IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

ABRAHAM L. SAVAGE,

Defendant.

ORDER

04-C-0145-C
01-CR-63-C

- -

Pursuant to 28 U.S.C. § 2255, defendant Abraham L. Savage has moved for vacation or modification of his sentence, arguing that he was denied the effective assistance of counsel. Defendant was charged with various counts of conspiracy to distribute marijuana, cocaine and methamphetamine, distribution of methamphetamine and distribution of marijuana. He pleaded guilty to a three-count information charging him with conspiracy to distribute marijuana and two counts of marijuana distribution. He was sentenced to two consecutive terms of 60 months on the conspiracy and one distribution count and five months on the second distribution of marijuana count. He alleges that his attorney was ineffective in various ways. He failed to object to defendant's sentence although it violated the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000); he failed to object to

defendant's prosecution despite the lack of any jurisdictional nexus between the statutes under which he was charged and any of Congress's enumerated powers; he failed to object to defendant's sentence even though it was based on lesser-included offenses; he failed to object at sentencing to the court's attribution to him of his wife's criminal conduct; and he failed to object when the court took a recess in the sentencing hearing to meet with the probation officer to discuss defendant's sentence. None of petitioner's allegations demonstrates constitutional ineffectiveness on the part of his court-appointed counsel. Therefore, his motion will be denied.

Defendant cannot bring any challenges to his sentence in a post-conviction proceeding that he could have brought in his direct appeal unless he can establish that he has cause and prejudice for his failure to raise them on appeal. As to four of his challenges, defendant has such cause because he was represented on appeal by his trial counsel. Courts do not expect trial counsel to raise their own deficiencies as a ground for appeal. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996) ("Because Prewitt had the same attorney at trial and on appeal, he has shown good cause for his failure to raise the ineffective assistance of counsel claim on direct appeal.") (citing United States v. Hall, 35 F.3d 310, 316 (7th Cir.1994)). However, defendant cannot show that he will be prejudiced if he cannot raise his challenges to his sentence in this motion because he cannot show that any of them have any merit.

Defendant's first claim is that counsel failed to represent him effectively by allowing him to be sentenced to 60-month sentences on each of counts 1 and 2. He contends that this is a violation of the rule announced in Apprendi, 530 U.S. 466, prohibiting courts from increasing sentences on the basis of facts that have not been found by the jury beyond a reasonable doubt. He argues that the government did not charge any amount of marijuana in the indictment, that the default sentence for marijuana distribution is found in 21 U.S.C. § 841(4), which provides for a sentence not to exceed one year for distribution of small amounts of marijuana for no remuneration. In fact, defendant distributed a large amount of marijuana for considerable remuneration. In his case, the default sentence for distribution of marijuana (or conspiracy to distribute marijuana) is 5 years. 21 U.S.C. § 841(b)(1)(D) ("In the case of less than 50 kilograms of marihuana . . . such person shall . . . be sentenced to a term of imprisonment of not more than 5 years . . . .").

Defendant did not receive more than 5 years on either count 1 or count 2; his sentence was not increased beyond the statutory maximum. Therefore, he had no grounds for launching an Apprendi attack on his sentence and his counsel was not ineffective for raising the issue.

Defendant's second claim is wholly frivolous. He contends that no jurisdictional nexus exists between the statutes prohibiting the distribution of marijuana and Congress's powers, making the statutes unconstitutional and unenforceable. Congress has power to

legislate under the commerce clause of the United States Constitution, art. I, § 8. When Congress enacted the Controlled Substances Act, codified at 21 U.S.C. § 801-971, it found that intrastate narcotic activity has a substantial effect upon interstate commerce. 21 U.S.C. § 801. These findings are adequate to establish the requisite jurisdictional nexus. United States v. Peterson, 236 F.3d 848, 855 (7th Cir. 2001).

Defendant's third claim is equally frivolous. He contends that his counsel provided ineffective assistance when he failed to challenge the court's imposition of consecutive sentences in violation of the double jeopardy clause of the United States Constitution. If, as defendant argues, the first count charged an act that constituted an attempt to commit the crimes charged in counts two and three, defendant might have a viable argument. However, the crime charged in count one is a conspiracy; the crimes charged in counts two and three are distribution counts. Conspiracy is not an attempt; distribution counts are not lesser-included offenses of the crime of conspiracy; they are separate and independent charges. It was not ineffective assistance for defendant's attorney to refrain from making a frivolous double jeopardy argument to the court.

Defendant's fourth claim rests on his attorney's failure to produce any evidence at sentencing showing that the court should not consider his wife's criminal behavior as relevant conduct affecting his sentence. This claim fails on its merits because defendant's attorney had no reason to call any additional witnesses in view of the government's

presentation of three of the four persons best positioned to testify favorably to defendant and could not call defendant's wife because she had a Fifth Amendment right not to testify and was prepared to assert it. It fails procedurally as well. Defendant cannot reargue that issue in this motion, because he argued it unsuccessfully before the court of appeals. Section 2255 is not intended to be either a substitute for a direct appeal or an opportunity to reargue matters decided on direct appeal. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994) (law of the case doctrine prevents reargument); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). Casting the argument as a claim of ineffective assistance does not change the fact that it has been decided and is therefore off limits on this motion.

Defendant's fifth claim is that he was denied the right to be present during a critical stage of the proceedings, when the court took a recess to review his presentence report with the probation officer. Defendant has no such right. Probation officers are arms of the court, who assist the court in fashioning legally appropriate sentences for convicted persons. In a sentencing hearing such as defendant's, in which numerous decisions must be made on the various sentencing arguments that the parties raised, it is almost inevitable that the court will have to consult with the probation officer to insure that the final sentence announced from the bench takes into account each of the decisions and is mathematically correct.

ORDER

IT IS ORDERED that defendant Abraham Savage's motion for vacation or modification of his sentence, filed pursuant to 28 U.S.C. § 2255, is DENIED.

Entered this 2nd day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge