

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

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MICHAEL ANDRLIK,

Petitioner,

v.

ORDER  
07-C-315-S  
04-CR-120-S-01

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Michael Andrlik 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 (7<sup>th</sup> cir. 1987).

FACTS

On July 14, 2004, a federal grand jury in the Western District of Wisconsin returned a seven count indictment against Michael Andrlik charging him with distributing cocaine.

On October 7, 2004 petitioner pled guilty to count seven of the indictment pursuant to a written plea agreement. He was represented by court appointed counsel, Attorney Toni Laitsch.

At the plea hearing the Court went through the plea agreement sentence by sentence ensuring petitioner's understanding and agreement with each paragraph in it. The Court also asked petitioner a number of questions to determine that the plea was, in fact, voluntary. At the plea hearing petitioner also testified that he was fully satisfied with his counsel's representation and advice given to him in the case.

A presentence report was prepared which indicated that Andrlik's relevant conduct involved at least 80 kilograms but less than 100 kilograms of marijuana equivalent. Petitioner's base offense level was determined to be 24 and two levels were added based on the recovery of firearms during a search of the petitioner's residence on July 16, 2004. Petitioner's offense level was reduced three levels for acceptance of responsibility which made his total offense level 23. Petitioner had a criminal History Category I which resulted in a Sentencing Guideline range of 46-57 months in prison.

Defendant initially objected to the drug quantity calculation and the firearm possession enhancement. He also objected to any upward adjustment based on facts not admitted by him or found by a jury beyond a reasonable doubt pursuant to Blakely v. Washington, 542 U.S. 296 (2004). On December 15, 2004 defendant withdrew his factual challenges to the Guidelines calculation maintaining only

his Blakely challenge. Attorney Laitsch specifically states in the letter as follows:

If Blakely applies, which I believe it does, then facts that raise the guideline range, without the defendant's agreement must be proven beyond a reasonable doubt with the jury as a factfinder. I do not believe the court can proceed to act as a fact finder under the preponderance of the evidence standard, of the enhancements for the specific offense characteristics and the calculation of drug quantities contained in the PSR.

At the December 16, 2004 sentencing hearing the Court addressed petitioner's withdrawal of his objections to the Presentence Report. Petitioner stated that he wished to withdraw the objections to the Guidelines calculations.

In sentencing petitioner, the Court stated as follows:

The Court has reviewed again Blakely and Booker, those cases as well as the parties' filings. And because the defendant has not stipulated to the enhancements to the sentencing guidelines which increase his sentence nor has waived his rights to a jury determination under Blakely, the Court does determine that the guidelines are not severable and they may not be constitutionally applied in this case. Accordingly, the Court imposes a sentence consistent with the provisions set forth in 18 United States Code Section 3553(a).

The Court sentenced petitioner to 57 months in prison with three years supervised release finding that petitioner was involved in continued drug activity and was aware of the firearms found in the

residence in which he was living and their connection to illegal drug trafficking activities. In the alternative, the Court sentenced petitioner under the Sentencing Guidelines in the event they are determined to be constitutional to the same sentence.

Petitioner filed a timely notice of appeal of his judgment of conviction. The United States Court of Appeals for the Seventh Circuit affirmed petitioner's conviction finding that his sentence was reasonable under 18 U.S.C. § 3553.

On June 2, 2006 petitioner filed a timely petition for a writ of certiorari in the United States which was denied on June 29, 2007. On June 11, 2007 petitioner filed this motion under 28 U.S.C. § 2255. Although petitioner filed his § 2255 motion before his direct appeal was final on June 29, 2007, his motion is no longer premature.

#### MEMORANDUM

Petitioner claims that his counsel was ineffective because she failed to object to the two level enhancement for possession of a firearm.

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 petitioner demonstrates cause for procedural default as well as actual

prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 813, 816 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1994).

The Court addresses petitioner's ineffective assistance of counsel claim. 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 argues that his counsel's performance was deficient because she advised him to withdraw his objection to the two level enhancement for possession of a firearm. He contends that she told him if he maintained his objection he risked his three-level reduction for acceptance of responsibility. He also asserts that his counsel told him that he would automatically have the two-level

enhancement removed on direct appeal when the Supreme Court decided Booker.

Petitioner's counsel's decision to withdraw the objections to the two level gun enhancement was a strategic decision based on her belief that it would preserve petitioner's acceptance of responsibility reduction and that the reasoning of Blakely would apply to remove the two level enhancement on appeal. At the sentencing hearing petitioner agreed with his counsel's decision. Petitioner cannot now claim that counsel's strategic decision was deficient performance. See Cooper v. United States, 378 F.3d 638, 640 (7<sup>th</sup> Cir. 2004).

Further, petitioner has not shown any prejudice caused by counsel's performance. Specifically, he has not shown he would have received a lesser sentence absent counsel's performance. The Court sentenced petitioner under 18 U.S.C. § 3553 and found that petitioner was aware of the firearms found in the residence in which he was living and that it was connected with illegal drug trafficking activities. The United States Court of Appeals affirmed this sentence.

Petitioner has not shown that counsel's performance was deficient nor that he would have received a shorter sentence absent his counsel's performance. Petitioner did not receive ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must be denied.

Petitioner is advised that in any future proceeding 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 (7<sup>th</sup> Cir. 1997).

ORDER

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

Entered this 7th day of August, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge