

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN HIGH,

Defendant.

OPINION AND ORDER

11-cv-627-bbc
07-cr-91-bbc

Defendant John High has filed a motion for post conviction relief, arguing that his trial counsel was constitutionally ineffective because he did not file a pretrial motion for suppression of evidence under Franks v. Delaware, 438 U.S. 154 (1978), and that his appellate counsel was constitutionally ineffective for failing to file a petition for a writ of certiorari to the United States Supreme Court. The motion will be denied. Defendant's trial counsel did file a motion for a Franks hearing and defendant has no constitutional right to have counsel appointed for him when petitioning for certiorari.

Defendant has filed two other motions. In the first, dkt. #113, he asks for the appointment of counsel to represent him; in the second, dkt. #118, he asks for an

opportunity to obtain discovery materials from the government relating to employees of the Dane County District Attorney who dealt with Angela Sims, a citizen who brought defendant to the attention of the Madison Police Department.

BACKGROUND

In a one-count indictment returned on June 6, 2007, the grand jury charged defendant with unlawfully possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). His court-appointed trial counsel filed a motion to suppress evidence seized in a search of defendant's grandmother's apartment. They also filed a motion for a Franks hearing, in which they argued that the police obtained a warrant to search the apartment only by omitting information essential to the judge's decision to issue a warrant and that the omission amounted to a deliberated falsehood or reckless disregard for the truth. Dft.'s M., dkt. #13 (07-cr-91-bbc), at 2. In support of the motion, defendant's counsel described incidents involving Angela Sim's prior police contacts, which in their opinion indicated her lack of credibility. They reported conversations Sims had with employees of the Dane County District Attorney's office on April 27, 2007, four days before she told the police she had information about a possible murder. One of the employees, Nancy Gustaf, director of the Deferred Prosecution Unit, said that Sims had told her about the possible murder on April 26, 2007, a day before Sims allegedly came into the

information about the murder.

The magistrate judge held a hearing on the motion to suppress, at which the police witnesses described their meetings with Angela Sims. The first took place on April 29, when she came to them with information linking defendant to the murder of Greg Bray that she said she had obtained from defendant's wife, Shameco Ross-High. (Sims had left a message with Crimestoppers on April 27, but had not given her name.) Although Ross-High did not tell Sims the name of the murder victim, she said that her husband had been involved in a murder that took place in a duplex on Raymond Road and that a safe had been taken from the premises at the time. Sims repeated this information to the police, who asked whether she would be willing to place a recorded telephone call to Ross-High in an attempt to corroborate Sims's report of what she had learned from Ross-High and perhaps obtain more information. Although it appeared that defendant was present at Ross-High's apartment when plaintiff called, causing Ross-High to be guarded in her conversation, she corroborated most of the things that Sims had told the police. Not surprisingly, she said nothing at the time about the gun and the possibility that defendant had been involved in Bray's murder.

Defendant's counsel brought out the fact that Sims had spoken with Julie Foley, who worked in the Dane County District Attorney's office as an advocate for victim witnesses, hrg. trans., dkt. #19, at 33, raising the possibility that Sims had learned about the safe from Foley. Counsel did not elicit any testimony about or from Nancy Gustaf, director of the

deferred prosecution unit.

From the evidence adduced at the hearing, the magistrate judge found that the seizure of the evidence was reasonable. In reaching that decision he relied heavily on Sims's knowledge that a safe had been removed from the victim's house, a fact that the lead investigators testified they had tried to keep from the public and from others in the department.

The magistrate judge recommended denial of defendant's motion to suppress; I agreed with the recommendation and denied the motion. Defendant went to trial and was found guilty of being a felon in possession of a firearm.

At sentencing, defendant was classified as an Armed Career Criminal under 18 U.S.C. § 924(e). He objected to the enhancement, arguing that two of the convictions supporting the classification were not properly classified as violent felonies. He was sentenced to 212 months in prison. He retained counsel privately to appeal his conviction and sentence, objecting to the constitutionality of the search of his grandmother's apartment and to the legality of his classification as an Armed Career Criminal. The court of appeals affirmed the constitutionality of the search. However, they agreed with defendant that two of his prior convictions should not have been considered violent felonies and returned his case to this court for resentencing.

Defendant asked for a rehearing, but his request was denied on September 4, 2009.

On September 28, 2009, he moved on his own behalf for appointment of counsel to represent him in filing a petition for a writ of certiorari. The court of appeals denied the motion on the ground that defendant had been represented on appeal by privately retained counsel and had not shown that he was financially eligible for appointed counsel.

After his case was remanded, defendant was resentenced to 120 months, the statutory maximum that could be imposed on him if he was not an Armed Career Criminal. He appealed from the new sentence but his appeal was dismissed as frivolous. He did not file a petition for a writ of certiorari.

OPINION

On its face, defendant's first claim is without merit. He alleged that his court-appointed trial counsel did not file a Franks motion on his behalf, when the record shows that they did file such a motion. Defendant argues nevertheless that the Franks motion was inadequate because of counsel's omission of information that would have cast great doubt on the reliability of the informant whom the police relied on in applying for the warrant. This argument is refuted by a review of the motion that counsel filed in which they made all of the arguments that defendant says should have been made in support of the motion.

Defendant describes in detail in his § 2255 motion the same incidents that his counsel described in the brief in support of the motion for a Franks violation. He argues that

these incidents show that Sims was an unreliable informant and that, because these incidents were known to the police, Detectives Woodmansee and Hammond must have known about them at the time they told the judge in their warrant application that Sims had supplied truthful and reliable information. As the magistrate judge concluded, this argument and these facts did not require a Franks hearing. Even if Sims's background showed reasons for questioning her reliability as a witness, the information she disclosed gave the detectives grounds for believing her report about defendant. As the magistrate judge observed in the report and recommendation, dkt. #25 at 13, "[Defendant's] conjecture that Sims may have learned [about the safe] from someone working for the district attorney of the deferred prosecution unit is desperate speculation with no support in the record or in common sense."

The magistrate judge acted properly when he denied defendant's request for a Franks hearing. Nevertheless, at the hearing on the legitimacy of the search and the search warrant, he heard much of the same evidence that defendant's counsel had argued in their motion in support of their request for the Franks hearing. Even after hearing that evidence, he found no basis for suppressing the evidence seized in connection with the search performed under the warrant. Defendant has no basis on which to argue that he was denied the effective representation of trial counsel.

Similarly, defendant cannot prevail on his second claim. He has no ground on which to argue that he was denied the effective assistance of counsel when his appellate counsel

failed to file a petition for a writ of certiorari to the United States Supreme Court. Defendant had no constitutional right to have such a petition filed. Austin v. United States, 513 U.S. 5, 8 (1994) (although indigent defendants pursuing appeals as of right are constitutionally entitled to brief filed on their behalf by attorney, they have no such right when it comes to discretionary review) (citing Ross v. Moffitt, 417 U.S. 600, 616-17 (1974)). See also United States v. Price, 491 F.3d 613, 615 (7th Cir. 2007) (criminal defendant does not have constitutional right to counsel while seeking certiorari, although he has statutory right based on Criminal Justice Act, 18 U.S.C. § 3006A).

The Criminal Justice Act provides counsel only to financially eligible persons. Defendant was represented on his first appeal by privately retained counsel and, according to the court of appeals, never demonstrated his financial eligibility for appointed counsel when he sought appointment of such counsel from the court of appeals. He has not shown that he was denied a constitutional right that would render his judgment vulnerable to collateral attack.

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, 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 John High's motion for post conviction relief is DENIED for defendant's failure to show that he is in custody in violation of the Constitution or laws of the United States. FURTHER, IT IS ORDERED that his motion for appointment of counsel to represent him on this motion, dkt. #113 (07-cr-91-bbc) is

DENIED, as is his motion for discovery, dkt. #118 (07-cr-91-bbc). No certificate of appealability shall issue.

Entered this 28th day of November, 2011.

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