IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

LEE ANTON JACKSON,

Defendant.

OPINION AND ORDER

11-cv-510-bbc
08-cr-69-bbc

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Defendant Lee Anton Jackson has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that (1) he was denied constitutionally effective counsel on appeal; (2) his plea of guilty, conviction and sentence were obtained in violation of his rights under the Sixth Amendment; (3) he was denied constitutionally effective counsel at trial; (4) the government breached its plea agreement; and (5) his conviction and sentence violated his rights under the First, Second, Fourth, Fifth, Sixth and Eighth Amendments. (Defendant never explains his fifth claim, which leads me to think he is not pursuing it.)

It is clear that defendant's first claim cannot succeed, so I will deny it in this order, without asking the government to respond to it. Defendant has submitted no proof in

support of his overlapping second and third claims, both of which allege ineffectiveness of counsel, or his fourth claim of breach of the plea bargain. I will give him an opportunity to supply the missing proof before dismissing these claims or asking the government to respond to them.

Defendant's first claim of ineffective assistance of counsel on appeal is predicated on his counsel's failure to challenge defendant's conviction and sentence as violative of the Second Amendment. He does not explain this claim in any detail, but simply says that if the facts alleged by the government in the indictment are true, they do not state a claim under the Second Amendment. There is no possible merit to this claim.

Defendant was indicted on April 24, 2008, of the crime of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Although the exact contours of the Second Amendment right to possess a firearm are not completely clear, District of Columbia v. Heller, 554 U.S. 570 (2008), they are definite when it comes to felons. Id. at 626 ("[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons"). When defendant was indicted, his criminal record included five felony convictions. He has no basis for arguing that his possession of a firearm in this case was an act protected by the Second Amendment.

Defendant's second and third claims cover the same territory: the alleged ineffectiveness of his trial counsel. His claim is complicated by the fact that he had three different appointed counsel (Assistant Federal Defender Kelly Welsh represented him at the outset, through the evidentiary hearing on defendant's motion to suppress; Joseph Summers represented him through his plea of guilty; and Reed Cornia represented him at sentencing). He complicates it further by not always identifying the lawyer he says was ineffective. For example, he alleges that prior to trial and during the plea process, "counsel" advised him to plead guilty. This lack of precision is not his main problem, however, A bigger problem is that he has not supported his allegations of ineffectiveness with any proof that would require an evidentiary hearing.

It is well established that mere unsupported assertions are not enough for the grant of a hearing; the defendant must file detailed and specific affidavit showing he has actual proof of allegations. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996). See also Hill v. Lockhart, 474 U.S. 52, 59 (1970) (holding that defendant must demonstrate that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); Galbraith v. United States, 313 F.3d 1001 (7th Cir. 2002). Defendant has not supported his claims of ineffectiveness in the plea process with any proof in the form of an affidavit. He merely says things such as "[p]rior to trial and during the plea process, counsel affirmatively misadvised [defendant] that there was simply no factual defense to the charges

and no chance he could prevail at trial" and "[p]rior to trial and during the plea process, cousnel could have but did not fully advise [defendant] as to the law relevant to the determination whether to plead guilty." Dft.'s M., dkt. #1, at 12.

In addition, to the extent that defendant is alleging that his counsel (whichever one) made specific promises to him, he will have to file a supporting affidavit setting forth exactly what promises counsel made, when he made them and whether other people were around to hear them. Also, if he intends to argue that he would not have pleaded guilty if he had received correct advice, he will have to file an affidavit to the effect that he would have insisted on going to trial and why, given the evidence against him. Merely stating that if he had been better advised, he would not have accepted the sentence or entered into that agreement is not enough. Gargano v. United States, 852 F.2d 886, 891 (7th Cir. 1988).

In claims 2 and 3, defendant makes allegations about counsel's failure to conduct an independent investigation of the facts and circumstances of the alleged crime. Such allegations are similar to those discussed above and just as inadequately supported. The Court of Appeals for the Seventh Circuit has made it plain that when the alleged deficiency supporting post conviction relief is a failure to investigate, the defendant must provide "the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003) (internal quotations and citation omitted). He must do more. He must produce

evidence that the results of the investigation"would have led counsel to change his recommendation as to the plea." Hill, 474 U.S. at 59.

Because defendant has produced no evidence to support his conclusory allegations about the deficiencies of his trial counsel, I will give no further consideration to these claims unless and until defendant files the requisite proof. Also, before I take up defendant's claim that his first appointed counsel, Kelly Welsh, was subject to an actual conflict of interest, he will have to provide a more specific description of the facts underlying his claim. As they stand now, his allegations are not at all clear about exactly what kind of conflict was involved, if any.

In ordinary circumstances, defendant's fourth claim, that the government breached its promise to reduce his sentence if he cooperated, would be barred from being raised in a post conviction motion because defendant could have been raised it on appeal. However, defendant has alleged that he did not raise it on appeal because he did not know at the time that the government would not keep its bargain. If defendant submits proof that he carried out his part of the bargain, I will ask the government to respond to the claim.

Although defendant set out five claims in his motion, he discussed only four of them. Therefore, I will consider that he is abandoning the fifth one.

ORDER

IT IS ORDERED that defendant Lee Anton Jackson may have until August 26, 2011, in which to file affidavits in support of the post conviction motion he filed on July 18, 2011, as directed in this order. If he fails to file the affidavits, the motion will be DISMISSED in whole or in part.

Entered this 5th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge