

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY J. PHILLIPS,

Defendant.

OPINION and ORDER

03-CR-0040-C-01

04-C-0565-C

This is a motion filed pursuant to 28 U.S.C. § 2255, in which defendant Gregory J. Phillips challenges his conviction for conspiracy to possess cocaine base with the intent to distribute. Defendant contends that the two lawyers appointed to represent him gave him constitutionally ineffective assistance and that he was sentenced in violation of the Constitution because the court relied at sentencing on its own determination of drug quantity. In an order entered on August 19, 2004, I stayed consideration of defendant's second contention pending a decision by the United States Supreme Court in United States v. Booker, No. 04-104.

Now that defendant's motion has been fully briefed and I have reviewed the presentence report once more, I conclude that (1) defendant has failed to show that his first

appointed lawyer was ineffective; (2) an evidentiary hearing is necessary to determine whether, as defendant alleges, his second attorney failed to appeal defendant's sentence, in violation of defendant's instructions; and (3) defendant has no viable claim under Blakely v. Washington, 124 S. Ct. 2531 (2004), which makes it unnecessary to continue the stay of consideration of this issue.

The record reveals the following facts.

FACTS

On April 3, 2003, a grand jury returned an indictment charging defendant with one count of conspiracy to possess with intent to distribute 50 grams or more of cocaine base and one count of possession of 50 grams or more of cocaine base with intent to distribute. On May 20, 2003, defendant entered a plea of guilty to the first count of the indictment, pursuant to a written plea agreement in which he acknowledged that the mandatory minimum penalty for his crime was 10 years in prison and the maximum was life.

At his plea hearing, defendant was represented by court-appointed counsel, John Smerlinski. In answer to questions from the court, defendant stated that no one had made him any promises other than those set out in the plea agreement, no one had threatened him or forced him to plead guilty and no one had told him he was going to receive a particular sentence. He admitted that the government would be able to prove that on March 12, 2003,

he and his girlfriend had traveled to Rochester, Minnesota, with another friend, that he had picked up approximately 290 grams of cocaine base, which he kept in his backpack for the trip home to La Crosse, Wisconsin, where he gave the drugs to his girlfriend to take into an apartment. He told the court that on several occasions he had traveled to Illinois to obtain cocaine, which he turned into cocaine base and then distributed.

The probation officer who prepared the presentence investigation report recommended an offense level of 34 based on defendant's status as a career offender. Defendant qualified for career offender status because he was at least 18 when he committed the offense for which he was being sentenced, the instant offense was a felony controlled substance offense and he had at least two prior felony convictions of either a crime of violence or a controlled substance offense. The career offender classification meant that defendant was at offense level 37 (because the maximum penalty for crimes involving more than 50 grams of crack cocaine is life, 21 U.S.C. § 841(B)(1)(a)(iii); U.S.S.G. § 4B1.1(b)). With a three-level reduction for acceptance of responsibility, his adjusted offense level was 34 and his guideline imprisonment range was 292-365 months.

After the report was filed, Mr. Smerlinski was allowed to withdraw from representation of defendant and Jonas Bednarek was appointed to take over. Neither the government nor defendant filed any objections to the presentence report.

On August 20, 2003, defendant was sentenced to 292 months in prison, the bottom

of the guideline range. The judgment and commitment order was signed on August 21, 2003. Defendant did not appeal. On December 29, 2003, he filed a motion to open the time for appeal, asking the court to give him additional time to appeal his conviction. In an order entered on January 9, 2004, I denied the motion as beyond the court's authority to grant but advised defendant that he could file a motion pursuant to 28 U.S.C. § 2255 to achieve the same result. If he could show that he asked his court-appointed attorney to appeal and his attorney either failed or refused to do so, he would have established the cause and prejudice necessary to allow him to raise issues on a collateral motion that he could have raised on a direct appeal.

On August 11, 2004, defendant filed this § 2255 motion, in which he contended that Mr. Smerlinski did not investigate the evidence against defendant, failed to develop a defense, coerced him into pleading guilty and allowed him to plead to an invalid charge. I denied the claim of pleading to an invalid charge in an order entered August 19, 2004. On September 9, 2004, in response to a directive from the court, defendant filed an affidavit in which he averred that Mr. Smerlinski visited him in the Dane County jail during the first week of May 2003 and discussed his defense with him. According to defendant, Mr. Smerlinski told defendant that if he went to trial and was found guilty, he could get a sentence of life, whereas if he entered a timely plea of guilty he would be entitled to a three-level reduction in the guidelines. With a base offense level of 34, this would bring him down

to level 31 and a guideline range of 135-168 months. However, he avers, when the presentence report was completed and he was placed in the career offender category, his guidelines more than doubled to the new guideline range of 292-365 months. He avers that if he had known that he faced a sentence in this range, he would not have pleaded guilty.

OPINION

Defendant cannot prevail on his claim of ineffective assistance of counsel as it relates to John Smerlinski unless he can show that Smerlinski's performance was objectively deficient and that the deficient representation caused him prejudice. Strickland v. Washington, 466 U.S. 680, 688 (1984). It is not enough merely to allege ineffectiveness; a defendant must have specific allegations of deficiencies in the representation.

Defendant has alleged nothing more than conclusions that Smerlinski was not prepared for trial, that he had done no investigation or that he coerced defendant into pleading guilty. Defendant says that he would have gone to trial had he known that he faced a sentence of as much as 365 months but he has alleged no facts suggesting that the outcome of the trial would have been more favorable to him than pleading guilty. He admitted in open court that he had traveled to Minnesota and Illinois to obtain either crack cocaine or powder cocaine that he converted to crack.

Although defendant believes that if his counsel had done a more effective

investigation he would have uncovered exculpatory evidence, he does not identify what that evidence might have been or explain why he agreed in court to the government's statement of what it could prove against him if the case went to trial. Without specific allegations, defendant is not entitled to an evidentiary hearing.

As for defendant's contention that Smerlinski coerced him into pleading guilty, he offers nothing but his description of Smerlinski's advice that going to trial would expose defendant to a sentence of as much as life, whereas pleading guilty would give him the benefit of a three-point reduction for acceptance of responsibility. This was truthful advice. Defendant may not have liked hearing it, but he cannot say that it amounted to coercion.

Smerlinski's failure to advise defendant that he would qualify for career offender status may have been an error but it is not the kind of error that amounts to ineffective assistance. Until the presentence report is completed, no lawyer can tell his client exactly what sentence he will receive. In defendant's case, it was not until his prior convictions were confirmed that he was found to qualify for career offender status.

I conclude that defendant's vague and unsupported allegations are insufficient to establish a need for an evidentiary hearing to determine the adequacy of Smerlinski's representation. With respect to defendant's claim of ineffectiveness on the part of Jonas Bednarek, however, it will be necessary to hold an evidentiary hearing because defendant has

specified that he told Bednarek he wanted to appeal and Bednarek failed to take the actions necessary for an appeal. (In his motion, defendant contended that Bednarek was ineffective in failing to object to defendant's career offender status but I denied his motion as to that claim in the August 19, 2004 order.) Although defendant has not identified when or where he asked Bednarek to appeal or who might have been present to hear the request, I will allow him an opportunity to testify on the issue.

Although I stayed defendant's second claim of unconstitutional sentencing in the August 19, 2004 order in this case, on reviewing the record, I am persuaded that it was error to enter such a stay. Defendant had alleged that his sentence rested on the court's determination of a drug amount but the presentence report shows that, in fact, it was based on his classification as a career offender, a status that is determined by prior convictions.

Prior convictions are the one kind of sentencing factor that courts may rely on in determining a sentence even if the jury has not made any finding about those convictions. Apprendi v. New Jersey, 530 U.S. 466, 488 (2000) (noting that procedural safeguards attached to any fact of prior conviction); Jones v. United States, 526 U.S. 227, 235 (1999) (noting that, "with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful") (citing Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998)). See also Custis v. United States, 511 U.S. 485 (1994) (in prosecution under

Armed Career Criminal Act of 1984, defendant in federal sentencing proceeding could not collaterally attack validity of previous state convictions used to enhance his sentence under act unless he could show conviction obtained in violation of right to counsel; his only options were to attack sentences before sentencing or afterward).

To date, the Supreme Court has not indicated that it would change its position on the characterization of prior convictions as sentencing factors. Therefore, there is no reason to stay action on defendant's challenge to his sentencing.

ORDER

IT IS ORDERED that defendant Gregory J. Phillips's motion filed pursuant to 28 U.S.C. § 2255 is DENIED with respect to his claim that John Smerlinski gave him ineffective assistance. As to his claim that Jonas Bednarek failed or refused to take the appeal defendant wanted to pursue, an evidentiary hearing will be held on December 14, 2004 at 9:00 am. Counsel will be appointed to represent defendant at the hearing.

FURTHER, IT IS ORDERED that the stay imposed on defendant's challenge to the constitutionality of his sentencing is lifted and his motion pursuant to 28 U.S.C. § 2255 is

DENIED with respect to his claim that he was sentenced unconstitutionally.

Entered this 28th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge