

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

RODNEY SPRUILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
06-C-700-S
05-CR-115-S-01

Petitioner Rodney Spruill moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed its response to the motion on January 5, 2007. Petitioner's reply was to be filed not later than February 5, 2007 and has not been filed to date.

FACTS

On August 4, 2005 a federal grand jury in the Western District of Wisconsin returned a four count indictment against Rodney Spruill charging him with transporting two minors across state line with intent that the minors engage in prostitution and illicit sexual contact. Federal Public Defender Michael Lieberman represented petitioner.

On October 13, 2005, pursuant to a written plea agreement, petitioner pled guilty to Count 1 of the indictment which charged him with knowingly transporting a minor across state lines on May 2, 2005 with the intent that said minor engage in prostitution.

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 subject to a five-level enhancement pursuant to USSG §4B1.5(b) because he engaged in a pattern of activity involving prohibited sexual contact. The report recommended a prison sentence in the advisory guideline range of 121-151 months and neither party objected to the amended calculation.

Prior to the sentencing hearing petitioner's counsel filed a sentencing memorandum arguing for a lower sentence based in that fact that a violation hearing was scheduled in the Northern District of Illinois in February at which time petitioner would receive additional time in prison.

Petitioner was sentenced on December 22, 2005. The Court asked petitioner whether he had read and discussed the sentencing memorandum filed by his counsel. Petitioner was sentenced to 151 month in prison.

Petitioner did not appeal his conviction. He timely filed this motion on December 4, 2006.

MEMORANDUM

Petitioner claims that his counsel was ineffective. He also claims that the government breached the plea agreement, that the sentence was unreasonable and that the five-level enhancement was improper.

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 plea agreement and his sentence are barred from collateral review in this Court because he failed to raise them on direct appeal unless he can demonstrate cause and prejudice for failing to raise them. Galbraith v. United States, 313 F.3d 1001, 1006-1007 (7th Cir. 2002). Petitioner has shown neither cause nor prejudice for failing to raise these claims on direct appeal.

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 for failing to advise him that the sentence he received in this case would run consecutive to any sentence he might later receive in state court. Petitioner's counsel filed a sentencing memorandum addressing his concerns that petitioner would receive more state time. Petitioner advised the Court at sentencing that he had read this memorandum. Accordingly, petitioner has not shown that his counsel's performance was deficient.

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 proceeded to trial.

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).

ORDER

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

Entered this 13th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge