

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

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SHANE BRADLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner Shane Bradley moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision. Petitioner's request for an evidentiary hearing will be denied as unnecessary under 28 U.S.C. § 2255. See United States v. Kovic, 830 F.2d 680, 692 (7th Cir. 1987), where as here the record demonstrates defendant is entitled to no relief.

FACTS

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

A Presentence Report was prepared and concluded that petitioner's offense level involved at least 80, but less than 100 grams of heroin. The report concluded that petitioner was a career

offender as defined in §4B1.1 because he was at least 18 years of ages, his offense of conviction was a felony controlled substance offense and he had at least two prior felony convictions that are either a controlled substance crime or a crime of violence. The report includes the following criminal offenses: Count 4, delivery of marijuana, felony / Count 5, conspiracy to deliver marijuana, felony (Jefferson County, Wisconsin Circuit Court Case No. 92-CF-264) (paragraph 46); Count 4, felony, intimidate victim and threaten force, (Jefferson County, Wisconsin Circuit Court Case No. 93-CF-158) (paragraph 49); and Count 1, possession of THC with intent to deliver, habitual criminality, felony / Count 2, possession of drug paraphernalia, habitual criminality, felony (Jefferson County, Wisconsin Circuit Court Case No. 93-CF-1096) (paragraph 50). Defendant did not object to these convictions, the amount of drugs involved or his career offender status at sentencing. On June 9, 2004 the Court sentenced him to 223 months in prison.

Petitioner did not appeal the sentence. On June 13, 2005 petitioner filed a motion to vacate his sentence under 28 U.S.C. § 2255. On August 3, 2005 this Court reduced petitioner's sentence to 188 months for substantial assistance.

#### MEMORANDUM

Petitioner claims that his counsel was ineffective. 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).

The Court addresses the merits of petitioner's claim that his trial counsel was ineffective because he failed to make objections to the presentence report. 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 now argues that his counsel was ineffective for failing to object to his career offender status because he was not convicted of two prior felony convictions of a controlled substance crime or a crime of violence. He contends that in Case No. 93-CF-1096 he was convicted only of possession and not of possession with intent to deliver. The record reflects at page 14, Paragraph 50, of the Presentence Report that he was convicted of Count 1, possession of THC with intent to deliver/habitual criminality. Petitioner also objects to the use of Case No. 93-CF-158, page 14, paragraph 49, in which he was convicted of the felony intimidation of a victim and threatening force. He now alleges that this was not a conviction of a crime of violence. This was a crime of violence and even were it not, petitioner would have been classified as a career offender because of his two other felony controlled substance offenses, 92-CF-264, delivery of marijuana/conspiracy to deliver marijuana (Paragraph 46 of PSR) and 93-C-1096, possession of THC with intent to deliver/habitual criminality (Paragraph 50 of PSR).

Petitioner cannot demonstrate that his counsel's performance for failure to object to the presentence report was deficient because at sentencing defendant advised the Court that he had reviewed the pre-sentence report with his attorney and had no objections. He suffered no actual prejudice for failure to raise the issues of which he now complains. He cannot now suffer from

prejudice for his counsel's alleged deficiencies with respect to the same said errors. See Kovic at 692. The decision by defendant's counsel not to raise meritless objections to the amount of drugs involved or defendant's status as a career offender was a reasonably strategic choice and did not prejudice defendant. See United States v. Bradford, 78 F.3d 1216, 1227 (7<sup>th</sup> Cir. 1996).

In addition petitioner has not shown that absent his counsel's decisions he would have received a lesser sentence. Accordingly, petitioner was not denied effective assistance of counsel and his motion under 28 U.S.C. § 2255 will be denied.

Any argument that petitioner raises concerning his guilty plea is barred because he did not raise the issue on appeal nor show cause and prejudice for failing to do so. Scott v. United States, 997 F.3d 340, 343 (7<sup>th</sup> Cir. 1993). Accordingly, petitioner's 28 U.S.C. § 2255 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 13<sup>th</sup> day of September, 2005.

BY THE COURT:

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JOHN C. SHABAZ  
District Judge