

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID DRONE,

Defendant.  
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ORDER

06-C-0325-C

Defendant David Drone has filed a timely motion pursuant to 28 U.S.C. § 2255 for vacation or correction of his sentence. He raises three grounds in support of his motion. First, he contends that his sentence is illegal because he was sentenced as a career offender without a jury determination that he fit into that category. Second, the government held back exculpatory evidence. Third, his appointed counsel did not undertake an adequate review and investigation of the available discovery before advising defendant to plead guilty.

I conclude that none of these grounds supports defendant's request for relief.

RECORD EVIDENCE

Defendant was charged with one count of conspiring to distribute and to possess with

intent to distribute heroin and one count of distributing heroin. He entered a plea of guilty to the conspiracy count on November 13, 2003. The probation office recommended a two-level reduction in his offense level for acceptance of responsibility but did not recommend an additional one level reduction because defendant did not advise the government of his intention to plead guilty until seven days before the scheduled start of trial. However, at sentencing, I concluded that defendant gave the government notice of his intention to plead guilty as soon as he could have reviewed the relevant discovery, which the government did not provide until one day before defendant entered his plea. I sentenced defendant as a career offender after finding that he had at least two prior felony convictions for either a crime of violence or a controlled substance offense (and that he was more than 18 years old and the present offense was a felony drug offense).

Defendant appealed his sentence during the interval between the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), addressing the role of the jury in sentencing determinations. It appears from the court of appeals' decision on his appeal that the only issue he raised was his contention that when the court sentenced him as a career offender, it erred in considering itself bound by the sentencing range provided under the sentencing guidelines. Following the decision in Booker, the court of appeals remanded the case to this court for the limited purpose of stating whether it would have imposed the same sentence had it known at the

time of sentencing that the sentencing guidelines were advisory and not mandatory. After I advised the court of appeals that I would have imposed the same sentence, it entered judgment, affirming defendant's conviction and sentence on August 10, 2005.

## OPINION

### 1. Sentencing as career offender

Defendant concedes that at the present time, the law does not recognize his argument that the sentencing court cannot sentence him as a career offender unless a jury makes the determination of his prior convictions beyond a reasonable doubt. He acknowledges that in Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Supreme Court held that sentencing courts can rely on the fact of prior convictions when sentencing even if the prior convictions have not been proven to a jury beyond a reasonable doubt, but he believes that the law will change. He characterizes his motion as filed merely to preserve the issue for presentation to the Supreme Court if and when Almendarez-Torres is overturned.

This issue requires no discussion. Almendarez-Torres remains good law, at least as far as a majority of the Supreme Court is concerned. Cf. Rangel-Reyes v. United States, \_\_ S. Ct. \_\_\_, 2006 WL 1209141, \*\*1 (Stevens, J., statement respecting denial of petitions for certiorari)

While I continue to believe that Almendarez-Torres v. United States, 523 U.S.

224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), was wrongly decided, that is not a sufficient reason for revisiting the issue. The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history, unlike the denial of a jury trial on other issues of fact that give rise to mandatory minimum sentences, see Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), will seldom create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling Almendarez-Torres. Moreover, countless judges in countless cases have relied on Almendarez-Torres in making sentencing determinations.

## 2. Alleged withholding of exculpatory evidence

Defendant's second ground for relief fares no better than his first one. He believes that his Fifth Amendment right to due process was violated by the government's withholding of critical exculpatory evidence, specifically the grand jury testimony of Fredricka Burks, who provided drugs to him at the Oxford Correctional Institution where he was a prisoner. There are a number of reasons why this contention cannot succeed. First, defendant never raised it on direct appeal and he has not shown cause or prejudice for this omission, as he must if he wants to raise the issue in support of his motion for post conviction relief. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (no collateral review absent 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)).

Second, defendant has not shown any denial of due process. He acknowledges that

he received the allegedly exculpatory evidence *before* he entered his plea of guilty and he does not suggest that he could not have asked for more time in which to study the evidence before he entered his plea. His trial date was still eight days away when he received the material.

Third, he has not shown that the late disclosures contained any information that was truly exculpatory. He has not submitted a copy of the grand jury transcript that he contends was exculpatory but it is hard to imagine how it could have been helpful to him, even if Burks had recanted her earlier statement to the FBI that she had agreed to bring drugs into the institution and pass them to defendant in the visiting room. Not only had Burks made a full and complete statement to the FBI, but the government had tapes of her telephone conversations with defendant in which defendant instructed Burks how to obtain the drugs and bring them to him.

### 3. Alleged ineffectiveness of counsel

Defendant contends that his appointed counsel was ineffective because he did not undertake an adequate investigation of the available discovery before advising defendant to plead guilty. Defendant says that had he known of the false and contradictory testimony Burks provided to the grand jury, he would not have pleaded guilty. This is a wholly unpersuasive assertion in view of defendant's admission in his motion that he had the transcript of Burks's testimony before he pleaded guilty. He complains about the

untimeliness of its delivery to him (a mere eight days before trial) but he does not say, because he cannot, that he did not have it before he made his decision to plead guilty.

Defendant does not assert the existence of any evidence other than the supposedly exculpatory grand jury transcript that would have helped to him. It is well settled that a defendant alleging ineffective investigation by counsel cannot succeed by merely saying that his counsel did not unearth evidence that would have helped him. Instead, he must provide the court “sufficiently precise information, that is, a comprehensive showing as to what [counsel’s] investigation would have produced,” Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003), and show that the information discovered “would have led counsel to change his recommendation as to the plea.” Id.

In summary, defendant has adduced no evidence showing that he was either convicted or sentenced illegally.

## ORDER

IT IS ORDERED that defendant David Drone’s motion to vacate his conviction or correct his sentence is DENIED for defendant’s failure to show that his conviction and

sentence are illegal in any respect.

Entered this 17<sup>th</sup> day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge