IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL STARK,

Defendant.

OPINION AND ORDER

11-cv-770-bbc
09-cr-114-bbc

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Defendant Michael Stark has filed a post conviction motion under 28 U.S.C. § 2255, contending that his sentence is unconstitutional right in two respects: (1) he was denied the effective assistance of counsel when his lawyer failed to advise him that if he challenged either the drug quantities attributed to him in the presentence report or his role in the offense, he might lose the reduction in his offense level for acceptance of responsibility and (2) the government has failed to honor the terms of the plea agreement. Defendant alleges that the United States Attorney promised to move for a reduction in his sentence if he provided substantial assistance to the government but failed to file such a motion, despite the fact that defendant gave information to law enforcement.

The motion will be denied. Although defendant has submitted an affidavit in which he avers that his trial counsel did not tell him he was putting at risk the three-level downward adjustment for acceptance of responsibility if he objected to the drug amounts or his role in the offense, he has not explained why he did not learn of the risk from reading of the addendum to the presentence report or from the response filed to his objections. As for defendant's claim that the government has breached its plea agreement, defendant has not shown that the government failed to fulfill its promises to him.

RECORD FACTS

Defendant Michael Stark was charged by indictment on August 6, 2009, with two counts of unlawful distribution and possession with intent to distribute methamphetamine. He retained counsel, negotiated a plea agreement with the government and entered a plea of guilty to count 2 of the indictment on November 6, 2009.

A presentence report was prepared in advance of sentencing. The author determined that defendant was a manager or supervisor in the criminal activity under U.S.S.G. § 3B1.1 and recommended a two-level increase in his offense level. Dkt. #35 at 8. She estimated defendant's drug quantity as at least 1.5 kilograms but less than 5 kilograms of methamphetamine. Id. at 7.

Defendant filed objections to the presentence report, disputing the estimates of drug

quantity and denying that he was a manager or supervisor. Dkt. #41. The government responded to the objections, saying that it would be prepared to support the probation officer's determination of defendant's role in the offense and her estimate of drug amounts. Dkt. #54 at 3. It identified the witnesses it would call and explained what each would say on the stand. Id. at 1-2. It concluded by saying that "if the Court determines that the defendant has falsely denied or frivolously contested relevant conduct," it would take the position that defendant has not acted in a manner consistent with accepting responsibility and it would argue to the court that he should be denied the reduction for acceptance. Id. at 3.

The probation officer filed an addendum to her report, summarizing defendant's objections and the government's response. Dkt. #52 at 3. She stated that the probation office would not be recommending an adjustment for acceptance of responsibility because defendant was denying responsibility for any quantity of methamphetamine not located at his residence. Id.

Defendant was sentenced on February 5, 2010. Defendant's counsel argued defendant's objections to the probation officer's estimated drug quantities, as well as to her recommendation that he receive a two-level upward adjustment for role in the offense. The government put on witnesses supporting the recommended quantity and the role defendant played in the criminal activity. I found that defendant had contested these matters

frivolously and concluded that he was not eligible for an adjustment for acceptance of responsibility. Without this three-level reduction, defendant's adjustment offense level was 36. With his criminal history category of III, his guideline range was 235 to 293 months. He was sentenced to a term of 168 months, which happened to equal the bottom of the guideline range that would have applied had he received an adjustment for acceptance of responsibility (168-210 months).

On direct appeal, defendant challenged the finding that he was a manager or supervisor in the criminal activity. The Court of Appeals for the Seventh Circuit rejected the argument in an unpublished order released on August 10, 2010.

Defendant filed this motion for post conviction relief on November 14, 2011. It is timely under the "mailbox rule" because it was put into the mail at the prison on November 5, 2011. Rule 3(d) of the Rules Governing Section 2255 Cases; Houston v. Lack, 487 U.S. 266 (1988), extended to pro se petitions for writs of habeas corpus by Jones v. Bertrand, 171 F.3d 499, 500-02 (7th Cir. 1999).

OPINION

Defendant's first contention is that his attorney did not warn him that he might be denied a three-level reduction in his sentence if he contested the drug amounts or his role in the offense. To succeed on a claim of ineffective assistance of counsel, 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)). He has supported this contention with an affidavit, as he is required to do. Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002) (court may deny defendant's motion when defendant has not provided any evidence of ineffectiveness, such as an affidavit from defendant or his counsel, supporting his version of counsel's conduct); see also Fuller v. United States, 398 F.3d 644, 650 (7th Cir. 2005) (same).

In his affidavit, defendant says only that his attorney did not inform him that he could lose the three-point reduction for acceptance of responsibility if he challenged drug quantity and relevant conduct. He does not say when or where this conversation occurred or exactly what his counsel told him. Even if he had fleshed out his version of events in his affidavit, he has not explained how he could have remained oblivious to the risk he was taking when both the probation officer and the Assistant United States Attorney warned him of it.

Defendant does not deny having read the warnings. Instead, he argues that they do not "affirmatively show that [his] *counsel* warned him that he could lose his three point reduction, only that documents before the Court spoke of such things." Dft.'s Reply Br., dkt. #3, at 2 (emphasis in original). To the extent he is arguing that it was ineffective representation when his counsel failed to discuss these matters with him, even if defendant knew of them from other sources, he is correct. A lawyer has an obligation to discuss such matters with his client. However, the lawyer's ineffectiveness would not be prejudicial to the client who learned of the risk in some other way. Defendant does not deny that he learned of the risk he was taking when he read the addendum to the presentence report and the government's response to his objections to the recommendations in that report. He has failed to show that he could meet both prongs of the Strickland showing, so his motion will be denied as to his first claim.

Defendant's second claim cannot go forward because he has no evidence that the government did not perform its part of the plea bargain. He argues that the government's agreement was that if he provided helpful information to the government, it would file a motion for a downward reduction of his sentence under Fed. R. Crim. P. 35(b). He maintains that he carried out his part of the bargain and that the government should be held to its promise.

Defendant misunderstands the terms of the agreement that he reached with the

government. It is true that the government made him a promise to move for reduction of his sentence if he cooperated and provided substantial assistance to the government, but defendant has not made any showing that the cooperation he provided was of substantial assistance. If he looks at his agreement carefully, he will see not only that the promise was only for *substantial* assistance but that the government hedged its promise by stating that "[t]he decision 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." In other words, defendant agreed to an arrangement in which the United States Attorney would have the sole discretion to decide whether the assistance he provided was substantial. Having done so, he cannot ask the court to overturn his sentence on the ground that the government breached the plea agreement. In that agreement, he gave up any right he might have had to ask the court to evaluate the extent and helpfulness of his assistance. United States v. Burrell, 963 F.2d 976, 985 (7th Cir. 1972) (plea agreement reserving "sole discretion" to move for reduction of defendant's sentence if he provided substantial assistance was not enforceable promise); United States v. Artley, 439 F.3d 813, 824-25 (7th Cir. 2007). For the same reason, he cannot ask the court to order the government to move for a reduction of his sentence under Rule 35(b). Only the government has the right under the agreement to determine whether defendant's assistance was substantial.

In summary, I conclude that defendant has not shown that he is entitled to any post

conviction relief based on the alleged denial of his constitutional right to the effective assistance of counsel or the government's failure to seek a reduction of his sentence under Rule 35(b) for substantial assistance.

ORDER

IT IS ORDERED that defendant Michael Stark's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 4th day of January, 2012.

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