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-171-bbc
08-cr-47-bbc

v.

ROBERT MICHENER,

Defendant.

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Defendant Robert Michener has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, arguing that he was denied the effective assistance of counsel at both the trial and appellate stages of his case, in violation of his rights under the Sixth Amendment. Defendant alleges that his trial counsel abandoned him at a critical stage of the proceedings by refusing to accompany him to a debriefing with the government, represented a potential co-defendant at the same time he was representing defendant, gave defendant inaccurate information about the length of sentence he was facing, failed to investigate the potential effect of defendant's prior sentences upon his sentence, failed to object at the sentencing hearing to defendant's prior state convictions and failed to object to the government's breach

of the plea agreement. He alleges that his appellate counsel failed to challenge the validity of his prior state conviction for 5th degree assault, failed to point out that defendant's prior conviction for possession of marijuana was relevant conduct to the offense of conviction, failed to challenge the government's breach of the plea agreement and failed to seek a remand on the ground that the court's statement of reasons contradicted the record.

Although defendant has enumerated many instances of allegedly substandard representation, he has not backed up his allegations with evidence sufficient to require an evidentiary hearing, let alone a grant of relief. Accordingly, his motion will be denied.

RECORD FACTS

Defendant was charged in a three-count indictment returned by the grand jury on March 26, 2008. The charges included one of conspiracy with intent to distribute 100 kilograms or more of marijuana and two counts of attempting to distribute marijuana. The charges arose out of a long-term conspiracy to supply high-grade marijuana to individuals in La Crosse, Madison and Milwaukee, Wisconsin. As detailed in the presentence report, defendant had a main distributor for the La Crosse-Madison marijuana distribution and another one for the Milwaukee distribution.

Starting sometime in 2004, Daniel Lichter received marijuana from defendant and moved it into Milwaukee through others, such as Scott Schwanke. Lichter quit the business

in the spring of 2006. In the fall, his replacement was arrested in possession of 40 pounds of marijuana. After learning of the arrest, defendant went to Lichter's place of employment in an effort to learn more about the arrest. Defendant told Lichter he had put a gun to Schwanke's head because he believed Schwanke had lied to him about cooperating. He told Lichter that if someone was working "for the feds" that person would get what was coming to him.

Schwanke was arrested on September 27, 2006 and started cooperating with law enforcement. Defendant learned about the arrest and told Schwanke he would kill him or anyone else who testified. Schwanke fled to the Philippines, where defendant wired him money on at least one occasion. Defendant told a witness that he had sent Schwanke to the Philippines to hide out.

During the course of the conspiracy, defendant purchased marijuana from Noy (Mike) Petchapan. Sometime in 2004-05, Petchapan told defendant that if he ever needed legal help, he should talk to Earl Gray, a Minnesota lawyer, with whom Petchapan had a good relationship. In 2006, when Drug Enforcement Agent Jerry Becka told defendant he was the subject of a federal investigation into marijuana trafficking, defendant took Petchapan's advice and retained Gray to represent him. Gray advised the United States Attorney in this district that he was representing defendant and that the office should cease further direct contact with defendant.

In January 2008, Gray met with defendant and told him he saw no reason to continue his representation of defendant because it did not appear that the government intended to prosecute him. Two months later, defendant was indicted and retained Gray again to represent him. In June 2008, defendant met with Gray, who advised him to plead guilty and cooperate with the government. Defendant agreed; a plea agreement was worked out; and defendant agreed to discuss his criminal activities with the government. He and Gray drove to Eau Claire for the debriefing in separate cars. They met in a local coffee shop, where defendant read the plea agreement, which provided that he could be incarcerated for as long as 40 years. Gray recommended that defendant sign it, which he did. At that point, Gray told defendant he would not be accompanying defendant to the proffer session with the government. Gray did not request the meeting be reduced to writing or negotiate any terms regarding information to be discussed at the meeting.

The plea agreement contained language prohibiting the government from using the information that defendant provided in his debriefing, but allowing it to make indirect use of the information such as pursing leads based upon information supplied by defendant and using the statements against defendant for impeachment and rebuttal if he was allowed to withdraw his guilty plea. Plea Agmt., dkt. #32 (08-cr-47), ¶ 6. The government promised defendant that if he provided substantial assistance, it would ask the court to reduce his sentence. Id. at ¶ 5. It made no recommendation for a downward reduction in the

guidelines for acceptance of responsibility.

During his debriefing, defendant gave the government a detailed account of his role in the conspiracy, admitted buying about 500 pounds of marijuana from Petchapan and said that he had sent money to Schwanke in the Philippines on several occasions. A month later, defendant pleaded guilty to conspiracy to distribute 100 kilograms or more of marijuana. Defendant advised the court twice that he understood he could receive any sentence up to and including the statutory maximum. Plea hrg. trans., dkt. #102, at 5-6, 11. He also told the court that he understood that the court could take into consideration the amount of marijuana involved in the conspiracy, the role he played in the conspiracy, his prior criminal record "and any other factor that was relevant." Id. at 5-6.

The probation office determined that defendant was responsible for distributing 400-700 kilograms of marijuana, making his base offense level 28, that he was an organizer or leader of criminal activity that involved four or more people, giving him a four-level adjustment, that he had obstructed justice, giving him a two-level increase and that he was not entitled to a downward adjustment for acceptance of responsibility despite his plea of guilty and his post-arrest cooperation. His total offense level was 34; his criminal history category was IV.

Before sentencing, defendant objected to the two-level increase for obstruction and the government's refusal to recommend a reduction for acceptance of responsibility. In

addition, he argued that his criminal history score overstated the seriousness of his criminal history. For its part, the government moved for a reduction in defendant's sentence to reflect his cooperation. (His statements had enabled the government to seize about $135,000 from Daniel Lichter.)

At sentencing, I denied defendant's objection to the obstruction increase, finding that defendant's threat to kill witnesses and his wiring money to Schwanke to keep him out of the country was serious obstruction, and I refused his request to reduce the guideline range for acceptance of responsibility because his actions in relation to his co-defendants did not suggest that he had suggested responsibility for his criminal acts. Defendant argued that his criminal history score was overstated, but I disagreed. He did not argue that his prior marijuana offense should not be counted because the conduct was part of the conduct for which he was being sentenced. Defendant's counsel argued for a variance based on defendant's history of drug addiction. I denied this request, but granted the government's request for a variance based on defendant's cooperation. The resulting advisory guideline range was 151-188 months. I sentenced defendant at the bottom of the range, 151 months.

Defendant appealed his guideline calculation and sentence, challenging the rejection of his request for a reduction for acceptance of responsibility. He argued that the government had reneged on its deal and acted contrary to the spirit of the plea agreement. The Court of Appeals for the Seventh Circuit affirmed the sentence. United States v.

Michener, 352 Fed. Appx. 104 (7th Cir. Nov. 13, 2009). Defendant asked for a re-hearing, which was denied on December 11, 2008. He did not seek a writ of certiorari from the Supreme Court, so his conviction became final 90 days after December 11, or March 11, 2009. He filed this motion on March 8, 2009.

OPINION

Strickland v. Washington, 466 U.S. 668 (1984), established the two-part test for ineffective assistance of counsel. A 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. As to the first prong, 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). As to the second prong or prejudice, 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.

Because counsel is presumed to have been effective, United States v. Harris, 394 F.3d. 543, 554 (7th Cir. 2005); United States v. Traeger, 289 F.3d 461, 470 (7th Cir. 2002); United States v. Trevino, 60 F.3d 333, 338 (7th Cir. 1995), a defendant challenging his representation has a heavy burden of proof. He cannot meet it with vague or conclusory allegations. Instead, he must show that he has specific evidence of the alleged substandard representation.

In this case, defendant has either fallen far short of the showing he needs to make or has failed to show that even if his allegations are accurate, they support a finding of constitutional ineffectiveness. He starts by alleging that his trial counsel abandoned him at a critical stage of the proceedings by refusing to accompany him to a debriefing with the government. Assuming that it is true that Gray did not attend the debriefing, and assuming only for the sake of this motion that the debriefing was a critical stage of the proceedings and Gray had an obligation to be present, defendant has not shown that Gray's absence cause defendant any prejudice. Gray made sure that defendant signed the plea agreement in advance of the meeting, so that he was protected by the government's promises in that agreement as they related to the debriefing. Defendant has not shown that the government misused any of the information defendant provided it. Defendant has not shown that the

government misused his protected statements about his role in the conspiracy, his purchase of marijuana from Petchapan and his wire transfers to Schwanke. None of these statements were news to the government. Other members of the conspiracy had given this information to the government years earlier.

Defendant has alleged that Gray was representing a "potential codefendant" (Petchapan) at the same time he was representing defendant, but he has produced no evidence to show that this was true. or that if it was, it prejudiced him in any way. As he himself has admitted, he knew before he talked with Gray that Petchapan had a relationship with him. Defendant alleged that Gray did not come with him to the proffer session with the government because he did not want the government to be able to accuse him of tipping off Petchapan, but as I explained, defendant was not prejudiced by Gray's failure to attend the session. Thus, it makes no difference what Gray's reason was. (Certainly, the mere statement that "it might tip off Petchapan" is too vague to bear any evidentiary weight.)

Defendant has also alleged that Gray gave him inaccurate information about the length of sentence he was facing, but again, he has not produced any reliable evidence that this is so. He has attached to his motion a copy of the indictment with notes on it that he says are Gray's, but those notes do not support his claim that Gray told him he was facing 3 1/2 to 5 years in custody. They show that Gray wrote "5 yrs min" next to count 1 (conspiracy to distribute marijuana) and "5 yrs max" next to count 2 (attempt to distribute marijuana).

In any event, defendant's statements that Gray told him he would serve no more than five years are belied by his statements in open court during his plea hearing that he understood he could be sentenced to the maximum sentence under the law, which according to the plea agreement he signed was 40 years. He told the court that no one had made him any promise other than those included in the plea agreement, plea hrg. trans., dkt. #102, at 5, and that no one had promised him a particular sentence. Id. at 6. The Court of Appeals for the Seventh Circuit is not receptive to allegations that conflict with statements made in open court. United States v. Peterson, 414 F.3d 825, 827 (7th Cir. 2005) ("Judges need not let litigants contradict themselves so readily; 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."); United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) ("Because of the great weight we place on these in-court statements, we credit them over his later claims [that he would not have pleaded guilty.]").

Moreover, even if Gray did give defendant inaccurate information about the length of sentence he was facing, defendant has not produced any evidence to show that he would not have entered a plea of guilty had Gray given him the correct information. Hill v. Lockhart, 474 U.S. 52, 59 (1970) (defendant must demonstrate that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); United States v. Rodriguez-Luna, 937 F.2d 1208, 1214 (7th Cir. Cir. 1991). In light of all the information

the government had about defendant's role in the marijuana conspiracy and the availability of most of the alleged coconspirators to testify against him, it seems unlikely that defendant would have chosen to go to trial. He has made no showing to the contrary.

Lack of prejudice disposes of defendant's next allegation, which is that Gray failed to investigate the potential effect of defendant's prior sentences upon his federal sentence. Defendant has not explained what Gray or any other lawyer could have done to ameliorate the effect of those prior sentences. He does not say that he was denied counsel at any of the prior proceedings, which is the only basis on which he could have contested a prior sentence in this case. Daniels v. United States, 532 U.S. 374, 382 (2001) ("[i]f an enhanced federal sentence will be based in part on a prior conviction *obtained in violation of the right to counsel,* the defendant may challenged the validity of his prior conviction during his federal sentencing proceedings . . . [b]ut [n]o other constitutional challenge to a prior conviction may be raised in the sentencing forum") (emphasis added). In the absence of any information that any of the prior sentences were susceptible to challenge, this issue needs no further discussion.

Finally, defendant says that Gray was ineffective because he failed to object to the government's breach of the plea agreement. This allegation can be dealt with quickly because defendant has not identified any promise in the agreement that the government violated. The government said it would move for a reduction in defendant's sentence based on his cooperation; it did so. It did not seek a reduction in defendant's offense level for acceptance

of responsibility but it never said that it would.

As to appellate counsel's failings, defendant's allegations are even more tenuous than those he has made about his trial counsel. He begins by arguing that his appellate counsel was ineffective because he failed to challenge the validity of his prior state conviction for 5th degree assault and failed to argue that defendant's prior conviction for possession of marijuana was relevant conduct to the offense of conviction. Defendant's trial counsel never made either of these arguments at trial, so appellate counsel would have been able to raise them on appeal only by convincing the court of appeals that the errors were so plain that they could be taken into account on appeal even though they were never brought to the attention of the trial court. It is obvious from the nature of the challenges that they do not constitute clear error. As I noted above, defendant has not identified anything about his 5th degree assault conviction that would have supported the challenge he thinks his counsel should have made.

As to the marijuana charge, the one to which defendant is referring was for conduct occurring in May 2002 involving possession of a small amount of marijuana (15.6 grams) and was punished by a fine. The federal charges against defendant concerned marijuana trafficking between the fall of 2002 and September 27, 2006. It would have made no sense for appellate counsel to argue that the first conviction was relevant conduct to the conspiracy charge. Not only did the prior conduct occur before the conspiracy began, the amount

involved would be considered a personal use amount, not part of a conspiracy.

Defendant argues that counsel was ineffective in failing to raise the government's breach of the plea agreement on appeal, but as I have said, he has no grounds on which to assert that the government did anything to breach the plea agreement.

Last, defendant alleges that his appellate counsel failed to seek a remand on the ground that the court's statement of reasons were contradictory to the record. He does not explain how a discrepancy between the written statement of reasons and the spoken statement would support a remand; more to the point, he does not even identify what the discrepancy might have been.

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 denial 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 Robert Michener's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. Further, it is ordered that no certificate of appealability shall issue.

Entered this 23d day of May, 2011.

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