

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICAH W. RICHARDSON,

Defendant.

OPINION AND ORDER

11-cv-451-bbc
08-cr-149-bbc

Defendant Micah W. Richardson has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that his sentence is illegal for three reasons: (1) the court took into consideration in sentencing more cocaine base than he was charged with distributing; (2) he and his counsel were not provided the presentence report 35 days before sentencing; and (3) his trial counsel did not provide constitutionally effective representation because he did not review and understand the presentence report. None of these claims stand up to close examination. Defendant's motion will be denied.

BACKGROUND

Defendant Micah W. Richardson was charged in one count of a multi-count indictment with knowingly and intentionally distributing crack cocaine on or about June 2, 2008. He entered a plea of guilty to the count without a plea agreement. At the plea hearing, the government told the court that if the case had gone to trial it would have proved that defendant distributed 2.03 grams of cocaine base on June 2, 2008.

Defendant's counsel asked for 35 days between disclosure of the presentence report and the day of sentencing, which is what defendant is entitled to under Fed. R. Crim. P. 32. Sentencing was set for February 20, 2009, 35 days after the anticipated disclosure of the report on January 16, 2009. On January 15, 2009, however, the probation office asked for a ten-day extension of time for filing the report. This request was granted without any objection by defendant or his counsel. The report was filed on January 26, 2009. On February 9, 2009, the sentencing was advanced to February 10, 2009, for reasons that do not appear in the record. Neither defendant nor his counsel made any objection to the change in dates and neither said anything about the issue at the sentencing hearing. To the contrary, both defendant and his counsel told the court that they had read the presentence report. Defendant said that he had no objections to it other than those that his counsel had raised in writing.

In the presentence report, the probation office recommended that defendant be held

responsible for 161.25 grams of crack cocaine. The probation office took the position that the \$5,000 in cash found in defendant's bedroom at the time of his arrest represented the proceeds of crack cocaine sales because he had no evidence of any legitimate employment. Although defendant had made a belated assertion that he bought and sold automobiles and raised dogs, this assertion was not credible because he had never mentioned either of these activities during his presentence interview. The probation office relied on the Drug Enforcement Administration's report that crack cocaine was selling for \$1000 an ounce to find that \$5000 represented the proceeds from the sale of five ounces or approximately 142 grams. The probation office added another 19.5 grams that had been seized from a purse found on the kitchen table at defendant's residence at the time of his arrest. This purse belonged to Jayme Schwarz, who told the agents that the drugs were intended for defendant and that she had made about 15 trips from Chicago to deliver crack cocaine to defendant. PSR, dkt. #82, at ¶¶ 53, 54 and 81. (The probation office did not attribute any crack cocaine from the prior deliveries to defendant because it was unable to determine the quantities transported. *Id.* at ¶ 81.) The total of 161.25 grams of cocaine base put defendant's base offense level at 32. Two levels were added for possession of a dangerous weapon in connection with the offense because defendant had beaten one David Neely with a baseball bat over a drug debt just a few days before defendant was arrested. Defendant was given a three-level reduction in his offense level for acceptance of responsibility. With an

adjusted offense level of 31 and a criminal history category of IV, defendant's advisory guideline range was 151-188 months.

Defendant's counsel objected to basing the drug estimate on the cash seized from defendant, arguing that it overstated the amount of crack cocaine for which defendant was responsible. He raised a second objection, arguing that crack cocaine guidelines overstated defendant's culpability, but withdrew the first objection before sentencing.

At sentencing, I acknowledged defendant's argument that the crack cocaine guidelines produced a much higher sentencing range than the powder cocaine guidelines would have. I explained that the wide discrepancy between the guidelines for the two types of cocaine might have merited consideration but for defendant's prior criminal history and the escalating nature of his criminal conduct, which included prior convictions for armed robbery and a weapons violation, along with seven pending cases in the Circuit Court for Dane County for drugs, battery and property offenses. I sentenced defendant near the bottom of the guidelines to a term of imprisonment of 156 months.

Defendant appealed his sentence, contending that the sentencing proceeding was procedurally flawed and his sentence was substantively unreasonable. The court of appeals rejected his contentions, finding that he had not shown either that the proceeding was flawed or that his sentence was unreasonable. It affirmed the sentence in a judgment issued on June 29, 2010. Defendant filed this post conviction motion on June 27, 2011, well within the

statutory time limit.

OPINION

A. Reasonableness of Sentence

Defendant's first claim, that his sentence was unreasonable because the court based it upon a finding that defendant had been responsible for five ounces of crack cocaine, is not one that he can raise in a post conviction motion. The court of appeals has decided that his sentence *was* reasonable. That holding is the law of the case, not subject to reconsideration by a lower court.

In rare instances, a defendant may be able to raise new issues on collateral review if he can show both cause for his failure to raise them earlier and prejudice if he cannot raise the claims at this time. Prewitt v. United States, 83 F.3d 932, 935 (7th Cir. 1996) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise the claims on direct appeal and actual prejudice from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice.") (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). "Cause" could be the constitutional ineffectiveness of appellate counsel. Defendant argues that his appellate counsel (who was also his trial counsel) failed to argue on appeal that the probation office acted illegally in "extrapolating" the 2.03 grams of crack cocaine in the indictment to

five ounces in the presentence report and in adjusting his base offense upward to reflect an unadjudicated battery. Dft.'s M., dkt. #1, at 3.

For the sake of argument only, I will assume that defendant could show cause for his failure to raise his present claims of probation office illegality. The problem is that he cannot show prejudice. The new arguments he wants to raise would not change the outcome of his appeal.

Defendant argues that he can be held responsible only for the 2.03 grams of crack cocaine charged in the indictment and that it was illegal for the probation office to increase the 2.03 grams to five ounces. He says he did not plead to the presentence report but to the indictment. First, he is wrong about what the indictment charged; it did not say anything about any particular quantity of crack cocaine. Second, he is wrong about the legality of the probation office's so-called extrapolation of the drug amount. Under the sentencing guidelines, it is the job of the probation office to determine from the evidence provided it by the government whether defendant should be held accountable for certain acts and certain quantities of drugs. The sentencing guidelines manual spells out how this is to be done; the probation office followed its directives in recommending defendant's offense level and calculating his criminal history category.

The probation office did not have to close its eyes to the evidence that defendant was responsible for the distribution of far more than 2.03 grams of crack cocaine and that this

additional amount was conduct relevant to that charged in the indictment. The probation office is not bound by the statements made by the government at the plea hearing if it has evidence to support its findings, as it did in this instance. It is true that the government said at the plea hearing that it could prove that defendant was responsible for approximately two grams because this was the amount defendant distributed in the transaction alleged to have taken place on June 2, 2008. Two grams did not encompass all of the relevant conduct for which defendant was ultimately sentenced. Defendant was told at his plea hearing that he could be sentenced up to the maximum sentence allowed by law, that the probation office would calculate the amount of drugs for which he would be held responsible and then calculate the applicable guidelines and that his counsel would have an opportunity to object to the calculations. Defendant was never promised that he would be sentenced on the basis of only two grams or that he would not have his offense level increased by two points for possession of a dangerous weapon.

Defendant's argument is essentially the one that was rejected in United States v. Booker, 543 U.S. 220 (2005), that a convicted defendant can be sentenced only on the basis of facts found by a jury or agreed to by the defendant in his plea of guilty. In Booker, the United States Supreme Court held that the sentencing guidelines were advisory and because they were, a sentencing judge could consider facts relevant to an offender's sentence even if the facts had not been proved beyond a reasonable doubt but only by a preponderance of the

evidence. I applied that standard to the findings to which defendant objects: the amount of crack cocaine for which he was responsible and his attack on David Neely over a drug debt. Defendant has not shown that he is entitled to any reduction in his sentence because of any illegality in the calculation of the drug amounts attributable to him.

B. Failure to Provide Timely Copy of Presentence Report

Defendant contends that his rights were violated when the presentence report was not provided to him and his counsel 35 days before his sentencing. At the outset, it is questionable whether this claim can even be entertained. It was not raised on direct appeal, which means that it cannot be heard unless defendant can show cause and prejudice for his failure to raise it on appeal. Prewitt, 83 F.3d at 935. Assuming that defendant would argue that his appellate counsel failed to raise the issue on appeal and that he has satisfied the “cause” prong of the showing, he would still have to show prejudice, which he has not done. It appears that his lawyer had sufficient time to review the presentence report. He filed an objection to the calculation of the drug quantity (although he withdrew the objection before sentencing) and he filed a second objection to the use of the crack cocaine guidelines on the ground that they overstated defendant’s culpability for the crime. At sentencing, counsel made a reasoned, thoughtful argument on defendant’s behalf. (By law, defendant’s counsel’s withdrawal of the first objection is presumed to be a reasonable strategic decision in the

exercise of his professional judgment. United States v. Traeger, 289 F.3d 461, 470 (7th Cir. 2002) (courts presume that counsel made reasonable strategic choices unless defendant presents evidence to contrary).) That would be true in this instance. Counsel had to balance the likelihood of prevailing on his challenge to the drug quantity against losing his client's three-point reduction in the offense level for acceptance of responsibility.)

Second, relief under § 2255 is available only upon a showing of an error of law that is jurisdictional, constitutional or constitutes a fundamental defect that inherently results in a complete miscarriage of justice. Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991). Not having a copy of the presentence report for the full 35 days before sentencing is not a violation of any constitutional right; it does not raise a jurisdictional issue; and it is not a fundamental defect that results in a complete miscarriage of justice. Not having the presentence report *at all* would be a serious defect that could justify post conviction relief, but defendant does not allege that this was the situation in his case. Nor could he, given the record. Nothing in there shows that defendant ever objected to the late filing or to the earlier sentencing date. Therefore, he waived his right to argue the point at this time.

Without any showing that defendant and his counsel did not have the presentence report for the minimum length of time necessary to review it and prepare objections and that defendant was prejudiced in some way, defendant cannot make out the kind of error sufficient to obtain post conviction relief.

C. Ineffective Assistance of Counsel

In support of this claim, defendant alleges only that he is entitled to relief “for the reasons stated in his Ground One and Ground Two, (above), as well as other incorrect information, advice, legal opinions offered by his Court appointed attorney, his attorneys failure to correctly review and understand the PSR all meet the ‘Strickland’ test insofar as a failure of proper, “Assistance of Counsel” pursuant to Article VI, U.S. Constitution.” Dft.’s M., dkt. #1, at 4. In his “Traverse,” dkt. #5, defendant enlarges upon his reasons for alleging ineffective assistance of counsel: his counsel failed to get defendant’s approval to waive the 35 days for review of the PSR and failed to explain anything about the report to defendant. In addition, counsel failed to object to the probation office’s decision to convert currency into a drug amount and did not raise the issue on direct appeal that defendant now wants to raise, which is that defendant can be sentenced only for the 2.03 grams of crack cocaine charged in the indictment.

For the reasons explained, none of these allegations make out a claim of constitutional ineffectiveness. Such a claim would require a showing that counsel’s representation of defendant fell below the minimum standard of representation required of criminal defense attorneys *and* that the deficiencies prejudiced defendant. Strickland v. Washington, 466 U.S. 668 (1986). Defendant has not made either showing.

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 Micah W. Richardson's motion for post conviction relief under 28 U.S.C. § 2255 is DISMISSED for defendant's failure to show that he is

custody illegally. Further it is ordered that no certificate of appealability shall issue.

Entered this 26th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge