

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

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DURON LEE,

Petitioner,

v.

MEMORANDUM AND ORDER

06-C-600-S

05-CR-70-S-01

UNITED STATES OF AMERICA,

Respondent.

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The above entitled matter came on to be heard before the Court on April 25, 2007 to determine whether petitioner told his counsel, Jack Hoag, to file an appeal. Petitioner appeared in person and by William Jones; the government by Erik C. Peterson, United States Attorney for the Western District of Wisconsin, by Elizabeth Altman, Assistant United States Attorney.

Both petitioner and his prior counsel, Attorney Jack Hoag, testified.

FACTS

Petitioner testified at the hearing as follows: "I was in the courtroom and after I was sentenced, at the table I told Jack Hoag to file for appeal" in a five second communication. He further testified that he wanted to appeal the issues of relevant conduct, the quantity of the drugs and whether the drug was crack cocaine although this was not explained to his counsel either before or after sentencing. At sentencing petitioner was asked by the Court

if he had any objections to the Presentence Report concerning these issues and he said he did not. Although Jack Hoag continued to represent petitioner on state charges, petitioner testified at the hearing that he did not discuss with his attorney any appeal.

Jack Hoag testified that he had no recollection of petitioner telling him he wanted to file an appeal. Hoag stated that if petitioner had told him to appeal he would have because it was his duty to do so and because it was his standard practice. Because petitioner pled guilty pursuant to a plea agreement, had no objections to the PSR and received a sentence within the guideline range, there did not appear to be any grounds for appeal.

#### MEMORANDUM

In Castellanos v. U.S., 26 F.3d 717, 719 (7th Cir. 1994), the United States Court of Appeals for the Seventh Circuit held that the Constitution does not require a lawyer to advise the client of the right to appeal (although this Court does so advise at sentencing). The Castellanos Court further held, however, that it was ineffective assistance of counsel when counsel fails to file an appeal where requested to do so by a defendant.

Petitioner's testimony is not credible. Petitioner testified in this Court at his plea hearing that he possessed crack cocaine. Further, at the sentencing he told the Court that he had no objections to the Presentence Report which included relevant

conduct, crack cocaine and the amount thereof. This hearing is the first that petitioner has advised of his concerns about relevant conduct, the quantity of drugs and whether the drug was crack cocaine. Petitioner never discussed grounds for an appeal with Attorney Hoag nor did he subsequently inquire as to the status of any appeal. Hoag's testimony that if petitioner had told him to file an appeal he would have is credible because that was his standard practice. Further, the facts in this case suggest that Attorney Hoag had no reason to conclude petitioner had any grounds for an appeal.

Accordingly, the Court finds that petitioner did not tell Attorney Jack Hoag to file an appeal.

The Court will now address the merit of petitioner's remaining claims in his motion under 28 U.S. C. §2255. He claims that his trial counsel was ineffective because he failed to investigate, failed to explain relevant conduct and failed to object to the presentence report.

#### FACTS

On May 11, 2005 a federal grand jury in the Western District of Wisconsin returned a two-count indictment against Duron Lee charging him with possession with intent to distribute cocaine base(a/k/a crack cocaine) and possession of a firearm in furtherance of the drug trafficking crime. Attorney Erika Bierma was appointed to represent petitioner. By August 5, 2005 petitioner had retained Attorney Jack Hoag to represent him.

On August 10, 2005, pursuant to a written plea agreement, petitioner pled guilty to the two count indictment. At the plea hearing petitioner testified that he was fully satisfied with the counsel, representation and advice given to him in the case by his attorney Jack Hoag. He also testified that he had discussed the plea agreement with his counsel. In paragraph 3 of the agreement petitioner agreed that his conduct involved crack cocaine as that term is defined in USSG §2D1.1. He also testified under oath that he knowingly and intentionally possessed with intent to distribute crack cocaine and that he possessed a firearm which was used in furtherance of this drug trafficking crime. Petitioner also testified that the sentence imposed could be longer than his attorney's estimate of his sentence.

A presentence report was prepared concluding that petitioner's offense level was 25 and his criminal history was III. The resulting guideline range with the inclusion of relevant conduct was 70-87 months on Count One. Count two carried a mandatory 60 month consecutive sentence.

On October 20, 2005 petitioner appeared before this Court for sentencing. Petitioner testified that he had reviewed his presentence report with his counsel and that he had no objections. The Court sentenced petitioner to 140 months in prison followed by five years of supervised release.

On October 18, 2006 petitioner filed this motion under 28 U.S.C. § 2255.

#### MEMORANDUM

Petitioner claims that his counsel was ineffective when he failed to investigate, failed to explain relevant conduct and failed to object to the presentence report.

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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1994).

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 Attorney Hoag was ineffective for failing to conduct an investigation of relevant conduct because he wanted to resolve the matter through a plea to save the expense of trial. To prevail on this claim petitioner has the burden of providing the court precise information as to what an investigation would have produced. Hardamon v. United States, 319 F.3d 943 (7<sup>th</sup> Cir. 2003). Petitioner has not made this showing. In addition the decision by counsel to seek a prompt plea agreement in this case was a very wise tactical decision given the strong evidence against petitioner. Petitioner has not shown that his counsel's performance was deficient for any failure to investigate relevant conduct.

Petitioner contends that his counsel was ineffective for failing to advise him that he would be held accountable for relevant conduct and for possessing crack cocaine. Petitioner admitted at the plea hearing and in his plea agreement that he possessed crack cocaine. He testified under oath that he was fully satisfied with the representation of his counsel and he did not object to any information concerning relevant conduct in the PSR.

Petitioner has not shown his counsel's performance was deficient. Further, he has not shown that absent his counsel's advice he would have proceeded to trial or would have received a shorter sentence.

Petitioner also claims that his counsel was ineffective for failing to object to his criminal history score. Petitioner has not shown that this was deficient performance nor that had any objection been made his sentence would have been shorter.

Petitioner has not shown that he received ineffective assistance of counsel. Accordingly, his 28 U.S.C. § 2255 motion must be denied.

Petitioner's motion under 28 U.S.C. § 2255 will 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 (7<sup>th</sup> Cir. 1997).

ORDER

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

Entered this 26<sup>th</sup> day of April, 2007.

BY THE COURT:

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JOHN C. SHABAZ  
District Judge