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-510-bbc
08-cr-69-bbc

v.

LEE ANTON JACKSON,

Defendant.

- -

Defendant Lee Anton Jackson has moved for post conviction relief under 28 U.S.C. § 2255, contending that his trial counsel and his appellate counsel were unconstitutionally ineffective, that the government breached the plea agreement by not filing a post sentencing motion for a reduction of his sentence and that his sentence and conviction were unconstitutional in a number of respects. His motion must be denied because none of his claims have any merit.

In his motion, defendant asks the court for an opportunity to conduct discovery and specifically to order certain witnesses to allow themselves to be deposed so that he can uncover evidence to support his allegations about the performance of his counsel.

Defendant's request will be denied. At this stage of the proceedings, it is his burden to show that a constitutional violation might have occurred in connection with his criminal proceedings. He has made no such showing.

RECORD FACTS

Defendant was indicted on April 24, 2008 for unlawfully possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Associate Federal Defender Kelly Welsh was appointed to represent him.

On June 9, 2008, defendant moved to suppress physical evidence (the firearm found in a computer case that defendant turned over to his mother) and certain statements. An evidentiary hearing was held before United States Magistrate Judge Stephen Crocker to determine whether a Madison police officer had reason to believe that defendant's mother had authority to consent to a search of the computer case and whether the officer's search stayed within the boundaries of the consent that was given.

The evidence at the hearing was that police conducting surveillance of defendant saw him give a black computer bag to his mother, DeFondeau Eaton. After defendant left, the police stopped Eaton and asked about the bag. Eaton told Officer Dexheimer that she had received the bag from defendant and that it contained a computer that Eaton wanted to use to check her emails and photographs. Dexheimer asked her whether he could look inside the

1bag; she said he could and that she had defendant's permission to use the computer. Dexheimer checked it and found the computer as well as a handgun.

After the hearing, Welsh filed briefs in support of defendant's motion to suppress, arguing that Eaton did not have either actual or apparent authority to consent to the search and that the search exceeded the scope of any alleged consent. Dkt. #21 at 9-16 & dkt. #33 (08-cr-69). On July 11, 2008, she sought leave to withdraw as defendant's counsel. Magistrate Judge Crocker granted the motion and appointed Joseph Sommers as replacement counsel on August 5, 2008.

Magistrate Crocker issued a report recommending denial of defendant's suppression motion. The recommendation was adopted on October 28, 2008.

On September 29, 2009, defendant filed a pretrial motion to present evidence at trial supporting his claim of "transitory possession." Dkt. #46. He asked for a jury instruction to the effect that his transitory handling of the gun should be deemed innocent and justifiable under the circumstances. In support of the motion, defendant alleged that he had received the handgun from a friend who had insisted on giving it to him because defendant was planning to go to Atlanta without family or friends. Defendant said he had refused to accept the gun but his friend had left it on the seat of defendant's car, whereupon defendant put it in his computer bag and called his mother to come get it. He said that because he and his mother had a long standing, antagonistic relationship with the Madison police, he

believed he could not trust the police if he merely alerted them to the gun. His plan was that his mother would pass the gun on to another individual, who would then give it to the police. Defendant's motion was denied on the ground that the Court of Appeals for the Seventh Circuit does not recognize a defense of innocent possession to a § 922(g) charge. Dkt. #55.

In a letter dated November 28, 2008, defendant entered into a plea agreement with the United States, reserving his right to appeal the district court's adverse determination of his suppression motion and his request to present an innocent possession defense. Dkt. #58. The government agreed to make a downward departure motion before sentencing or a motion for reduction of sentence after sentencing if defendant's mother gave the government the substantial assistance she had promised to provide:

> If the defendant provides substantial assistance before sentencing, the United States agrees to move the Court pursuant to 18 U.S.C. § 3553(e) to impose a sentence reflecting that assistance. If the defendant provides substantial assistance after sentencing, the United States agrees to move the Court pursuant to Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3553(e) to reduce the defendant's sentence to reflect that assistance. The government acknowledges that another individual has provided assistance, and will continue to provide assistance to the government, on behalf of the defendant, and this will be taken into account in making a motion pursuant to this paragraph. Although the decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin, the United States will file the appropriate motion upon completion of the assistance provided by the individual working on behalf of the defendant. The defendant acknowledges that even if the United States makes such a request, the Court is not required

to reduce the defendant's sentence.

Id. at 5.

At his change of plea hearing, defendant told the court that he had talked with his counsel about possible defenses to the charge against him and about the consequences of the plea. He stated his agreement to the terms of the plea agreement after the government summarized them on the record. He denied that anyone had made him promises other than those itemized in the plea agreement, that he had not been promised a particular sentence and that he understood he could not withdraw his plea even if the court did not accept the government's recommendations in the plea agreement. Plea Hrg. Trans., dkt. #91, at 12-13. Sentencing was set for February 18, 2009. It was continued several times at defendant's request, for various reasons, including allowing defendant's mother to complete the assistance she was providing to the government in an effort to help her son (defendant's mother was the "individual working on behalf of the defendant" described in the plea agreement). The sentencing was finally held on May 7, 2009.

At sentencing, defendant was represented by his third counsel, Reid Cornia, who had been appointed to represent defendant at sentencing after defendant and his second appointed counsel developed irreconcilable differences. Defendant was found to be an armed career criminal under 18 U.S.C. § 942(e) because he had three prior convictions for violent felonies. His base offense level was 33; it was reduced by three levels for his

acceptance of responsibility. His criminal history category was VI, which would have given him an advisory guideline imprisonment range of 168 to 210 months, but his statutory mandatory minimum sentence was 180 months. However, the government moved pursuant to U.S.S.G. § 5K1.1 for a reduction based on the substantial assistance provided by defendant's mother. I granted the motion, and sentenced defendant to a term of 120 months.

After the sentencing, before defendant's counsel left the courtroom, Assistant United States Attorney Peter Jarosz told counsel that the government was finished with its work with defendant's mother and that it would not give defendant any further credit for any work done by his mother on behalf of law enforcement. Defendant's counsel reported this statement by the government to defendant on the same day, May 7, 2009. Cornia Aff., dkt. #23, at 2 (11-cv-510). Defendant says he has no memory of being told this by either the Assistant United States Attorney or by Cornia. Dft.'s Aff., dkt. #26, at 3 (11-cv-510).

Defendant took an unsuccessful appeal of his conviction and sentence to the Court of Appeals for the Seventh Circuit. United States v. Jackson, 598 F.3d 340 (7th Cir. 2010). Defendant challenged the legality of the search of the computer case and this court's denial of his requests to pursue an "innocent possession" defense and to have the benefit of U.S.S.G. § 5K2.11, which allows a court to reduce a sentence if it finds that the defendant committed his crime to avoid a perceived greater harm. He did not challenge the

government's refusal to file an additional motion for reduction of sentence for cooperation under Fed. R. Crim. P. 35(b). The court of appeals found none of defendant's challenges meritorious and affirmed his conviction and sentence.

Defendant filed a petition for a writ of certiorari with the Supreme Court, which was denied on October 18, 2010. He filed this motion on July 18, 2011.

OPINION

Defendant raised five claims in his original motion. The first three claims were variations of his claim that he was denied the effective assistance of counsel. The fourth was a claim that the government had breached the plea agreement when it moved for reduction of his sentence at the time of sentencing and did not move for a second reduction after sentencing.

A. Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance, a defendant must prove that his attorney's performance fell below an objective standard of reasonableness *and* that he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). It is not enough simply to allege ineffectiveness; a defendant must "establish the specific acts or omissions of counsel that he believes constituted ineffective assistance" and from which

the court can "determine whether such acts or omissions fall outside the wide range of professionally competent assistance." Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)). As for the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id., (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Id. (citing Bethel v. United States, 458 F.3d 711, 718 (7th Cir. 2006)).

1. Appellate counsel's failure to argue defendant's Second Amendment right to bear arms

Defendant's first claim is that his appellate counsel (who was also his counsel at sentencing) was ineffective because he failed to argue on appeal that defendant's conviction and sentence were unconstitutional in light of the Second Amendment. Defendant did not enlarge upon this claim in his original motion except to say that "Counsel could have but did not challenge the conviction and sentence of [defendant] on direct appeal as violative of the Second Amendment because, even if the facts alleged were true, they did not and do not state a claim under the Second Amendment." M., dkt. #1, at 11. He adds in his brief that the underlying crime that caused him to become a felon did not involve violence, the gun at issue was one commonly found in the home and his punishment was severe. Dft.'s Br., dkt. #2, at 25. This statement is factually untrue: defendant's previous felonies *did* involve

violence; they included party to the crime of burglary, burglary and aggravated battery. The statement is legally irrelevant because defendant's gun was not kept in his home; he was a felon; and the resulting sentence does not affect the nature of the crime charged.

It is well established that the government may restrict felons from possessing guns, even if law abiding citizens have a constitutional right to possess them in their own homes for protection of their families and property. District of Columbia v. Heller, 554 U.S. 570, 627 (2008) ("nothing in our opinion [to invalidate District of Columbia regulations on handguns kept in home for personal protection] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"). It would have been a waste of time for defendant's counsel to argue this issue on appeal. Defendant suffered no prejudice from his appellate attorney's decision not to do so.

2. Ineffectiveness in connection with suppression hearing

Defendant's second and third claims of ineffectiveness overlap extensively. I have separated the claims that relate to counsel's alleged ineffectiveness in connection with the motion to suppress the evidence of the gun from those that relate to the alleged ineffectiveness in relation to the plea. Associate Federal Defender Kelly Welsh represented defendant at the suppression hearing. Defendant contends that Welsh was ineffective because she was torn between protecting her own reputation as an advocate and defending

him vigorously. However, he never explains this point, despite repeating it on several instances throughout his motion, his brief and his supplemental brief. Dkts. ##1, 2 and 6. His argument is that Welsh based her challenge to the search of the computer bag on Officer Dexheimer's police report, which appeared to show that he had not conducted a sufficient inquiry of defendant's mother before he obtained her consent to search the bag, but that when defendant's mother gave testimony that contradicted Welsh's approach, Welsh ignored the testimony. It is difficult to determine exactly what testimony supposedly "contradicted Welsh's approach." Defendant comes closest to describing it in his supplemental brief, dkt. #6. Apparently, his position is that his mother's answers to Officer Dexheimer showed that she did not have *actual* authority to give the bag to anyone. Id. at 4. If this is his position, it is not helpful to him. The record shows that Welsh argued that defendant's mother lacked both actual and apparent authority in her briefs on suppression, dkts. ## 21 & 33, (08-cr-69); she did not give up the actual authority argument as defendant seems to think.

Defendant also contends that Welsh was ineffective because she failed to interview his mother before the evidentiary hearing, but he does not specify any evidence that she would have discovered had she done so. It is well established that it is the movant's obligation to provide the court "sufficiently precise information, that is, a comprehensive showing as to what the [allegedly inadequate] investigation would have produced." Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003). Unless the movant makes

this showing, the court need not consider the issue. Defendant has not made the showing and I will not consider his claim that Welsh was ineffective because she filed to interview defendant's mother.

Defendant alleges that his "counsel" failed to contact an available exculpatory witness, Charles Bryant, who would have corroborated defendant's story about how he came into possession of the firearm. (He does not specify which counsel, but if he is talking about a witness at the suppression hearing, it would be Welsh.) Had counsel done so, defendant adds, "there is a reasonable probability that the evidence would have been suppressed or an innocent possession defense would have been allowed." Dft.'s Br., dkt. #2, at 32. This is a losing argument. The Court of Appeals for the Seventh Circuit does not recognize the defense of innocent possession, as it explained in its opinion denying defendant's appeal. Jackson, 598 F.3d at 349 (citing United States v. Matthews, 520 F.3d 806, 810-12 (7th Cir. 2008) (possessing a firearm even "for a brief period of time is sufficient to constitute possession within the meaning of § 922")).

Defendant alleges an additional ground of ineffectiveness: his counsel (again, it must be Welsh) did not move to dismiss the indictment against him. M., dkt. #1, at 16. He does not specify any reason why the indictment would have been subject to a motion for dismissal so I will not give any further consideration to this allegation.

3. Ineffectiveness in connection with plea

Defendant alleges that his second appointed counsel, Joseph Sommers, advised him to plead guilty without first conducting an independent investigation of the facts, circumstances and law, advised him that he had no legal defense to the charges and failed to tell him that a plea of not guilty would not result in any increase in his sentence. Defendant adds that counsel affirmatively advised him that if he pleaded guilty, he would receive a reduction in his sentence for acceptance of responsibility. These allegations fall far short of showing ineffectiveness.

Defendant's first claim of ineffectiveness by Sommers includes the general allegation that Sommers never conducted any independent investigation of the facts and law, as well as specific allegations that Sommers did not investigate the information that one of the officers involved in defendant's case had been disciplined, dft.'s decl., dkt. # 7, at 2-3, and that Sommers did not try to contact Charles Bryant to corroborate defendant's story about how defendant came into possession of the firearm. Id. at 3. Defendant does not support his general allegation with any evidence. He has not identified any fact or legal issue that Sommers would have found had he undertaken the allegedly omitted investigation and he has not shown that any information Sommers might have uncovered would have led him to change his recommendation about the advantages of the plea. Defendant's failure to provide the evidence means that his claim fails. Hardamon, 319 F.3d at 951. See also Richardson

v. United States, 379 F.3d 485, 488 (7th Cir. 2004) ("[w]hen the alleged deficiency is a failure to investigate, the movant must provide "the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced."). Whether a movant who pleaded guilty can establish prejudice from his counsel's failure to investigate depends on whether the information that might have been discovered "would have led counsel to change his recommendation as to the plea." Hill v. Lockhart, 474 U.S. 52, 58-60 (1985).

As for the allegation that Sommers never investigated the reasons for the officer's discipline, defendant is mistaken. Sommers raised the issue. Dft.'s M., dkt. #48. The government then submitted documents relating to the discipline to the court for review. The magistrate judge conducted the review and ruled that the government did not have to disclose the documents to defendant. Order, dkt. #54.

Finally, for the reasons discussed above, Sommers's failure to locate Bryant or interview him did not prejudice defendant. How defendant came into possession of the firearm was essentially irrelevant; the fact is that he had possession of it, even if only for a short time.

Defendant's second claim of ineffectiveness by Sommers is that Sommers advised defendant that he had no legal defense to the charges. This claim fares no better than his first one. Again, he has not explained why this advice was erroneous by identifying a

potential defense he did have. I have explained why the Second Amendment defense would have failed had that been tried and the court of appeals made short shrift of the defense of innocent possession that he did raise.

Defendant's third claim is that Sommers failed to tell him that a plea of not guilty would not result in any increase in his sentence and that he had nothing to lose by going to trial. This alleged "failure" is exactly the contrary. Sommers would have been ineffective had he told him what defendant says he should have, because it is wrong. Defendant has only to look at the reduction in his potential sentence to know that his allegations are completely unfounded. He received a three-level reduction in his guideline range for acceptance of responsibility. More important, with Sommers's help, he achieved a highly favorable plea agreement in which he would receive a reduction in his sentence if his mother provided assistance to the government. Defendant received a sentence of 120 months when he was facing a *mandatory* minimum sentence of 180 months, with a maximum of life.

Defendant has one final allegation in connection with this claim, which is that Sommers told him he would be out of prison in 2-3 years. Dft.'s decl., dkt. #7, at 4. This allegation is contradicted by defendant's statement to the court at his plea hearing that no one had made him any promises about his sentence or had told him what sentence he would receive. Plea Hrg. Trans., dkt. #91, at 12-13. He also told the court that he had discussed possible defenses with Sommers. Id. at 2-3. Statements made in open court are credited

over later contradictory statements. United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) ("'he record of a Rule 11 proceeding is entitled to a "presumption of verity" . . . and the answers therein are binding'") (quoting United States v. Winston, 34 F.3d 574, 578 (7th Cir. 1994)). See also 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."). Defendant has not offered *any* explanation for the contradiction in his case, let alone a compelling one.

4. Ineffectiveness in connection with sentencing

Defendant alleges that Reid Cornia, his third appointed counsel, failed to object to "unlawful, false and unreliable evidence" that was used to calculate defendant's sentencing range. M., dkt. #1, at 17. He does not identify any such evidence, so it is not necessary to consider this allegation.

B. Government's Alleged Breach of the Plea Agreement

Defendant's fourth claim, that the government breached its agreement, is without merit for two reasons. The first is that defendant had an opportunity to raise it on direct

appeal and failed to do so. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both *good* cause for failure to raise 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."). Defendant says now that the reason he did not raise it is because "it was unclear during direct appeal whether the government would actually fulfill their plea agreement." M., dkt. #1, at 6. This statement is refuted by the affidavit of his counsel in which Cornia averred that he told defendant on the day of his sentencing that the government would not be filing any additional motion for reduction of sentence. Affid., dkt. #23, at 2. Defendant does not deny having this conversation with Cornia but avers that he does not recall it and adds that he was not made aware of the email from the Assistant United States Attorney confirming what he had told Cornia earlier.

Even if Cornia did not tell defendant about the government's determination that it was no longer working with defendant's mother, defendant still cannot prevail on his claim. Under the plea agreement, the government agreed to move for a reduction in defendant's sentence in return for cooperation by "another individual," which turned out to be defendant's mother. This was an unusual concession by the government, with defendant receiving the benefit of the assistance but not having to do anything himself to earn it. As is customary in such agreements, the government agreed to make a motion at sentencing if

the substantial assistance was provided before sentencing. It added that it agreed to move to reduce the sentence if the defendant provided substantial assistance after sentencing. It went on to say that "[a]lthough the decision whether to make such a request rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin, the United States will file the appropriate motion upon completion of the assistance provided by the individual working on behalf of the defendant." Plea agmt., dkt. #58, at 2. (This language appears to override the previous clause leaving the making of the motion to the discretion of the United States Attorney.)

The sentencing was continued for several months to allow defendant's mother to assist the government before sentencing. At sentencing, the government moved for a reduction. The motion was granted and resulted in a five-year reduction from what would have otherwise been a mandatory sentence of at least 15 years. The government told defendant's counsel after the sentencing that it was finished with its work with defendant's mother and would not be making any additional motion for a sentence reduction based on the help she had provided.

The plea agreement is not as clear as it should be. It could be read as promising defendant to make two motions, as defendant argues, one at sentencing and one after sentencing, but this reading seems improbable in light of the two sentences that follow the description of the two motions: "The government acknowledges that another individual has

provided assistance, and will continue to provide assistance to the government, on behalf of the defendant, and this will be taken into account in making *a motion* pursuant to this paragraph. Although the decision whether to make such *a request* based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin, the United States will file *the appropriate motion upon completion of the assistance* provided by the individual working on behalf of the defendant. (Emphasis added.) These sentences imply strongly that the government will file one of two possible motions, not two.

Despite the possible ambiguity of the rest of the paragraph, there is no ambiguity about the government's intention to file the motion "upon completion of the assistance." It asked for a reduction in defendant's sentence at the time of sentencing after it had completed its work with defendant's mother. In doing so, it carried out its obligation to defendant under this provision of the plea agreement. Defendant has no ground on which to argue that the agreement was breached. The government promised defendant it would file a motion when it completed its work with his mother and it did so. It did not breach the terms of the plea agreement.

C. Additional Claims

Defendant's fifth claim is an unsupported laundry list of reasons why his conviction

and sentence were unconstitutional, such as violating his rights to free speech, due process, jury trial, compulsory process, etc. He has never explained, either in his original motion, his 111-page brief in support of his motion, dkt. #2, his two declarations, dkts. ## 6 & 7, his affidavit, dkt. #26, or his traverse filed in reply to the government's brief, dkt. #25, how the rights he listed in his fifth claim might have been violated, with the exception of his right to counsel and possibly to a jury trial, so I am disregarding this claim.

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 that his claims that he was denied the effective assistance of counsel or that the government breached the plea agreement have any merit, 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 Lee Anton Jackson's motion for post conviction relief is DENIED. No certificate of appealability shall issue. FURTHER, IT IS ORDERED that defendant's motion for discovery is DENIED.

Entered this 15th day of February, 2012.

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