

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

DARRIN R. CROSSSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
05-C-237-S
04-CR-051-S-01

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

FACTS

On March 17, 2004 a grand jury in the Western District of Wisconsin returned an indictment charging petitioner with one count of being a felon in possession of a firearm. On May 25, 2004 petitioner pled guilty to the indictment pursuant to a written plea agreement. On July 28, 2004 this Court sentence petitioner to 82 months in prison.

On April 18, 2005 petitioner filed a motion to vacate his sentence under 28 U.S.C. § 2255.

MEMORANDUM

Petitioner claims that his counsel was ineffective, that his sentencing violated the Sixth Amendment under Booker and that the

Court did not have jurisdiction because there was no evidence that he moved the weapon in interstate commerce.

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 (7th 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 (7th Cir. 1994).

Petitioner is barred from raising his claims that the Court lacked jurisdiction and that his Sixth Amendment rights were violated because he has showed neither cause nor prejudice for failing to raise these claims on appeal.

Further, the Court's decision in United States v. Booker, 125 S. Ct. 738 (2004), that the Sixth Amendment was violated where at sentencing a finding was made by the judge rather than a jury does not apply retroactively to criminal cases that became final before its release on January 12, 2005. See McReynolds, et al v. United States, 397 F.3d 479 (7th Cir. 2005). Accordingly, Booker does not

apply to petitioner's case even though the Court sentenced him in accord with Booker using the guidelines as advisory.

The Court will address the merits of petitioner's claim that his trial counsel was ineffective because he failed to make timely 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 cannot demonstrate that his counsel's performance was deficient because the record reflects that petitioner's counsel made objections to the presentence report which were considered. Further he has not demonstrated that he would have received a lesser sentence had his counsel made other objections to the presentence report. Accordingly, petitioner was not denied effective assistance of counsel and his motion under 28 U.S.C. § 2255 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 (7th Cir. 1997).

ORDER

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

Entered this 6th day of July, 2005.

BY THE COURT:

/s/ _____
JOHN C. SHABAZ
District Judge