

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

CLARENCE BELL,

Petitioner,

v.

ORDER
07-C-092-S
04-CR-182-S-01

UNITED STATES OF AMERICA,

Respondent.

Petitioner Clarence Bell 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 October 28, 2004 a federal grand jury in the Western District of Wisconsin returned a one-count indictment against Clarence Bell charging him with unlawful possession of firearms as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Attorney Erika Bierma was appointed to represent him. On November 17, 2004 a two count superseding indictment was returned by the grand jury. Count 1 was identical to original indictment and Count 2 charged him with possession of a sawed-off shotgun.

On February 11, 2005 Bell pled guilty to count one of the superseding indictment. At the plea hearing petitioner testified under oath that he agreed with the statements that the government

provided in its offer of proof. At the plea hearing petitioner also testified that he was fully satisfied with the counsel, representation and advice given to him in the case by his attorney Erika Bierma.

A presentence report was prepared which found an offense level of 23 and a category VI criminal history. Two criminal history points were attributed to petitioner's 1998 juvenile sentence because his sentence to confinement was at least 60 days and he was released within five years of his commencement of the offense of conviction. USSG §§4A1.2(d)(2)(A) and 4A1.2(k), application note 11. Two points were also attributed to petitioner's 2001 juvenile sentence pursuant to these guidelines. Three points were attributed to petitioner's adult sentence for felony battery by a prisoner. The resulting advisory guideline range was 92 to 115 months.

On April 21, 2005 petitioner appeared before this Court for sentencing. He did not object to the presentence report. The Court sentenced petitioner to 115 months in prison followed by a three-year term of supervised release.

Petitioner appealed his judgment of conviction and sentence to the United States Court of Appeals for the Seventh Circuit. His counsel moved to withdraw under Anders v. California, 386 U.S. 738 (1967). Petitioner responded in letter form on September 22, 2005.

The Court of Appeals rejected petitioner's letter stating his request had to be submitted in motion form. On November 25, 2005 petitioner's appeal was dismissed.

On February 16, 2007 petitioner filed this motion under 28 U.S.C. § 2255.

MEMORANDUM

Petitioner claims that his counsel was ineffective. 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 (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 claims that his counsel was ineffective for not challenging the search of his home and for not challenging his criminal history at sentencing or on appeal. 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 counsel failed to file a motion to suppress evidence seized during a consent search of Shaunese Allen's apartment. To prevail on this claim petitioner must prove that the motion was meritorious. Owens v. United States, 387 F.3d 607, 610 (7th Cir. 2004). Petitioner has not made this showing. Further, he testified under oath at the plea hearing that he was fully satisfied with his counsel's representation. Petitioner has not shown that his counsel's failure to file a motion to suppress was deficient performance or caused him any prejudice.

Petitioner contends that his counsel was also ineffective for failing to object to his criminal history points. Petitioner's criminal history points for his juvenile sentences were correctly calculated pursuant to USSG §4A1.2(d). He was also properly assessed three criminal history points for his adult conviction. Since his criminal history points were properly calculated,

petitioner cannot prevail on his claim that his counsel was ineffective in failing to challenge his criminal history at sentencing or on appeal. In addition he has not shown that he would have received a shorter sentence had his counsel objected to his criminal history.

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 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 (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 9th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge