he gave him incorrect information about the possible sentence he could receive. 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).

It is undisputed that prior to plea agreement negotiations Attorney Weeden advised petitioner that if he was convicted on all three counts of the indictment he could face 3 consecutive thirty year sentences for a total of 90 years in prison. It is undisputed that this information was incorrect. Pursuant to U.S.S.G. §5G1.2 n.1, the three sentences would have run concurrently for a total of 30 years in prison. Attorney Weeden did not make a good faith effort to discover the facts relevant to petitioner's sentencing and to analyze those facts in terms of the applicable legal principles. This is deficient performance under United States v. Cieslowski, 410 F. 3d 353, 359 (7th Cir. 2005).

It is petitioner's burden to show that but for this deficient advice of counsel he would have gone to trial. The United States Court of Appeals for the Seventh Circuit in its decision at page 4 discussed three factors concerning whether counsel's deficient performance caused him to plead guilty. These are: the defendant's statements during the plea hearing, evidence of the defendant's desire to go to trial and the disparity between the advised sentence and the sentence received.

Petitioner testified under oath at the plea hearing that he was satisfied with his counsel's representation but he has now

changed his mind because he discovered that he only faced a thirty year sentence rather than a ninety year sentence.

It is possible that had petitioner known that he faced a thirty year sentence rather than a ninety year sentence he would have gone to trial. Petitioner's testimony at the evidentiary hearing that he would have proceeded to trial, however, is simply not credible. Had petitioner been convicted on all three counts he would have faced a maximum sentence of 30 years and with the 18 U.S.C. §851 enhancement a possible life sentence. It is undisputed that petitioner feared that had he not plead guilty he could have been re-indicted for conspiracy with Howard for which he would face a life sentence.

Based on petitioner's testimony at the evidentiary hearing on August 8, 2007 the Court finds that he would not have proceeded to trial absent his counsel's deficient performance because had he not pled guilty he would have faced a life sentence when re-indicted for conspiracy. Under Strickland, petitioner has not shown prejudice. Accordingly, petitioner's motion to vacate his sentence on this ground 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 10th day of August, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge