

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

LARRY L. HORTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
06-C-388-S
05-CR-089-S-01

Petitioner Larry L. Horton moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision.

Petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is not necessary under 28 U.S.C. § 2255. See United States v. Kovic, 840 F.2d 680, 682 (7th Cir. 1987).

Petitioner also moves for appointment of counsel. Pursuant to 18 U.S.C. §3006A (a) (2) (B), an attorney may be appointed for any financially eligible person seeking relief under 28 U.S.C. § 2255 when the Court determines that the interest of justice so requires. Based on the petitioner's ability to represent himself the Court finds that the interest of justice does not require appointment of counsel.

FACTS

On June 22, 2005 a grand jury sitting in the Western District of Wisconsin returned a seven count indictment against petitioner:

counts one, two, three, four and six alleged that he distributed a mixture or substance containing cocaine base and counts five and seven alleged that he possessed with intent to distribute five grams or more of a mixture or substance containing cocaine base.

On July 12, 2005 petitioner pled not guilty. On September 1, 2005 the government filed a notice of enhanced penalties under 21 U.S.C. § 851 based on petitioner's two prior felony drug convictions. This increased petitioner's mandatory minimum penalty to 10 years in prison and the maximum penalty to life in prison.

On October 3, 2005, the morning of jury selection and trial, petitioner pled guilty to Count five of the indictment pursuant to a written plea agreement.

At the plea hearing petitioner testified under oath that he was fully satisfied with the representation of his counsel. He also testified that he was aware of the penalties for his crime under §851.

A Presentence Report (PSR) was prepared which indicated that the guideline range was 292-365 months. Petitioner did not object to the proposed guideline range.

At the December 12, 2005 sentencing the Court asked petitioner whether he had any objection to the PSR and he stated he did not. After considering the factors in 18 U.S.C. §3553 the Court sentenced petitioner to 300 months in prison to be followed by an eight-year term of supervised release. The Court stated that the

sentence was warranted because of petitioner's repeated criminal history and his risk of recidivism.

Petitioner appealed his judgment of conviction. On May 25, 2006 the United States Court of Appeals for the Seventh Circuit dismissed petitioner's appeal specifically finding that his 300 month sentence was reasonable. The Court states, "The court considered the factors identified in 18 U.S.C. §3553(a) and imposed a sentence near the bottom of the guidelines range."

MEMORANDUM

Petitioner claims that his attorney was ineffective, that his sentence was in violation of 18 U.S.C. § 3553(a)(6) and that his advisory guideline range was calculated in violation of due process.

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).

Petitioner's claims concerning his sentence were raised in his appeal and dismissed. He cannot relitigate these claims in this Court.

The Court will address petitioner's claim of ineffective assistance of counsel. 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 have insisted on proceeding to trial. 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 has not submitted any evidence that his counsel's performance was deficient. Further, he testified at his plea hearing that he was satisfied with his counsel's representation. Petitioner has not shown that absent any action or inaction by counsel, his sentence would have been shorter. Accordingly, his 28 U.S.C. § 2255 motion must be denied because he has not shown that his counsel was ineffective.

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 19th day of September, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge