IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

11-cv-742-bbc
09-cr-18-bbc

v.

VINCENT A. LOWE,

Defendant.

- -

Defendant Vincent Lowe has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied due process by the court and that his counsel, William Jones, was constitutionally ineffective in two major respects: he failed to pursue a suppression motion vigorously and he did not argue at sentencing for a downward departure in the guidelines based on the alleged overrepresentation of defendant's criminal history. Because none of defendant's claims have any merit, his motion will be denied.

RECORD FACTS

After supervising two controlled drug buys on September 4 and September 5, 2008

in which a confidential informant purchased crack cocaine from defendant, Madison Police Department Detective Julie Rortvedt reported the purchases to defendant's state probation officer, Dan Robinson, on September 16, 2008. Robinson initiated a probation hold. Purely by coincidence, that same day, other Madison police officers stopped defendant's van after it ran a red light at about 11:30 a.m. Krause Rep., dkt. #1-2, at 2 (11-cv-742). Town of Madison Det. Krause searched defendant and found approximately $3000 in his pocket. Id. at 2. The police ran a check on defendant, learned of the probation hold and took him to the South Madison Police District, where he was held in custody.

After learning that City of Madison officers were actively investigating defendant, Krause turned over to them everything he had taken from defendant, including his keys. Id. City of Madison officer Denise Markham took possession of the keys, which included a key to a Lincoln, and moved the van to a nearby parking lot. Id. at 2.

At some point in the afternoon, defendant's girlfriend, Altisha Rodgers, called Markham at the South Madison Police Department, asking about defendant's keys. At about 4:20, before Markham could arrange to meet Rodgers, Markham learned that defendant was making telephone calls from the booking area. She and Officer Jeremy Winge monitored the calls. Dkt. #16-5 (09-cr-18). In one call, defendant was heard asking a female whether she had gotten the keys from a police officer and then telling her she should get the keys and take the Lincoln. He then said to forget the keys and break a window.

When a man got on the phone, defendant told him to "bust that window and do what you gotta do, armrest, hurry up, all right, do what you gotta do." Id.

After hearing these calls, locating the Lincoln Continental parked near defendant's residence and taking steps to secure it and have it towed until they could obtain a warrant to search it, the police applied for a search warrant on September 17, 2008. Once they had the warrant, the officers searched the car, finding more than 100 grams of crack cocaine in the center front seat armrest. The government took the case to a grand jury, which returned an indictment on February 18, 2009, charging defendant with one count of possession with intent to distribute 50 grams or more of a mixture or substance containing crack cocaine.

Defendant moved to suppress the crack cocaine evidence, challenging the legality of the search and the validity of the search warrant. The magistrate judge decided the motion on the parties' briefs and stipulated evidence, but allowed the parties to put in "five minutes of testimony and five minutes worth of cross" from Det. Rortvedt about what she had told defendant's probation officer on September 16 about the controlled buys of cocaine base. Trans., pretrial mot. conf., dkt. #35, at 2-9 (09-cr-18). The magistrate judge added that the parties could argue that they were entitled to more evidence and he would consider their position. Id. at 12. Defendant's counsel completed his cross-examination within five minutes and did not request any additional time. Trans., evid. hrg., dkt. #32, at 6-13 (09-cr-18).

The magistrate judge issued a report in which he recommended denial of the suppression motion. Defendant objected to the recommendation, but it was adopted by the court. In May, defendant reached a plea agreement with the government, agreeing to plead guilty in return for the government's agreement not to file informations under 21 U.S.C. § 851. (Depending on the number of informations filed (one or two), defendant's mandatory minimum sentence might have increased to 20 years or to a mandatory term of life.) In paragraph 3 of the agreement, defendant waived any right to appeal his conviction and any sentence of imprisonment of 327 months or less. Plea Agmt., dkt. # 73, at 2 (09-cr-18).

The probation office determined that defendant was a career offender because he had three prior convictions involving controlled substances; he was 18 or older when he committed the offense for which he was being sentenced; and the offense involved controlled substances. U.S.S.G. § 4B1.1. The presentence report showed that for two of the prior offenses, one a controlled substance offense and one a crime of violence, defendant had been sentenced on the same day, but that the two sentences were separated by an intervening arrest. Presentence rep., dkt. #81, at ¶¶ 48 & 51. The third offense was a controlled substance offense that occurred several years after defendant had been sentenced on the first two qualifying offenses. Id. at ¶ 57. Defendant pleaded guilty to a charge of knowingly delivering more than one gram but less than five grams of cocaine or cocaine base. Id.

Before sentencing took place, defendant's counsel learned that Officer Denise

Markham was the subject of an investigation of possible misconduct. Counsel filed a demand for exculpatory evidence. Dkt. # 98 (09-cr-18). In response, the government filed a letter from the Acting United States Attorney and the chief of the criminal section of the United States Attorney's Office to the effect that they had met with the officers investigating the misconduct and had determined from them that nothing in the investigation would be helpful to defendant. Dkt. #102-1. Defendant renewed his demand for exculpatory evidence and asked for the FBI report that had been prepared in the interim between his first and second request. Dkt. #111. I met with the government and defendant's attorney and agreed to hold an ex parte hearing with the Acting United States Attorney and the chief of the criminal section to review the information uncovered by both investigations. I invited defendant's counsel to submit questions he would like asked at the hearing. After the hearing with the government on October 29, 2009, and after reviewing all of the reports that the government had about the investigation, I advised the parties that I had found no exculpatory information in the reports. Dkt. #111. Nothing in the reports suggested that Officer Markham might have kept the keys to the Lincoln in order to make a warrantless search, that she might have planted evidence or taken any other act that would lead an impartial observer to suspect that she had done anything that would have affected the officers' search or their seizure of the crack cocaine. Id.

Sentencing was set for November 10, 2009. Before then, defendant's counsel filed

a sentencing memorandum in which he discussed defendant's prior convictions, among other matters. Dkt. #83. He pointed out that seven of defendant's ten criminal history points were attributable to traffic offenses and the remainder were mostly minor offenses. He noted that both of the drug crimes that were the predicate crimes for the career offender classification involved very small amounts of crack cocaine. Id. He suggested that a sentence of 151 months would be appropriate in light of the relatively minor nature of defendant's criminal history. He filed an additional brief, dkt. #91, arguing that the court should consider the sentencing disparities in crack and powder cocaine cases. Finally, he filed a character letter from an Assistant District Attorney for Dane County, dkt. #93, to bring to the court's attention defendant's acts as a key witness in a highly publicized murder trial in 2007. In the letter, the prosecuting attorney vouched for defendant's integrity and courage in agreeing to testify despite pressure from friends and relatives of the accused murderer. Id.

At the sentencing, I determined that defendant's guideline sentencing range was 262 to 327 months. Trans., Sent. Hrg., dkt. #131, at 21. Defendant asked for a sentence that was below the guidelines, reiterating his position that his crimes were generally less severe than those that generally led to career offender status. Id. at 15-16. I sentenced defendant to 240 months in prison, after finding that his criminal convictions showed a history of impulsivity and physical attacks against his girlfriends and an inability or unwillingness not

to stop committing crimes when he was on supervision. Id. at 21-22.

Defendant took an unsuccessful appeal to the Court of Appeals for the Seventh Circuit and he petitioned for a writ of certiorari from the United States Supreme Court. The writ was denied on November 1, 2010. Defendant filed this motion on October 27, 2011.

OPINION

A. Ineffective Assistance

Defendant's primary claims focus on his trial counsel's alleged ineffectiveness. To succeed on such a claim, 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" 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)). This is particularly true in this case, where anyone reviewing the record would be hard pressed to find counsel's representation of defendant anything but exemplary.

Defendant's first claim of ineffectiveness is that his attorney did not pursue a

suppression motion vigorously. He bases this on counsel's refusal to move to suppress the evidence on the ground that Det. Rortvedt's criminal complaint filed in the Circuit Court for Dane County showed the date of the search as September *16,* before the police had a warrant, rather than September 17, after they had the warrant. Defendant argues that his counsel's refusal to challenge the validity of the search on this basis shows that his lawyer was operating under a conflict of interest, conspiring with the government against defendant and acting as defendant's adversary.

Defendant has not supported this claim with much in the way of specific allegations. He just says that if counsel had undertaken further investigation, including subpoenaing the in-car video recordings that would show the exact time and date the cars arrived at the site of the Lincoln Continental, he would have discovered that the officers conducted a search of the car on September 16, 2008, before they had a warrant. His theory rests on two facts: Denise Markham had the key to the Lincoln in her possession in the early afternoon of September 16 and Officer Rortvedt's statement in the criminal complaint filed in the Circuit Court for Dane County that she executed a search warrant on defendant's Lincoln Continental on the 16th. From these two facts, he asserts that counsel should have investigated to determine whether Markham and Rortvedt searched the car illegally the day before the search warrant issued.

It is possible, but totally improbable, that Markham and Rortvedt did search the

Continental on the 16th. It is improbable because it would make no sense for the two of them to conduct an illegal search and then disclose it, in effect, by using the September 16 date in the criminal complaint. It is far more likely that a person acting illegally would try to cover up her act, not reveal it in an official court filing. Moreover, defendant has not suggested any reason why Markham or Rortvedt would have even thought about searching the Lincoln before Markham learned from monitoring defendant's telephone calls that the car might contain contraband. Defendant may be trying to suggest that Markham planted cocaine base in his car to frame him, but his frantic telephone calls make short shrift of that suggestion. As his telephone calls show, there was contraband in his car, but not because someone else put it there.

It is not enough to say, as defendant does, that Markham had a "continuous pattern of conducting illegal searches and searches after improperly seizing vehicle keys," Dft.'s Br., dkt. #2, at 6, when nothing in the record supports this statement, including the investigatory reports of her alleged misconduct. Defendant says that her unreliability is shown by her statement in her report that "a very small amount of marijuana" was found in defendant's van at the time of the arrest, when other reports did not mention any marijuana. Dft.'s Reply Br., dkt. #9-1 (11-cv-742). This discrepancy hardly shows her unreliability, particularly when it is undisputed that she recovered two small baggies of marijuana from one of the passengers, who had hidden them in his socks.

At this stage of the proceedings, the burden is on defendant to 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). It is not enough simply to argue that an investigation *might* have turned up helpful information had counsel undertaken one. Defendant has not shown that the police found evidence of the crack cocaine in the armrest of the Lincoln until September 17, 2008, when they searched the car pursuant to a warrant issued by a state judge.

Under Strickland, defense counsel are presumed "to have rendered adequate assistance and to have made significant decisions in the exercise of [their] reasonable profession judgment," United States v. Traeger, 289 F.3d 461, 470 (7th Cir. 2002), "unless the defendant presents evidence rebutting that presumption." Id. at 472 (citing Strickland. 466 U.S. at 689-90). Defendant has adduced no evidence to rebut this presumption.

Defendant's second claim of ineffectiveness, that his counsel failed to argue for a downward departure from his criminal history category, hardly warrants mention. Counsel's two sentencing briefs and the character letter he submitted to the court before sentencing show that he argued vigorously for a sentence below the guidelines, both in writing in advance of sentencing and at the sentencing itself for a sentence below the guidelines. He took the position that defendant's criminal history category was overstated, warranting a reduction in his criminal history category, and that the disparities between the sentences for

crack and powder cocaine warranted another reduction in his sentence. Defendant was the beneficiary of that argument: he received a sentence that was 22 months below the guideline sentence.

Defendant maintains that counsel was ineffective because he did not point out to the court its authority to reduce the sentence if it were persuaded that the criminal history category overstates the likelihood that defendant will continue to commit crimes. It was unnecessary for counsel to remind the court of this authority, when it is well known to every sentencing judge. Defendant did not get a reduction in his criminal history category because he did not persuade me that his criminal history score overstated his likelihood of reoffending. Defendant had 22 criminal history points, nine more than required for Criminal History Category VI. He would have been in the highest category even if he had not been classified as a career offender. It is true that many of his crimes were for relatively minor offenses, such as driving without a license, but defendant's overall criminal history demonstrated a pattern of continued disregard for laws, probation restrictions and the rights of others.

Defendant asserts that counsel should have challenged the probation officer's decision to classify him as a career offender because two of the crimes on which the officer relied were counted erroneously. He says they should have been treated as one because he was sentenced for both on the same day and, in that situation, U.S.S.G. § 4A1.2(a)(2)(B)

prescribes treating the two crimes as one offense for the purpose of computing a defendant's criminal history. Defendant is misreading this provision. Subsection (a)(2)(B) directs the sentencing court to treat prior sentences as a single sentence if they are imposed on the same day *only* if the sentences were imposed for offenses that were not separated by an intervening arrest. The two offenses defendant is challenging were committed on two separate occasions and separated by an intervening arrest. Defendant was arrested on February 25, 2000 for the first of the two offenses and he was not arrested until September 22, 2000 for the second offense. Presentence rep., dkt. #81, ¶ ¶ 48 & 51. The provisions of § 4A1.2(a)(2)(B) did not apply to the 2000 offenses.

Even if the provisions of the guideline did apply to defendant and the two offenses had to be treated as one for sentencing purposes, defendant would still be a career offender under the guidelines. He has a third controlled substance offense that would count as one of the two controlled substance offenses or crimes of violence required for career offender status. U.S.S.G. § 4B1.1.

B. Denial of Due Process

Defendant asserts two grounds for his claim that he was denied due process by the court. First, he says, he was denied due process (and his Sixth Amendment right to confrontation of the witnesses against him) when the magistrate judge found that the

probation hold on defendant was valid, without hearing directly from the probation agent, and after limiting defense counsel to five minutes of cross examination of Officer Rortvedt. Second, he contends, the court denied him due process by conducting an ex parte review of the records of the investigation of Officer Markham.

The claim raises an interesting procedural question. Ordinarily, a defendant cannot challenge his conviction or sentence in a post conviction motion on a claim that he could have raised on direct appeal but did not. Defendant did not raise his due process and confrontation claims on direct appeal, but he could not have done so because he waived his right to appeal in his plea agreement. The question is whether he should be prohibited from raising these claims in his post conviction motion because he gave up the right to appeal knowingly and voluntarily and, having done so, cannot avoid the prohibition against raising issues in a post conviction motion that he could have raised on direct appeal. (He does not argue that his waiver was forced upon him or that he did not know what he was doing when he agreed to it. Also, his waiver does not prevent him from raising his claims of ineffectiveness of counsel. Those claims could not have been raised on direct appeal because they rest on facts that are not part of the trial record.)

Although such result may seem a logical consequence of the waiver of appeal, it would not be fair to impose it on defendant when the record does not show that this aspect of his waiver was ever explained to him. In any event, the issue is theoretical because his claim

fails on the merits.

The magistrate judge did not deny defendant due process when he ruled that the state probation officer need not be present in person for the evidentiary hearing; he heard defendant's arguments and the witnesses he called and he gave defendant an opportunity to show why he should have had the officer present to testify. Defendant did not present any compelling reason for the officer's presence or explain why additional question of Det. Rortvedt would have helped his claim. The probation officer needed nothing more than reasonable suspicion to support a probation hold; he had considerably more than reasonable suspicion from the information that Rortvedt provided of defendant's actual sales of crack cocaine.

Defendant's due process claim against the court is no more successful. It was not a violation of defendant's rights for the court to undertake an in chambers review of non-public investigative reports to search for information that might tend to show that defendant was not guilty of the federal offense. The investigation of Markham was not undertaken in connection with defendant's prosecution and the results were not public at the time. The only way to handle the report was to read it in chambers to determine whether it might contain information helpful to the defense. United States v. Phillips, 854 F.2d 273, 277 (7th Cir. 1988) ("Generally the decisions whether to conduct an *in camera* review of government files in appropriate cases, whether to require discovery of materials contained

therein, and in what form such materials should be produced are committed to the sound discretion of the district judge.") (citing United States v. Valona, 834 F.2d 1334, 1441 (7th Cir. 1987)).

C. Summary

Defendant has not made a sufficient showing of constitutional defects in his conviction and sentence to require the holding of an evidentiary hearing. His motion for post conviction relief will be denied for his failure to show that he has any entitlement to such relief.

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). 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 Vincent A. Lowe's motion for post conviction relief is DENIED for his failure to show that his conviction and sentence are constitutionally defective in any respect. FURTHER, IT IS ORDERED that no certificate of appealability shall issue.

Entered this 21st day of February, 2012.

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