

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

JONATHAN ATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
06-C-742-S
04-CR-191-S

Petitioner Jonathan Atkins moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed its response to the motion on January 23, 2007. Petitioner's reply was to be filed not later than February 22, 2007 and has not been filed to date.

FACTS

On November 12, 2004 a federal grand jury in the Western District of Wisconsin returned a one count indictment against Jonathan Atkins charging him with distributing 50 grams or more of cocaine base. Attorney Erika L. Bierma was appointed to represent 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 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.

Prior to sentencing a presentence report (PSR) was prepared which concluded that petitioner was a career offender as defined in USSG §4B1.1. Atkins's counsel initially objected to this recommendation but withdrew the objection with the defendant's agreement at the beginning of the sentencing hearing. The PSR also concluded that petitioner's sentence should be based on 122 grams of cocaine as confirmed by testing by the Wisconsin Crime Laboratory.

Petitioner was sentenced on May 6, 2005 to 300 months in prison. On May 16, 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 motions to withdraw and dismissed the appeals.

MEMORANDUM

Petitioner claims that his counsel was ineffective because she failed to object to his being sentenced as a career offender. He also contends that his counsel should have objected to him being sentenced on the basis of "crack" rather than 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 him being sentenced as a career offender. The PSR and the addendum indicate that plaintiff had

three felony drug convictions noted in paragraphs 35, 36 and 42. Since the record supported petitioner being sentenced as a career offender, counsel's failure to object was not deficient performance. Accordingly, petitioner has not shown that his counsel's performance was deficient.

Petitioner also argues that his counsel should have objected because the substance that formed the basis for his conviction was never tested. The record indicates that the substance was tested by the Wisconsin Crime Laboratory and found to be cocaine base. Accordingly, petitioner has not shown that the failure by counsel to object was deficient performance.

Further petitioner has not shown any prejudice caused by his counsel's performance. Specifically, petitioner has not shown that absent his counsel's performance he would have received a shorter sentence. Id.

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).

Atkins v. United States, 06-C-742-S

ORDER

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

Entered this 27th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge