IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

07-C-O337-C
06-CR-0022-C-01

v.

EMMIT Z. QUINN,[1]

Defendant.

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Defendant Emmit Z. Quinn has moved for postconviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel and denied other constitutional rights at his sentencing. Defendant was convicted of possession of cocaine base with intent to distribute it and sentenced in this court on June 22, 2006 to a term of imprisonment of 121 months. He alleges that his court-appointed counsel fell short of constitutional effectiveness in two ways: he failed to investigate the facts of the case properly and thus never discovered that defendant had not made any incriminating

[1] Defendant spells his first name as Emmit; he was indicted under the spelling Emmett. For this motion, I will use his spelling of his first name.

statements regarding drug quantities and he failed to take an appeal on defendant's behalf even though defendant asked him to do so.

Defendant challenges his plea as not being an intelligent and knowing one. He alleges that he did not know that the government would not honor its agreement with defendant but would apply a two-level enhancement based on eight additional grams not mentioned in the written agreement. Finally, he contends that he was denied his Fifth and Sixth Amendment rights when the court relied in sentencing on facts that were not alleged in the indictment, not found as fact by a jury and not admitted by defendant and also when the court followed the mandate of the Court of the Appeals for the Seventh Circuit that only a sentence within the advisory guideline range would be sustained as reasonable.

Defendant's first allegation of ineffectiveness is an odd one. He alleges that his attorney would have discovered that defendant never made incriminating statements about drug quantities to law enforcement officers had counsel "conducted an investigation of the facts surrounding [defendant's] arrest." Mot., dkt. #18. Defendant does not say why counsel needed to undertake an investigation to discover that defendant had not made incriminating statements to the police. Wouldn't defendant have known whether he made such statements and wouldn't he have told his counsel? If defendant means to say that he did tell counsel but that counsel did not follow up on the information, he will have to submit an affidavit to the court in which he sets forth in detail what he said to his attorney about

the statements he made to the police and exactly what counsel would have learned had he investigated the circumstances under which the statements were allegedly provided. A defendant seeking an evidentiary hearing on a claim that his trial counsel did not undertake an adequate investigation of the facts must provide "the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003) (internal quotations and citation omitted).

If defendant wishes to pursue his second claim that his attorney failed to take an appeal on his behalf, defendant will have to make a showing similar to that described above: he will have to set forth in an affidavit the specific circumstances of his request to counsel, that is, where and when he asked counsel to file an appeal on his behalf and whether there were any witnesses present when he made the request and if so, who those witnesses were. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996) (requiring detailed and specific affidavit showing actual proof of allegations). Given the vigorous representation that defendant's trial counsel gave him, the fact that he prevailed on all but one of the challenges the guidelines calculation that counsel raised on his behalf and received a sentence at the low end of the guidelines range and the fact that he did not dispute his guilt but pleaded guilty, it is difficult to see a strategic reason for taking an appeal. However, every defendant has a right to appeal even when doing so might be contrary to what others see as his best interests;

if he can show that he did want to appeal immediately after he was sentenced and that he made this clear to his attorney, he will be given an opportunity to do so now.

Defendant's next claim is that his plea was not an intelligent and knowing one because, he alleges, he did not know that the government would not honor its agreement but would apply a two-level enhancement based on eight additional grams not mentioned in the agreement. This claim is nonsensical. It is also unsupported. The written plea agreement says nothing about the quantities of cocaine base for which defendant would be held accountable. Defendant and his counsel signed this agreement and both stated in open court that it conformed to their understanding of the agreement they had reached; defendant assured the court that no one had made any promises to him other than those contained in the written agreement. More to the point, even if the government had made the promise defendant describes, it would have had no effect on his sentence. Defendant was held responsible for 48 grams, which put him in base offense level 30 (the offense level for quantities between 35 and 50 grams. U.S.S.G. § 2D1.1(c)(5)). A difference of eight grams would not have changed his offense level or his sentence. His postconviction motion will be denied as to this claim.

Finally, defendant challenges the court's reliance on facts for sentencing that were not found by the jury or admitted by defendant and that were not alleged in the indictment. Defendants have been making similar arguments since the United States Supreme Court

decided United States v. Booker, 543 U.S. 220, in 2005, and they have been uniformly unsuccessful. Booker preserved the guidelines by holding that they are advisory and not mandatory. So long as the sentencing court treats the guidelines as advisory, it may take into account facts not found by a jury or admitted by the defendant when imposing a sentence.

Defendant is misinformed when he says that this "court followed the mandate of the Court of the Appeals for the Seventh Circuit that only a sentence within the advisory guideline range would be sustained as reasonable." The court of appeals has no such mandate. It presumes that a sentence within the guidelines is reasonable; it does not require that it be within the guidelines. United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005). This approach has been upheld by the Supreme Court. Rita v. United States, 2007 WL 1772146 (June 21, 2007) (concluding that appellate courts may apply a presumption of reasonableness to sentences that are within guidelines).

ORDER

IT IS ORDERED that defendant Emmit Z. Quinn's motion for postconviction relief is DENIED as to his claims that the government breached its plea agreement and that the court sentenced him unconstitutionally. A ruling is reserved on his remaining two claims, that his attorney failed to investigate the circumstances of defendant's alleged statements to

law enforcement and failed or refused to take an appeal on defendant's behalf. If defendant wishes to pursue these two claims, he must submit an affidavit no later than July 23, 2007, in which, as to his first claim, he describes the circumstances in which he advised his attorney that he did not make the statements attributed to him by the police and what his attorney would have learned had he investigated the matter. As to his second claim, he must state in is affidavit exactly where and when he asked his attorney to take an appeal for him and whether there were any witnesses to his request. If defendant does not submit such an affidavit, I will assume that he does not wish to prosecute his remaining two claims and I will dismiss his postconviction motion in its entirety.

Entered this 29th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge