IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

10-cv-696-bbc
09-cr-120-bc

v.

CHRISTOPHER HAMLIN,

Defendant.

- -

Defendant Christopher Hamlin contests the legality of his conviction under 28 U.S.C. § 2255, contending that he was deprived of the effective assistance of counsel in the trial court. He wants to withdraw his plea of guilty so that he may move for suppression of the pipe bomb that a Watertown, Wisconsin police officer found in his possession on August 6, 2009, after the officer had stopped defendant for acting suspiciously in the vicinity of a house fire. I conclude that defendant cannot prevail on his claim of ineffective assistance and that his post conviction motion must be denied.

RECORD FACTS

Christopher Hamlin was charged in this court on August 6, 2009, with possession of an unregistered firearm (a pipe bomb) in violation of 26 U.S.C. § 5861(d). He was appointed counsel, entered into a plea agreement with the government, pleaded guilty on December 17, 2009 and was sentenced to a term of 84 months on February 25, 2010. He took a direct appeal of his conviction and sentence on his own; his trial counsel filed another appeal; and defendant withdrew both appeals. He filed this timely post conviction motion on November 10, 2010, contending that his court-appointed counsel was ineffective in three respects: (1) failing to challenge defendant's unlawful stop; (2) failing to challenge the admissibility of a statement that defendant made to the police while he was intoxicated; and (3) failing to argue that the pipe bomb in defendant's possession was not a destructive device under the law.

When it became apparent that defendant was unable to represent himself effectively on his post conviction motion, the court appointed counsel. Counsel filed an addendum to defendant's original § 2255 motion, withdrawing the second and third claims (the admissibility of defendant's statement and the characterization of the pipe bomb), leaving only the claim that counsel was ineffective in not filing a motion to suppress evidence obtained through an allegedly illegal stop.

In support of the amended motion, defendant filed an affidavit in which he averred

that on August 6, 2009, he had been walking away from a crowd that was watching a house fire when a police officer shouted at him to stop. Defendant stopped, turned toward the officer and waited for him to approach. The officer told defendant to hand over the energy drink can he was holding; defendant did so. The officer smelled the contents, said that he smelled alcohol and told defendant he was under arrest. He then frisked defendant and found a piece of pipe in his pocket.

In a report filed August 6, 2009, the officer, Jonathan Caucutt, wrote that he was alerted to defendant by another officer, who told Caucutt he believed defendant was trying to conceal something and was acting as if he did not want to be seen by the officer. Caucutt waited for defendant to approach and noted that he had a black can in his hand that appeared to be some sort of energy drink. Defendant seemed noticeably intoxicated with a strong odor of intoxicants on his breath. Caucutt stopped defendant and asked his name; defendant showed him a Wisconsin photo identification card. Caucutt asked what was in the can defendant was carrying; defendant turned it over to him. He opened the can and smelled it, concluding that it was some sort of alcoholic drink. Meanwhile, according to Caucutt, defendant began to reach into his left pocket, disregarding Caucutt's instructions to keep his hands out of his pocket. In light of the fire, the lack of backup and the need to carry out his assignment of blocking traffic, Caucutt decided to put defendant in handcuffs, advising him and dispatch that he was under arrest. Dispatch told Caucutt that defendant

was on probation.

According to the report, Caucutt told defendant to sit on the curb, where he began again to reach into his pocket; Caucutt reached in and pulled out an unopened can of Sparks, which Caucutt thought was an alcoholic energy drink. Before he could pat defendant down on his other side, defendant began to reach into his right pocket. Caucutt grabbed the pocket and pulled out a 5" or 6" cylindrical piece of pipe, approximately 1" in diameter. Caucutt set the pipe on the sidewalk behind defendant, called dispatch to contact probation and parole and advise them of the situation.

At the plea hearing, the government went over the evidence it would have introduced at trial. Among other things, the government said it would have called Officer Caucutt, who would have testified that he encountered defendant on August 6, 2009, acting suspiciously around a fire scene in Watertown. Defendant agreed that the government could prove what it had said it would.

OPINION

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). The court must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690.

In this case, no basis exists for finding that counsel's failure to challenge defendant's stop was "outside the wide range of professionally competent assistance." Defendant agreed on the record that the government could proved he had been acting suspiciously around the fire; that is enough for a stop under Terry v. Ohio, 392 U.S. 1, 21 (1968) (investigative stop is permissible when officer has "specific and articulable facts . . . together with rational inferences from those facts"). Officer Caucutt identified the suspicious activity in his report: defendant was in the vicinity of a fire of unknown origin; another officer had told Caucutt that defendant seemed to be trying to conceal something and acted as if he did not want to be seen by the officer; and defendant was carrying a drink can of something that appeared to be an energy drink. After Caucutt told defendant to stop and got closer to him, he

observed that defendant was noticeably intoxicated. The officer had "specific and articulable facts" along with rational inferences to justify an investigative stop. Id. at 21. In addition, he had ample reason to subject defendant to a patdown. His actions met the Terry standard that an "officer need not be absolutely certain that the individual [he has stopped] is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27. Defendant's efforts to reach into his pockets despite being told not to provided ample justification for a search, but in fact, once Caucutt had smelled the can that defendant was carrying, he had sufficient information to effect an arrest for violation of Watertown ordinance 11.144(1), prohibiting the possession of an open alcohol container on the roadway.

Unless defendant's trial counsel had reason to think that Caucutt was wrong about his own actions or defendant's or about defendant's intoxication, it would have been a waste of time to challenge the stop and subsequent search that led to the discovery of the pipe bomb. Defendant has not alleged anything that would support a conclusion that Caucutt was not telling the truth. There is a small discrepancy in defendant's affidavit and Caucutt's report about exactly when defendant was put under arrest: defendant says he was put under arrest as soon as the officer smelled the contents of the drink can; Caucutt says he did not tell defendant he was under arrest until he had placed him in handcuffs. The discrepancy is immaterial. Once Caucutt had determined that the can smelled like alcohol, he had a basis

for arresting defendant, whether he did so immediately or a few minutes later.

Adding these facts to defendant's argument in his original § 2255 motion that he was too intoxicated at the time of his arrest to give an admissible statement, there is no reason to think that a challenge to the stop and search would have succeeded. I conclude therefore that it was good trial strategy and not ineffectiveness for trial counsel to choose not to mount a Fourth Amendment challenge to the discovery of the pipe bomb.

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). Defendant has not made a substantial showing of a constitutional right 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 Christopher Hamlin's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 18th day of March, 2011.

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