

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

JOHNNIE STEWART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

06-C-729-S

04-CR-191-S

Petitioner Johnnie Stewart moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed its response to the motion on March 5, 2007. Petitioner filed his reply brief on April 9, 2007.

The petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is unnecessary under 28 U.S.C. § 2255. See United States v. Kovic, 840 F.2d 680, 682 (7th Cir. 1987).

FACTS

On November 12, 2004 a federal grand jury in the Western District of Wisconsin returned a one count indictment against Johnnie Stewart charging him with distributing 50 grams or more of cocaine base. On December 2, 2004 Attorney Kelly Walsh appeared in court representing petitioner.

On February 25, 2005, pursuant to a written plea agreement, petitioner pled guilty to the indictment. At the plea hearing

petitioner testified under oath that he committed the offense charged in the indictment, that he voluntarily signed the plea agreement and that he was fully satisfied with the counsel, representation and advice given to him in the case by his attorney Kelly A. Walsh.

Prior to sentencing a presentence report (PSR) was prepared which concluded that petitioner's sentence should be based on 122 grams of cocaine as confirmed by testing by the Wisconsin Crime Laboratory. Petitioner did not object to this conclusion.

Petitioner was sentenced on May 6, 2005 to 300 months in prison. On May 10, 2005 petitioner filed a timely notice of appeal. His counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). On September 13, 2005 the United States Court of Appeals for the Seventh Circuit granted the motion to withdraw and dismissed the appeal.

Petitioner filed a timely petition for rehearing on September 22, 2005. The Court of Appeals denied that motion on October 4, 2005. Petitioner did not file a petition for a writ of certiorari. He filed this motion to vacate his sentence under 28 U.S.C. § 2255 on December 11, 2006.

MEMORANDUM

Petitioner claims that his counsel was ineffective because she failed to object to the government's plea offer. He also contends

that he should have been sentenced based on powder cocaine instead of based on "crack" cocaine.

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).

The Court will address the merits of petitioner's claim that his trial counsel was ineffective. 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 claims that his trial counsel was ineffective because she did not object to the government's plea offer. He argues that his counsel should have attempted to secure a plea agreement to a different offense than that charged in the indictment. His argument is without merit because at the plea hearing he admitted under oath that he committed the offense with which he was charged. He also testified that he had knowingly and voluntarily agreed to the plea agreement and that he was satisfied with the counsel, representation and advice of his attorney.

In an affidavit filed in this Court on April 9, 2007 petitioner states that in March 2005 he instructed his attorney to withdraw his guilty plea but that she advised him to "go along with" the plea agreement and he did. This does not show that his attorney's performance was deficient.

Further, petitioner has not shown that absent any deficient performance by his attorney he would not have pled guilty and would have insisted on going to trial. Petitioner's claim that his counsel was ineffective is without merit.

Petitioner argues that he should have been sentenced based on powder cocaine rather than cocaine base ("crack"). This claim is without legal merit because the substance involved in petitioner's

case was tested by the Wisconsin Crime Laboratory and tested positive for the presence of cocaine base.

Petitioner has not shown that he received ineffective assistance of counsel nor that his sentence was improper. 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).

ORDER

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

Entered this 10th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge