IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

06-C-0152-C
04-CR-0196-C-01

v.

JOHN E. BEDNARSKI,

Defendant.

- -

An evidentiary hearing was held in this case on June 8, 2006 on defendant John E. Bednarski's motion for post-conviction relief under 28 U.S.C. § 2255. The government appeared by Paul Connell, Assistant United States Attorney. Defendant was present in person and by counsel, Jeffrey Brandt.

RECORD EVIDENCE

Defendant was sentenced on March 25, 2005, after pleading guilty to the crime of possessing a computer hard drive containing multiple depictions of minors engaged in sexually explicit conduct transported in interstate commerce, in violation of 18 U.S.C. §

2252(a)(4)(B). In preparing defendant's presentence report, the probation officer recommended offense enhancements based on material involving prepubescent minors or minors under the age of 12; for an offense involving the distribution for the receipt or expectation of receipt of a thing of value but not for pecuniary gain; for use of a computer to transmit or receive the material; and for an offense involving at least 300 but fewer than 600 images. She also recommended that defendant receive a three-level downward adjustment for his acceptance of responsibility. Defendant did not file any objections to the recommendations.

At the sentencing hearing, defendant's counsel asked for a sentence of probation in light of defendant's advanced age, his work history, his devotion to his disabled wife and his role as her caregiver, his dedication to his family and his concerns about his daughter's health. Despite counsel's thoughtful and vigorous argument on behalf of his client and defendant's own expressions of remorse, I was not persuaded that probation was appropriate. Taking into consideration the matters that counsel had raised as well as the extent of defendant's criminal activity and the deliberate and repetitive nature of that activity, I sentenced defendant at the bottom of the sentencing guideline range, which was 70 months. Defendant did not file an appeal from the sentence.

Almost one year after sentencing, defendant filed a § 2255 motion, alleging that he had been denied the effective assistance of counsel when his retained trial attorney failed to

ask the court for a "non-guideline sentence" and later, when trial counsel failed to file an appeal of defendant's sentence. I dismissed the first issue in an order entered on April 3, 2006, after finding that counsel had not provided ineffective assistance in asking the court for a term of probation for his client rather than for a sentence lower than the lowest one permitted under the sentencing guidelines. Counsel's request for probation made it clear that he was asking for the most lenient punishment possible.

EVIDENCE ADDUCED AT HEARING

The evidentiary hearing went forward on the one remaining issue relating to appeal: defendant's contention that his trial counsel, Jared Redfield, had not provided sufficient information to allow defendant to assess the advantages and disadvantages of appealing and had not made a reasonable effort to discern defendant's wishes on the subject. Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). Defendant does not allege that he ever asked Redfield to take an appeal for him.

At the hearing, defendant testified that after his sentencing, he rode back to Stevens Point with Redfield, that they discussed the sentence he had received and that he asked Redfield about the pros and cons of appealing but that Redfield ignored his questions. Redfield testified to the way in which defendant's case had played out. Early in his representation, Redfield met with the FBI agent investigating the case, who convinced

Redfield that the evidence against defendant was what the government claimed it to be and that it was extensive. Defendant had received many images of child pornography and had forwarded them to others. Armed with this information, Redfield counseled defendant to accept full responsibility for his actions and seek to obtain all the credit he could for contrition and cooperation. To that end, defendant agreed to be sentenced as if the guidelines applied, although the Supreme Court had held in January 2005 that the guidelines were constitutional only if they were treated as advisory and not mandatory. United States v. Booker, 543 F.3d 220 (2005). In the course of advising his client, Redfield explained to him that if he adopted the recommended approach, he would have few if any grounds for appeal because there would be no issues in dispute.

When Redfield discussed defendant's sentence with him during the drive to Stevens Point, Redfield was taken aback at defendant's surprise about his sentence because the sentence imposed on defendant was no more severe than Redfield had warned him he could receive. Redfield does not recall whether they talked about appealing. Had defendant asked, Redfield would have filed a notice of appeal and arranged for another lawyer to take over the case, because he does not handle criminal appeals. Although Redfield does not handle many cases in federal court, he had filed a notice of appeal for another federal client only a few months before defendant was sentenced and was familiar with the filing requirements.

OPINION

I find as fact that Redfield gave defendant advice about filing an appeal, starting in the early stages of the case, and made it clear to defendant that if he followed the recommended course of cooperation and contrition he would have few if any chances of taking a successful appeal. I do not find defendant credible when he says now that on the way back to Stevens Point he asked Redfield about appealing and Redfield ignored his questions. Defendant has a strong motivation to remember the conversation incorrectly, whereas it is hard to imagine any reason Redfield would have had for not responding to defendant's questions. At the least, Redfield would have reminded defendant about the compromises he had made in his effort to obtain the lowest possible sentence. And if defendant was not persuaded that he had no chance of succeeding on appeal, what reason would Redfield have had to ignore defendant's desire to appeal? Filing a notice of appeal is a simple procedure.

Moreover, I conclude that even if defendant is correct about Redfield's ignoring his questions, the advice Redfield provided his client throughout his representation was sufficient to fulfill his obligations to his client under Flores-Ortega. Given the previous discussions the two had had, it was reasonable for Redfield to conclude from defendant's failure to ask expressly about taking an appeal that although defendant was disappointed about his sentence, he understood that an appeal would be futile.

ORDER

IT IS ORDERED that defendant John E. Bednarski's motion for relief from his sentence, filed pursuant to 28 U.S.C. § 2255, is DENIED for defendant's failure to show that his sentence is illegal in any respect.

Entered this 12th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge