

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DERRICK RAPLEY,

Defendant.

OPINION AND ORDER

09-cr-159-bbc

11-cv-18-bbc

Shortly after defendant Derrick Rapley's direct appeal was denied on November 22, 2010, he filed a "Motion for Relief from Breach of Contractual Plea Agreement and Combined Motion for Appointment of Conflict-Free Counsel and Hearing." In an order entered on December 15, 2010, I advised defendant that his motion would be considered as one brought under 28 U.S.C. § 2255, because he was seeking modification of his sentence. I told defendant that before proceeding with the motion, he should consider whether he wished to add any more claims to it because in all likelihood, it would be the only one that he will be allowed to file.

Defendant responded to the December 15 order, confirming his intention to continue with his motion as one brought under § 2255 and adding an additional claim under the

recently passed Fair Sentencing Act of 2010. Unfortunately, he cannot pursue that claim. The court of appeals decided in October 2010 that the Act does not apply retroactively to sentences imposed before the Act took effect on August 3, 2010. United States v. Bell, 624 F.3d 803 (7th Cir. 2010). This means that persons like defendant who were sentenced in 2009 (or at anytime before August 3, 2010) cannot take advantage of the changes in sentencing authorized under the new law.

Defendant was charged in a nine-count indictment with being a member of a conspiracy to distribute crack cocaine, with maintaining drug houses and with distributing crack cocaine on tribal lands in northern Wisconsin. Defendant pleaded guilty to the conspiracy count of the indictment. On the same day, the government filed an information under 21 U.S.C. § 851, based on defendant's prior conviction for a felony drug offense. Such an information is a prerequisite to seeking an increased penalty. Defendant was sentenced to 156 months' imprisonment, which was 32 months below the low end of his guideline range of 188-235 months. (Defendant's base offense level was 32 because the crack cocaine attributable to him was at least 150 grams but less than 500 grams. His offense level was enhanced by two levels for his leadership role in the offense. I did not find defendant to be a career offender because the government did not ask for the finding and making it would not have changed either defendant's offense level or his criminal history category. In addition, there was some question whether his prior conviction was a predicate

offense. Defendant received a downward adjustment of three levels for his acceptance of responsibility.)

Defendant raised two other claims in his original motion that he continues to advance in his amended motion. The first is that the government breached the plea agreement. Defendant alleges that the government promised him it would not file a career criminal charge and would not propose that defendant's base offense level under the Sentencing Guidelines be enhanced by his leadership role in the conspiracy. Defendant contends that his promise was breached when the court enhanced his sentencing guidelines in reliance on facts not found by a jury or admitted by defendant at his plea hearing, finding that he was a career offender, that he had been in possession of 292 grams of crack cocaine and that he played a leadership role in the drug distribution conspiracy. Defendant's second ground for relief is that his counsel was ineffective because he did not object to the breach of the plea agreement and did not prepare adequately for the sentencing hearing.

Neither of these claims is a ground for vacation of defendant's sentence. Defendant frames his challenge to the enhancement of his sentence as a breach of contract, but the challenge breaks down in a number of respects. Any contract he had was with the government and not with the court. The court never agreed with defendant not to enhance his sentence for the role he played in the conspiracy or not to find him responsible for 292 grams of crack cocaine. To the contrary, it was made plain to defendant at the plea hearing

that the court could sentence him anywhere up to the maximum sentence allowed by law.

It is well established that in determining a sentence, a court may take into consideration a number of matters that bear on the sentence, such as whether the defendant is a career offender, the amount of drugs attributable to him or the role he played in the crime. The sentencing court may not use these factors to impose a sentence higher than the statutory maximum for the crime, but may use them to guide the determination of a proper sentence within the statutory range. United States v. Booker, 543 U.S. 220, 233 (2005) (under advisory sentencing guidelines system, “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant”)

Defendant alleges that in discussions about the plea agreement, the government agreed not to file a career criminal charge against him and not to charge him with a leadership role. If he is talking about the § 851 information, it played no role in the determination of his sentence because the government was unable to prove that he had a qualifying prior conviction. Even if it had played a role and even if it is the case that the government made this promise to him, it would not help him, because he pleaded guilty in reliance on a written document that made no reference to these alleged promises. As a general rule, when a contract is set out in writing and is intended to be the parties’ final expression of their agreement, it is irrelevant whether the parties discussed other matters in

the negotiation process, 3 Corbin, Contracts at 357, § 573, but in this case, it is not necessary to rely on the presumption. Defendant was asked specifically at the plea hearing whether anyone had made any promises to him other than those stated in the agreement and he answered “no” under oath. He is presumptively bound by this answer. Courts do not readily accept statements that contradict earlier statements made under oath. 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.]”); United States v. Winston, 34 F.3d 574, 578 (7th Cir. 1994) (“[the record of a Rule 11 proceeding is entitled to a ‘presumption of verity’ and the answers therein are binding”).

Finally, defendant has not said or even suggested that he would have proceeded to trial had he not been misled by the government about the terms of the plea agreement. Such an allegation and supporting evidence are necessary to establish prejudice. Gargano v. United States, 852 F.2d 886, 891 (7th Cir. 1988) (citing Key v. United States, 806 F.2d 133, 139 (7th Cir. 1986)). His motion will be dismissed as to this claim.

Defendant’s second challenge, to the effectiveness of his representation, falls with his first claim. If there is no merit to that claim, and there is none, his counsel cannot be found ineffective for failing to pursue it. Counsel does not serve his client well by arguing issues that have no legal merit. Defendant adds that his counsel was “unprepared” for the

sentencing hearing, but he alleges no fact to support that assertion and the record belies it.

Defendant's counsel filed three objections to the sentencing guidelines range proposed by the probation. He challenged the amount of crack cocaine attributed to defendant, the determination that he played an aggravating role in the offense and the finding that he was a career offender. These arguments were legitimate and well argued and the one directed to the career offender finding was successful. Defendant has not identified any additional objections that counsel could have made.

In addition to the objections that counsel filed on defendant's behalf, he filed a thoughtful and comprehensive sentencing memorandum, in which he expanded on the objections he had made and explained why he believed that the court should consider the "considerable disparity," Mem., dkt. #70, between defendant's guideline range as a career offender and his range without that enhancement and why the court should vary downward to account for the disparity. I found his argument persuasive and sentenced defendant to a term 32 months below the applicable guideline range.

There is no basis for any challenge to counsel's ineffectiveness apparent from the record or from the proceedings I observed. Defendant does not suggest any additional one. Therefore, his motion will be dismissed as to this claim.

When defendant filed this motion, he included a motion for appointment of counsel to represent him at an evidentiary hearing on his claims. That motion will be denied because

he has not shown a need for such a hearing.

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 petitioner. 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's claims do not meet this standard.

ORDER

IT IS ORDERED that defendant Derrick Rapley's motion for relief under 28 U.S.C. § 2255 is DENIED. No certificate of appealability shall issue.

Entered this 10th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge