IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JEREMY L. BEST,

Petitioner,

v.

MEMORANDUM AND ORDER
06-C-674-S
04-CR-017-S-01

UNITED STATES OF AMERICA,

Respondent.

Petitioner Jeremy L. Best moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision.

Petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is not necessary under 28 U.S.C. § 2255. See United States v. Kovic, 840 F.2d 680, 682 (7th Cir. 1987).

FACTS

On March 7, 2003 law enforcement officers executed a search warrant at Travis Ryan's residence in Eau Claire, Wisconsin and found approximately 71.16 grams of cocaine, a digital scale and $3,872. Ryan told investigators that he had purchased four ounces of cocaine a month from petitioner Jeremy Best for the prior eight months.

Investigators also spoke to Greg Shiver who reported that he sold petitioner three pounds of marijuana starting in the fall of

2001. Shiver stated he bought 4 ounce quantities of cocaine from petition approximately 20 times.

Nate Felix told investigators that he had accompanied petitioner to Indiana approximately 10 times between the fall of 2002 and the fall of 2003. Felix reported that petitioner bought cocaine on these trips.

On April 22, 2004 petitioner pled guilty to a one-count information charging that he knowingly and intentionally distributed a mixture or substance containing cocaine. Petitioner was represented by appointed attorneys Kenneth Sipsma and Erika Bierma. At the plea hearing petitioner stated under oath that he was fully satisfied with the counsel, representation and advice given him by his attorney Mr. Sipsma. Petitioner also stated that he was voluntarily pleading guilty.

A presentence report (PSR) was prepared. The report concluded based on the statements of Ryan, Shiver and Felix that petitioner was responsible for 700.21 kilograms of marijuana placing him at a base offense level of 30. The report recommended a three level reduction for acceptance of responsibility.

At the sentencing hearing on July 7, 2004 Ryan, Shiver and Felix testified confirming the information they had provided investigators about the amounts of drugs that petitioner had bought and sold. All three witnesses were vigorously cross-examined by defense counsel concerning their criminal convictions, the fact

that they were looking for consideration for cooperating with the government and their lack of specific recollections about petitioner's drug activities. Petitioner's counsel asked the Court to sentence petitioner based on the amount of 84.6 grams of cocaine to which he admitted selling.

The Court found petitioner's relevant conduct involved between 700.12 and 756 kilograms of marijuana equivalent placing his offense level at 30. The Court found that since petitioner falsely denied relevant conduct in a manner inconsistent with acceptance of responsibility he was ineligible for a reduction of the base offense level. Based on an offense level of 30 and a Criminal History Category II petitioner's sentencing guideline range was 108-135 months.

Petitioner's counsel argued that he should be sentenced at the lower end of the guideline range because he was a good father to his child, had an intact family, had earned his GED and had benefited from drug treatment in the past. Petitioner apologized for his actions.

The Court found that a sentence near the bottom to middle was sufficient to hold the petitioner accountable. The Court noted the amount of drugs and the extensive period of time involved when imposing a 115 month sentence pursuant to the Sentencing guidelines. In the alternative the Court sentenced petitioner to

115 months as a fair and reasonable sentence under the circumstances without the use of the Guidelines.

Petitioner appealed his judgment of conviction. The United States Court of Appeals affirmed his conviction on December 9, 2005. Petitioner attempted to file a petition for a writ of certiorari in the United States Supreme Court but it was denied as time barred.

MEMORANDUM

Petitioner claims that his attorneys were ineffective when they failed to investigate his case, to subpoena witnesses for his trial and to call his parents as alibi witnesses.

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 petitioner must show that but for the deficient advice of counsel he would not have pled guilty. 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 contends that his attorneys failed to investigate his case. In Hardamon v. United States, 319 F.3d 943, 951 (7th Cir.

2003), the Court stated: "As we have stated, a petitioner alleging that counsel's ineffectiveness was centered on a supposed failure to investigate has the burden of providing the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." In his reply and supplement petitioner identifies eleven witnesses who would have testified on his behalf. He contends that these witnesses would have called into question the credibility of the government's witnesses Greg Shiver and Travis Ryan, but he has not submitted any affidavits from these eleven witnesses.

There is nothing in the record to suggest that had counsel interviewed these witnesses petitioner would not have pled guilty and would have proceeded to trial. Petitioner has not shown that his counsel was ineffective by failing to investigate or call witnesses. Further, at sentencing petitioner's attorney vigorously cross examined the government's witnesses concerning their credibility.

Petitioner also contends that his attorneys should have called his parents as witnesses because they would have offered an alibi for him at trial. Since petitioner's alleged criminal conduct covered approximately 18 months, a lengthy period of time, it would not have been either probable or reasonable for his parent's to be able to provide a convincing alibi. It was not ineffective assistance of counsel for petitioner's attorneys not to call petitioner's parents as witnesses.

Petitioner voluntarily decided to plead guilty. He has not shown that absent his attorneys' performance he would have proceeded to trial. Petitioner testified under oath that he was voluntarily pleading guilty and that he was satisfied with his counsel's representation.

It appears that petitioner is also arguing that because of his attorneys' performance he received a longer sentence. This argument is speculative. Petitioner has not shown that absent any action or inaction by counsel, his sentence would have been shorter.

Petitioner also argues that his attorneys did not make the arguments on appeal that he wished to pursue. Petitioner has not shown that his attorneys' actions on appeal were deficient or prejudiced him. See Winters v. Miller, 274 F.3d 1161, 1167 (7th Cir. 2001).

Petitioner has not shown that he received ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must 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).

Best v. United States, 04-CR-17-S

ORDER

IT IS ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 24th day of January, 2007.

BY THE COURT:

S/

_____
JOHN C. SHABAZ
District Judge