

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY PHILLIPS,

Defendant.

ORDER

03-CR-0040-C-01

Defendant Gregory Phillips has filed a timely motion to vacate his sentence, pursuant to 28 U.S.C. § 2255. He contends that the two lawyers appointed to represent him gave him constitutionally ineffective assistance, the first one because he did no investigation of the evidence against him, failed to develop a defense, coerced him into pleading guilty and allowed him to plead to a charge that was invalid and the second one because he failed to take an appeal on defendant's behalf. He contends also that he was sentenced in violation of the Constitution because the court made its own determination of the amount of drugs for which he was responsible and relied on that determination in applying the sentencing guidelines.

Although defendant sets out a number of allegations about the performance of his

appointed counsel, many of the allegations lack the particularity required to trigger an evidentiary hearing. For example, he alleges that his first lawyer coerced him into pleading guilty yet he does not support his allegations with an affidavit setting forth the time, place and circumstances in which his lawyer supposedly applied coercion to him and demonstrating why he would have been better off had he not pleaded guilty. Key v. United States, 806 F.2d 133 (7th Cir. 1986) (allegation that counsel made promises to defendant must be supported by allegations specifying terms of alleged promises, when, where and by whom such promises were made and precise identity of any witnesses to promise); see also United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991) (defendant must show more than that he would not have pleaded guilty if he had received correct advice but must show likelihood that he would not have been convicted and given sentence at least as severe). It seems unlikely that defendant will be able to make the showing that he would have been better off had he not pleaded guilty when he agreed at his plea hearing that the government would be able to prove among other things that he put 290 grams of packaged cocaine base into his girlfriend's backpack and directed her to take the backpack into her apartment, where she was arrested by the La Crosse County Police Department.

Defendant alleges that his first lawyer was not prepared for trial but he has no evidentiary support for this allegation. In fact, in his brief, he says only that he "believes" counsel was unprepared. Dft.'s Mem. of Law, dkt. #43, at 3. Similarly, he says that his

lawyer conducted no investigation of the case, but he has no evidence to back up his assertion.

As to defendant's claim that his first lawyer let him plead guilty to an illegal charge, it is hard to make sense of the claim. Apparently, defendant is arguing that the Comprehensive Crime Control Act of 1984 was passed in violation of the "repassage clause" of the Constitution, Art. I, § 7, because it did not receive a two-thirds majority vote for both houses of Congress after it had been vetoed by President Reagan. Defendant offers no proof that it did not receive the necessary number of votes. He then seems to argue that because the Act was enacted as a continuing resolution to an appropriations act, it had only one year of life and expired on September 30, 1985. Next, he argues that appropriations acts cannot become acts that change or establish criminal law. His only support for this last proposition is House Rule XXI(2), which provides that no provision in an appropriation bill can change existing law.

Not only is defendant's claim inherently inconsistent, it lacks any precedential support. Defendant has not cited a single case supporting his views of the validity of the Comprehensive Crime Control Act, the limited terms of continuing resolutions and the nature of appropriations acts. The Comprehensive Crime Control Act has been law for 20 years; Art. I, § 7 of the Constitution has been in effect for 215 years. If there were any merit to defendant's contentions, some court would have addressed them before now. I decline

to delve into the questions in any depth in the absence of any coherent argument by defendant.

Turning to the deficiencies in his second lawyer's work, defendant alleges that counsel failed to object to defendant's classification as a career offender under § 4B1.1 of the sentencing guidelines. He asserts that two cases used to enhance his sentence were convictions that had been served in full and therefore should not have been considered. Not surprisingly, defendant does not cite any language in the sentencing guidelines manual that would support his assertion that judges cannot rely on sentences that have been fully served; there is none. Chapter 4 of the guidelines describes the sentences that may be taken into account and those that may not. It does not exclude sentences that have been fully served, even if they are ones in which civil rights have been restored. It does exclude certain sentences if they were imposed many years before the offense for which the defendant is being sentenced, see, e.g., U.S. Sentencing Guidelines Manual § 4A1.1(a), cmt. n.1: "A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period." Defendant does not suggest that the sentences to which he objects were imposed more than 15 years before he was sentenced as a career criminal in this court or that they must otherwise be excluded from the sentencing calculation.

Defendant alleges that he asked his second lawyer to file an appeal and the lawyer

refused or failed to make the filing. Again, he has failed again to file an affidavit in which he avers with particularity what he said to counsel about his appeal, when he said it, where he was when he said it and whether there were any witnesses.

I will give defendant an opportunity to submit an affidavit setting forth with particularity the factual basis for his allegations that his first lawyer failed to investigate the case, failed to mount a defense and coerced defendant into pleading guilty and that his second lawyer failed to take an appeal from defendant's sentence, despite defendant's request that he do so. I will dismiss defendant's claims that the Comprehensive Crime Control Act of 1984 is invalid and that he was illegally sentenced as a career criminal.

Finally, as to defendant's claim that his sentence is unconstitutional under Blakely v. Washington, 124 S. Ct. 2531 (2004), I will hold that issue in abeyance for the reasons explained in United States v. Hamilton, 92-CR-0106-C-01 (Aug. 17, 2004), a copy of which is attached to this order.

ORDER

IT IS ORDERED that defendant Gregory Phillips may have until September 10, 2004, in which to file an affidavit in support of his motion for post-conviction relief pursuant to 28 U.S.C. § 2255. FURTHER, IT IS ORDERED that his motion is DISMISSED with respect to his claims that he was improperly sentenced as a career criminal

and that the Comprehensive Crime Control Act of 1984 is no longer in effect. His claim of the unconstitutionality of his sentence is STAYED pending the United States Supreme Court's decision in United States v. Booker, No. 04-104.

Entered this 19th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge