

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

05-C-0743-C

05-CR-0084-C-01

v.

TIMOTHY SCHUMANN,

Defendant.

Defendant Timothy Schumann has filed a motion pursuant to 28 U.S.C. § 2255, alleging that the sentence imposed on him on October 31, 2005 is illegal in a number of respects. First, he was given a sentence at the high end of the Sentencing Guidelines when “only a jury can make that determination.” Second, his criminal history category was 5 under the guidelines because of crimes he had committed in the past and which he had “paid for by incarceration, fine or probation.” Third, his attorney did not inform him of new laws available to him at the time of sentencing and his rights under the Fifth and Sixth Amendments were violated and his “due process wasn’t explained” to him.

Defendant did not take an appeal from his sentence. He says that is because he was

unaware of the laws that were available to him in his case and his attorney “didn’t make [him] aware of [his] procurement into [his] legal rights.” I assume that defendant is not suggesting that he was unaware he could appeal his sentence because I instructed him carefully about his appeal rights, including his right to counsel on appeal at government expense. I assume instead that he is arguing that he did not know he had any grounds for appealing.

A § 2255 motion is not intended to be a substitute for appeal. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994). A defendant who does not appeal cannot pursue a post conviction motion under § 2255 unless he can show both cause and prejudice for his failure to appeal. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (holding that post conviction review is not available in absence of showing of both good cause for failure to raise claims on direct appeal and actual prejudice from failure to raise claims or if refusal to consider issue would lead to fundamental miscarriage of justice) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). Lack of knowledge of grounds for appeal does not constitute cause, except in the rare situation in which the Supreme Court recognizes a new right after the time for appeal had passed and makes it retroactive to cases that have become final before the right was recognized. “Cause” can be shown if a defendant asks his lawyer to take an appeal for him and the lawyer refuses or forgets to do so or in other situations in which a defendant is unable to appeal through no fault of his own.

Even if I were to find that defendant could show cause for his failure to appeal, he would be unable to show that he would be prejudiced by not being able to press his claims in this court. He is wrong in thinking that only a jury can decide where in the guidelines he can be sentenced and that his previous convictions could not be considered in his sentencing because he had completed service of his sentences for those crimes. Even under United States v. Booker, 125 S. Ct. 738 (2005), a court is free to decide where in the guideline range it will sentence; it is forbidden only from making factual findings that drive the calculation of the guideline range, such as quantities of drugs or role in the offense, and then only if it is applying the guidelines as if they are mandatory. Booker holds that so long as the court treats the guidelines as advisory and not mandatory, it can determine disputed issues that increase the guideline range without violating the United States Constitution.

Defendant is wrong, too, about his theory that his previous convictions cannot be considered once he has served his time. It is appropriate for courts to consider prior criminal history when sentencing, whether under a guidelines system or without one. A defendant's tendency to engage in repeated criminal acts is a good indicator of his likelihood to continue to commit crimes. Defendant's adult criminal conduct began when he was 26 and continued without abatement as he grew older. During the period in which he was committing the offense for which he was sentenced in this court, he was arrested and charged with domestic abuse. His history reveals a pattern of criminal conduct fueled by alcohol consumption that

does not bode well for the future.

As for defendant's claim of due process violations, I cannot tell whether this is an independent claim or one encompassing the challenges to his sentence that I have discussed. Because this is defendant's only chance to file a § 2255 motion, I will give him a brief opportunity to explain his claim of a due process violation and to advise the court whether he has any cause for not appealing his sentence.

ORDER

IT IS ORDERED that defendant Timothy Schumann's motion for post conviction relief, brought pursuant to 28 U.S.C. § 2255, is DENIED with respect to his claims that the court erred in sentencing him at the top of the guidelines range and in considering his previous convictions. I will reserve a ruling on defendant's claim that his due process rights were violated. Defendant may have until January 20, 2006, in which to advise the court what due process rights he thinks were violated and how, as well as to try to persuade the court that he has cause for not taking a direct appeal of his sentence. If he fails to file the

requested information by January 20, 2006, I will deny his motion in its entirety.

Entered this 3rd day of January, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge