

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

JOSEPH N. RUSSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
07-C-96-S
05-CR-141-S-01

Petitioner Joseph N. Russo moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed its response to the motion on March 22, 2007. Petitioner filed his reply brief on April 11, 2007.

FACTS

A grand jury sitting in the Western District of Wisconsin returned a single count indictment against petitioner Joseph Russo charging that after being convicted of a felony he unlawfully possessed a Remington Model #1917, bolt action rifle; a Western Fields 410 Shotgun and a Mossberg Model #185KA, 20 gauge bolt action shotgun in violation of 18 U.S.C. §922(g)(1). Attorney Kirt Posthuma was appointed to represent petitioner.

Petitioner pled not guilty and filed a motion to suppress evidence obtained in a search of his residence as well as written and oral statements he made to police. An evidentiary hearing on

this motion was held before the United States Magistrate Judge Stephen Crocker. After hearing the evidence, the Magistrate Judge accepted the police officers' version of the events and recommended denying petitioner's motion to suppress both the evidence seized in the search and his statements. Petitioner did not file objections to the Magistrate Judge's report and recommendation. The Court adopted the Magistrate Judge's recommendation.

After a jury trial petitioner was found guilty. A presentence report was prepared. Petitioner was assigned a base offense level of 24 because he had committed the instant offense after sustaining at least two prior convictions for a crime of violence or a controlled substance offense. U.S.S.G. §2K2.1(a)(2). His offense level was increased by two because the offense involved three or more firearms. U.S.S.G. §2K2.1(b)(1)(A). Petitioner also received a two level increase for obstruction of justice for offering false statements in his affidavit and the false testimony of a witness at the motion hearing. U.S.S.G. §3C1.1. Petitioner's total offense level was 28.

Petitioner had a criminal history of IV and a guideline range of 110-137 months. At sentencing the Court using a preponderance of the evidence standard found that the §3C1.1 enhancement applied because petitioner had lied in an affidavit, that McAllister had testified falsely and that petitioner had attempted to suborn

perjury from a defense witness. The Court sentenced petitioner to 110 months in prison followed by three years of supervised release.

Petitioner appealed his judgment of conviction. Petitioner's counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), because there were no appealable issues. Petitioner did not respond to that brief and the United States Court of Appeals for the Seventh Circuit dismissed the appeal. Petitioner filed this motion under 28 U.S.C. § 2255 on February 20, 2007.

MEMORANDUM

Petitioner claims that his counsel was ineffective because he did not present testimony concerning guns being left unattended for a short time in the hallway of the courthouse during trial. He also claims that the search of his home was illegal, that the evidence at trial was insufficient and that a juror improperly discussed the case during trial.

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 the search of his residence, errors at trial and juror misconduct are claims that were not raised on direct appeal. Petitioner did not respond to his counsel's Anders brief filed in the Court of Appeals. He has not demonstrated cause for procedural default as well as actual prejudice from the failure to appeal these issues. Accordingly, he is barred from raising these issue in this 28 U.S.C. § 2255 motion.

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 because he failed to present testimony concerning guns being left

unattended for a short time in the hallway of the Courthouse during trial. Since the guns were identified in court, not only by the police but by the petitioner's own witnesses, the chain of custody of those guns was a moot issue and would not affect their admissibility in evidence. It would have been futile for petitioner's counsel to object to the admissibility of the guns because of the chain of custody.

Petitioner has not shown that his counsel's performance was deficient. Further, has demonstrated no prejudice from the failure of his counsel to make a futile objection to the admissibility of the guns.

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 12th day of April, 2007.

BY THE COURT:

s/
JOHN C. SHABAZ
District Judge