IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

12-cv-200-bbc
09-cr-111-bbc-1

v.

COREY WEBSTER,

Defendant.

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Defendant Corey Webster has moved for post conviction relief under 28 U.S.C. § 2255, contending that he was convicted and sentenced in violation of his constitutional rights. He argues that his trial counsel failed to provide him constitutionally effective representation in a number of respects: the government induced him to enter into a plea agreement in violation of the law; it engaged in a sham prosecution of him in conspiracy with the District Attorney for Dane County; and his sentence is improper. I conclude that defendant has shown that he was denied a constitutionally effective representation in one respect, but that this court cannot consider his challenges to his sentence because he could have raised them on direct appeal and failed to do so and that he cannot prove he was the

victim of a sham prosecution.

BACKGROUND

Defendant was charged with distributing heroin, in violation of 21 U.S.C. § 841(a)(1) and pleaded guilty to the charge on November 4, 2009. Before the plea hearing, the government filed an information under 21 U.S.C. §§ 841(b)(1)(C) and 851(a) based on an alleged prior conviction for a felony drug offense. The effect of the information was to raise the maximum term of imprisonment from 20 to 30 years and the minimum term of supervised release from three years to six. None of the parties or the court realized that defendant did not have a previous conviction for a felony drug offense at the time he committed the offense for which he was charged in this court, which meant that the information was invalid. Defendant had pleaded guilty to such a charge in November 2008, but he had not been sentenced for the crime when he entered his plea of guilty in this court a year later. Defendant never objected to the information.

Defendant was sentenced on December 30, 2009. He was committed to the custody of the Bureau of Prisons for a term of 151 months, with a six-year term of supervised release to follow. Represented by new counsel, defendant took a direct appeal of his sentence. His appellate counsel concluded that any appeal would be frivolous because defendant had not taken advantage of his opportunity to challenge the information before sentencing. Counsel

believed that defendant would be barred from appealing under § 851(c), which provides that "[a]ny challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause can be shown for failure to make a timely challenge."

The court of appeals agreed with defendant's counsel that an appeal would be frivolous. It acknowledged that § 851(c)(2) seemed to block all appellate challenges, even for plain error, United States v. Webster, 628 F.3d 343, 345 (7th Cir. 2010), but found it unnecessary to decide that issue because the question raised in defendant's appeal would be frivolous in any event. To prevail on plain error, a defendant must prove that the court "committed an obvious error that affected substantial rights and undermined the fairness, integrity, or public reputation of judicial proceedings." Id. at 346 (citing United States v. Olano, 507 U.S. 725, 732-34, 736 (1993)). In this case, the court found the error inadvertent. Moreover, "[w]ith or without the Information filed by the government, the district court could have imposed a term [of supervised release] of six years or longer." Id.

The court of appeals considered whether defendant could argue that his custody term was unreasonably long, but concluded it could not. The sentencing court had taken into account defendant's arguments in mitigation and the § 3553(a) factors and had imposed a sentence within the properly calculated guidelines range, making it presumptively reasonable. The court found no reason to set aside the sentence.

The court of appeals' mandate issued on December 27, 2010. Defendant could have, but did not, seek a petition for a writ of certiorari from the Supreme Court, so his one-year time period for filing a post conviction motion expired 90 days after December 27, 2010, which was March 29, 2011. Clay v. United States, 537 U.S. 522, 529-30 (2003). He filed his motion on March 23, 2012, within the statutory one-year time period.

OPINION

A. Challenges to Application of § 851 Information

Defendant contends that it was error for the court to use the § 851 information to increase his term of supervised release. He argues first that the government erred in filing the information without making sure that defendant had the requisite prior conviction; second, that the court failed to allow him to affirm or deny the prior conviction (claims 1(a) and (b) of defendant's motion, dkt. #1).

Defendant raised the same two claims on his direct appeal, so they are barred by the "law of the case" doctrine, which prevents a court from reconsidering matters that have previously been decided. As the doctrine applies to post conviction motions, it means that an issue that was raised on direct appeal cannot be reconsidered on a post conviction motion except in unusual circumstances, such as a showing of changed circumstances. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007) Defendant has alleged no changed

circumstances or any other unusual circumstance, so these two claims will not be considered in this proceeding.

B. Ineffective Assistance of Counsel

Defendant has alleged that his counsel was ineffective in four respects: counsel did not object to the § 851 information despite its invalidity (claim 1(c) of defendant's motion); he advised defendant to enter into a plea agreement, warning him inaccurately that because of the § 851 information, he faced a sentence as long as 30 years (claim 2); counsel misrepresented the length of sentence that defendant might receive (claim 3); and counsel did not object to the court's decision to enhance defendant's sentence by two levels for possession of a firearm in connection with a drug offense (claim 7). The first three allegations are tied to the erroneous assumption that defendant had a valid prior conviction.

At first glance, the claims seem to be barred by the law of the case doctrine because they involve an issue decided on direct appeal (the validity of defendant's custody and supervised release terms), but I am persuaded that the issue is separate enough that it can be taken up on defendant's post conviction motion. Defendant's claim in this proceeding centers on the adequacy of defendant's legal representation, not on the court's error in accepting the § 851 information as valid.

The test for constitutional ineffectiveness of counsel was established in Strickland v.

Washington, 466 U.S. 668 (1984). The test has two components. First, the defendant must show that counsel's representation fell below an objective standard of reasonableness, id. at 688. In other words, proving a lawyer ineffective requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Second, he must that there exists a reasonable probability that the result of the proceeding would have been different had it not been for counsel's unprofessional errors. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

It was plain error for counsel to accept the government's representation that defendant had a prior conviction for delivery of heroin without checking the validity of the § 851 information. (It was equally mistaken for the government and the court not to realize that defendant had not been convicted of a prior delivery of heroin before he entered his plea of guilty, as § 851(a)(1) requires. In hindsight, this is obvious from the presentence report. Dkt. # 25 at ¶ 73.) As Strickland holds, however, it is not enough to show that counsel erred; "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The issue is not a close one in this case. Even if counsel did not realize the invalidity of the § 851 information when it was filed, he should have realized it once he read the presentence report and saw that the alleged "prior conviction" was only

a charge lodged against defendant by the state before he committed the federal offense. Given the serious consequences of such an information, it was constitutionally ineffective for counsel not to have scrutinized the information and the status of the case in the Dane County court before accepting it as valid.

The prejudice question is easily answered, if only because the court of appeals has held that the increased supervisory term affected defendant's substantial rights. Webster, 628 f3d 546. Defendant would not have received a six-term of supervised release had it not been for the filing of the information. I find, therefore, that with respect to the increased supervisory term, defendant has proven that he was denied his constitutional right to the effective assistance of counsel by his attorney's failure to challenge the § 851 information.

The next two issues are bound up together. Defendant alleges that his counsel was constitutionally ineffective in advising him to enter into a plea agreement and that counsel misled him into pleading guilty by telling him that if he went to trial he would be facing a maximum 30-year term because of the § 851 information. These allegations suggest that defendant wants to overturn his plea of guilty. However, on direct appeal, defendant's counsel told the court of appeals that defendant did not want his guilty plea vacated.

Even if defendant is not bound by his statement to the court of appeals, he cannot show that he was prejudiced by counsel's advice (although he has good grounds for a claim that his counsel's representation was ineffective in this respect). The evidence against him

was strong: law enforcement had conducted many controlled buys involving defendant and at least eight other persons who were selling heroin in the Madison area. The size of the selling group and the number of customers meant that there were many potential witnesses against defendant. If counsel's advice was not made with full knowledge of the facts, the only prejudice it caused defendant was to subject him to a six-year term of supervised release, rather than a three-year term, as I have found previously. Defendant received a custody term at the bottom of the sentencing guidelines range and the court of appeals has held that this range was properly calculated. Webster, 628 F.3d at 346. These two claims of ineffective assistance in connection with the § 851 information will be dismissed.

Defendant's last challenge to the effectiveness of his counsel concerns counsel's failure to object to an enhancement of defendant's sentence by two points for his possession of a dangerous weapon in connection with his drug dealing (claim 7). Citing United States v. Booker, 543 U.S. 220 (2005), defendant argues that it was error for the court to apply a two-level enhancement when he had not pleaded guilty to possessing a dangerous weapon and no jury had determined that he possessed one. Defendant misunderstands the holding in Booker. The Supreme Court did say in that case that a sentencing court could not increase sentences on the basis of facts not found by the jury if it is sentencing under a mandatory sentencing scheme, but it explained that under an advisory scheme, it is free to consider facts not found by the jury. Defendant was sentenced after the guidelines had been declared

advisory in Booker, which means that this court was authorized to consider in sentencing facts not found by the jury or stipulated by defendant. He cannot prevail on this claim of error.

C. Conspiracy Claims

Defendant has alleged that he was sentenced mistakenly as if he had been charged with a conspiracy (claims 6(a) and (b)), which he was not. He contends that it was error to treat him as if he had been charged in a conspiracy, first by holding him responsible for the drug amounts attributable to the conspiracy and second, by assessing him a two-level enhancement for being an organizer or leader.

These claims are barred because defendant could have raised them on his direct appeal and has not shown cause or prejudice for his failure to raise them at that time. It is well established law that a post conviction motion is not a substitute for an appeal. Bousley v. United States, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and "'will not be allowed to do service for an appeal.'") (quoting Reed v. Farley, 512 U.S. 339, 354 (1994)). "Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice' resulting from the alleged . . . violation.'" Reed, 512 U.S. at 354.

Defendant has not shown any cause for his waiver, but even if he had, he could not establish any prejudice. Contrary to his belief, he was held accountable for only the amounts of heroin he distributed, not for the amount distributed by the entire group. Presentence Rep., dkt. # 25, at ¶ 36. He was given a two-level increase in his base offense level for his role in the offense, but the increase did not depend on his being found part of a conspiracy. The Introductory Commentary to Part B of the sentencing guidelines makes it plain that increases in sentences for role in the offense are not limited to persons charged in a conspiracy. The commentary provides that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of 1B1.3 (Relevant Conduct) . . ." Nothing in the commentary or in any of the provisions of Part B limits the adjustment for role in the offense to conspiracy prosecutions.

D. Government Misconduct

Defendant contends that the government's misrepresentation of the prior conviction induced him to enter into a plea agreement involuntarily and unintelligently (claims 4 and 5). This contention adds nothing to his motion. It was an error for the government to file the § 851 information and defendant is entitled to a reduction in his term of supervised release.

E. Sham Prosecution

Defendant has alleged that the United States Attorney and the Dane County District Attorney reached an agreement in which the United States acted as a "mere" puppet of the district attorney by agreeing to prosecute defendant on charges the district attorney had agreed to dismiss (claim 8). He cites United States v. Jarrett, 447 F.3d 520 (7th Cir. 2006), in support of his contention that it was error to proceed with his prosecution in federal court. Jarrett was a case in which the defendant, a defense lawyer, argued that he had been prosecuted vindictively, because of his success in getting charges dropped against a client in a murder case.

The Constitution prohibits the government from undertaking a prosecution solely for vindictive motives, id. at 524, that is, a prosecution "motivated by some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication," id. at 525 (citing United States v. Falcon, 347 F.3d 1000, 1004 (7th Cir. 2003)), or in retaliation for the exercise of a protected statutory or constitutional right, Falcon, 347 F.3d at 1004. Unfair as it may seem, the Constitution does not prohibit separate prosecutions by state and federal prosecutors of the same person for the same allegedly illegal conduct. Koon v. United States, 518 U.S. 81, 112 (1996); United States v. Krueger, 415 F.3d 766, 775 (7th Cir. 2005). This is because the states and the United States are separate sovereigns. "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by

breaking the laws of each, he has committed two distinct 'offenses.'" Heath v. Alabama, 474 U.S. 82, 88 (1985).

Although defendant does not cite Bartkus v. Illinois, 539 U.S. 121, 122-24 (1959), he seems to be relying on the suggestion in that case that it would be impermissible for one sovereign to use the other as a tool to bring a second prosecution against a person for the same offense conduct. The suggestion was dicta and the idea that it creates an exception to the dual sovereignty doctrine has little apparent merit. United States v. Tirrell, 120 F.3d 670, 677 (7th Cir. 1997) ("This circuit has expressed doubts about 'whether Bartkus truly meant to create such an exception and we have uniformly rejected such claims.'") (quoting United States v. Brocksmith, 991 F.2d 1363, 1366 (7th Cir. 1993)).

In any event, defendant has not made any showing that the federal government was acting as a tool for Dane County when it brought charges against him. He has not alleged anything that would tend to show that the county's action was vindictive in any respect. Proving vindictiveness requires more than merely saying that the prosecutors worked in concert to trick him and coerce him into a plea agreement with the state that left him vulnerable to new charges in federal court. Defendant says this is the "quintessential prosecutorial vindictiveness defined by United States v. Falcon, 347 F.3d 1000," but it is not. Defendant has made no showing that either the state or federal government prosecuted him in retaliation of his exercise of a constitutional right or because of some form of prosecutorial

animus, such as a personal stake in the outcome of the case or an attempt by the prosecutor to seek self-vindication.

ORDER

IT IS ORDERED that defendant Corey Webster's motion for post conviction relief is GRANTED with respect to his claim that he was denied the effective assistance of counsel when he entered his plea of guilty; in all respects, his motion is DENIED. FURTHER, IT IS ORDERED that the judgment and commitment entered in this case on December 30, 2009 is VACATED. An amended judgment will be entered providing that defendant's term of supervised release will be three years. In all other respects, the judgment and commitment order shall remain as entered on December 30, 2009.

Entered this 31st day of May, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge