IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

11-cv-0349-bbc
09-cr-135-bbc

v.

DARNELL W. MOON,

Defendant.

- -

Defendant Darnell W. Moon has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the assistance of constitutionally effective counsel. He alleges that his counsel was ineffective in advising him to plead guilty and in failing to object to the total intended tax loss resulting from his offense. He alleges that the district court denied him his right to effective assistance of counsel by refusing to appoint a third lawyer to represent him and that the government coerced him into pleading guilty by threatening him with false information.

After reviewing defendant's motion, the government's response and the record, I conclude that defendant's claims are either unsubstantiated, barred by the law of the case

or insufficient to show that he is in custody illegally. His motion must be denied.

From the record I find the following facts relevant to the resolution of this motion.

RECORD FACTS

On September 22, 2009, defendant was charged in a one-count information with knowingly making and presenting a false claim to the IRS in the form of a tax return seeking a refund, knowing that the return was false. The information was preceded by extensive discussions between the government and the defense, as well as by admissions defendant had made to the FBI. Among other things, defendant had admitted that, as an inmate of the Federal Correctional Institution in Oxford, Wisconsin, he had filed false tax returns on behalf of several other inmates and that these returns included false wages, false W-2 forms and false dependents. He told the FBI he knew that the inmates had not worked during the tax years for which he prepared their returns and that he had simply filled in random numbers for their wages.

Five days before the information was prepared, defendant and his second court-appointed counsel met with the United States Magistrate Judge to talk about letters that defendant had written to the court, complaining about counsel's work. After discussing the matter, defendant told the magistrate judge that he was frustrated because he was being held in segregation at Oxford and that he wanted to get the case behind him and "plead to

everything." Hrg. trans., dkt. #30, at 6, 9-10. He and his counsel assured the magistrate judge that they could work together.

At the subsequent plea hearing on the information, defendant expressed no objection when the government said that the potential tax loss was approximately $55,000. He agreed that if the case had gone to trial, the government would have produced evidence that he had confessed to the FBI that he had filed a false 2007 tax return on behalf of inmate Darnell Northington. He admitted as well that Northington could have testified that he did not give defendant permission to file a tax return for him and he did not provide defendant any financial data for filing a return. Defendant made no objection when the government said that it would have called Special Agent Eric Kopp of the IRS, who would have testified that the return defendant filed on behalf of Northington was false and that the potential tax loss for defendant's conduct was approximately $55,000.

Defendant raised no objections to the presentence report, which showed that the intended tax loss was $54,881, his net offense level was 10, his criminal history category was III and his advisory guideline range was 10-16 months. He was sentenced to a 14-month term of imprisonment.

Defendant appealed, still represented by trial counsel, who filed a brief in the court of appeals in compliance with Anders v. California, 386 U.S. 738 (1967), advising the court that he was not able to identify any nonfrivolous ground for relief. Although defendant was

given an opportunity to respond to counsel's brief, he did not take it. Counsel identified three potential issues: (1) whether the district court erred in denying defendant's second request for change of counsel; (2) whether defendant's guilty plea met the requirements of Fed. R. Crim. P. 11 and (3) whether defendant's sentence was reasonable. The court of appeals agreed with counsel that defendant had no ground for challenging the court's denial of what would have been his third request for appointed counsel because he had waived that issue by pleading guilty without reserving his right to challenge the denial of the request. Op., dkt. # 38-3, at 2. It agreed also that any challenge to the adequacy of defendant's plea colloquy or the voluntariness of the plea itself would have been frivolous. Id. Finally, the court agreed that defendant could not challenge the length of his sentence or the fact that it was imposed to run consecutively to the sentence he was serving when he committed the criminal acts. The court of appeals observed that defendant had not identified any reason why a consecutive sentence would be inappropriate and it was satisfied that the length of the sentence was presumptively reasonable because it fell within the properly calculated guidelines range. Id. at 2-3.

OPINION

A. Ineffectiveness of Counsel

Defendant's first two challenges go to the alleged ineffectiveness of counsel. The test

for constitutional ineffectiveness of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984). The test has two components. The defendant must show both that counsel's representation fell below an objective standard of reasonableness, id. at 688, and 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. 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. Merely showing that counsel erred in a few specific respects may not be enough to show incompetence; counsel's work must be evaluated as a whole. Id. at 690; see also Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005) ("it is the overall deficient performance, rather than a specific failing, that constitutes" ineffectiveness). Even if a defendant can prove that his counsel was ineffective, he still must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland. 466 U.S. at 694.

1. Guilty plea

Defendant contends that his trial counsel was ineffective in advising him to plead guilty "because it was an unintelligent plea." Mot., dkt. #41, at 5. At the outset, I note that

the government has argued that defendant is barred from raising this claim because he argued the validity of his plea on his direct appeal to the Court of Appeals for the Seventh Circuit. My review of that argument is that it was limited to a challenge to the adequacy of the plea hearing and specifically whether the court advised defendant of all of his rights and made sure that he understood them. In his motion, he is challenging the plea in terms of the advice his attorney gave him (or did not give him), which is another issue altogether. Therefore, I see no reason not to take up the issue on this motion.

As far as I can make out from defendant's motion, he is asserting that because several of the tax returns he admitted filing were in fact, legitimate tax returns, he "pled guilty to facts that were not true in the criminal information." Mot., dkt. #41, at 5. This is an odd assertion. The information charged defendant with filing only one false tax return, dkt. #9, and he agreed at his plea hearing that he had filed a false return for Darnell Northington, who knew nothing about the filing. Plea hrg. trans., dkt. #32, at 15-16. Now, defendant says that he talked to Northington recently and learned from him that he would not have testified against defendant. Mot., dkt. #41, at 5.

This "newly discovered" information makes defendant's claim even stranger. When he pleaded guilty, he had all the information he needed for deciding whether to plead guilty. He knew what he had done and what he had or had not told Northington. He knew he had admitted his illegal conduct to the FBI and discussed it with the government. It makes no

sense for him to say he entered his plea without adequate information. Even if I accepted as true defendant's statement that Northington told him the government lied to defendant about Northington's willingness to testify against defendant, defendant's claim would still make no sense in light of all the evidence that defendant had provided the government. Moreover, defendant assured the court at his plea hearing that the government would be able to prove the elements of the crime charged against him. He is bound by his own statements made under oath. United States v. Peterson, 414 F.3d 825, 827 (7th Cir. 2005) ("a motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction").

Defendant seems to be saying that his plea was unknowing for another reason: he pleaded guilty without knowing whether the government's estimated potential tax loss was accurate or not. Again, he agreed at his plea hearing that the government could prove this amount and he raised no objection to the amount when the probation office included it in his presentence report. If anyone had reason to think that some of the tax returns were legitimate and should not have been included in the tax loss estimate, as defendant says now was the case, it would have been defendant. Yet he never spoke up. Sent. hrg. trans., dkt. #29, at 3. His failure to raise any issue about the tax loss amount bars him from raising it now.

Defendant's claim of ineffectiveness suffers from a third defect. A defendant who challenges his counsel's effectiveness in counseling him about a guilty plea must support such a challenge with an affidavit in which he states that he would not have pleaded guilty had his attorney given him better advice but would have insisted on going to trial. Key v. United States, 806 F.2d 133, 139 (7th Cir.1986) ("mere allegations by a defendant that he would have pleaded differently and insisted on going to trial are insufficient to establish prejudice"); United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991) (defendant must show more than that he would not have pleaded guilty if he had received correct advice; evidence that he would have been unlikely to succeed at trial tended to disprove his claim that he would have proceeded to trial). It is wholly implausible to think that defendant would have insisted on going to trial after admitting his fraudulent tax scheme to the FBI.

Defendant has failed to show any ground on which to find his trial counsel ineffective either for failing to challenge matters that were not in dispute when defendant pleaded guilty or for advising defendant to plead guilty. Defendant's motion will be denied as to this claim.

2. Counsel's failure to hire tax expert

Defendant contends that his counsel was ineffective because he did not hire a tax specialist to determine the potential tax loss. He adds that because of counsel's

ineffectiveness, his guilty plea should be set aside. This is a losing argument for two reasons. First, a defendant seeking postconviction relief who argues that his counsel failed to undertake an adequate investigation must show what the investigation would have uncovered had it been done properly. It is well settled law that mere unsupported assertions are not enough to persuade a court to hold an evidentiary hearing on such a claim, much less to grant a petition. Hardamon v. United States, 319 F.3d 943 (7th Cir. 2003); Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002). When it comes to an allegation of an inept or incomplete investigation, a petitioner must provide the court "'sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced.'" Hardamon, 319 F.3d at 951(quoting United States ex rel. Simmons v. Gramley, 915 F.2d 1129, 1133 (7th Cir. 1990)). The burdens of production and proof that fell on the government at a defendant's criminal trial shift entirely when the defendant files a post conviction motion. Then it is the defendant who must produce enough evidence to convince the court that he was convicted unconstitutionally. In this instance, defendant has not shown that hiring a tax specialist to investigate his tax loss would have led to a reduction in his advisory sentencing guidelines calculation.

Second, if defendant thought that his tax loss was calculated incorrectly, he should have raised an objection to the calculation when he read the presentence report containing the calculation. He never did so, although he had been warned of the probable amount at

the time of his plea hearing when the government stated that its estimate of the potential tax loss was $55,000. Two and one-half months later, he told the court at sentencing that he had no objections to anything in the report, which included the amount of tax loss. Sent. hrg. trans., dkt. #29, at 3. By failing to raise any objection at the time, he is stuck with his acceptance of the estimated tax loss. His motion must be denied as to this claim.

B. Court's Refusal to Appoint Third Counsel

Defendant contends that the district court denied him his right to effective assistance of counsel by refusing to appoint a third lawyer to represent him, after he asked to be relieved of the assistance of his second appointed counsel. He cannot raise this claim at this time because he raised it on appeal and the court of appeals decided it against him. The law of the case doctrine bars him from rearguing the issue again under § 2255. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007) (issues raised on direct appeal may not be reconsidered on § 2255 motion).

C. Government's Coercion of Defendant's Plea

Defendant's final claim is that the government coerced him into pleading guilty by making the false representation to him that it had a potential witness ready to testify against him. This claim cannot succeed. As I have noted, defendant never told the court that he

was not entering his plea of guilty voluntarily, although he had an opportunity to do so. Moreover, despite the fact that he alleges that Darnell Northington told him that the government had lied to defendant, he has not produced any actual evidence to support his allegation, such as an affidavit from Northington. His mere assertion of the fact does not require any further inquiry into the matter and it would be difficult for him to prove any coercion, in light of his statements to the magistrate judge that he wanted to plead guilty and move his case along. Hrg. trans., dkt. #30, at 9-10. His motion must be denied in full.

D. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this case, defendant has not made the necessary showing, so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether

a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Darnell W. Moon's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. No certificate of appealability shall issue.

Entered this 27th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge