IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTOPHER C. BELL,

Defendant.

ORDER

12-cv-275-bbc
09-cr-19-bbc

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Defendant's counsel has filed a request on defendant's behalf for a certificate of appealability from the December 7, 2012 order denying defendant's motion for post conviction relief under 28 U.S.C. § 2255. The motion will be denied.

A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make this showing, a defendant must "sho[w] 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.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

Defendant's post conviction motion was based on the alleged ineffectiveness of his

appointed trial counsel, Alan Habermehl. The issue was solely one of credibility: were defendant's allegations of Habermehl's ineffectiveness more believable or less believable than Habermehl's denials of ineffectiveness?

Defendant alleged that Habermehl urged him to go to trial rather than plead guilty because the evidence against defendant was so thin, that Habermehl never told him the advantages of pleading guilty and that he never discussed the sentencing guidelines with defendant. He testified to this effect at the evidentiary hearing held on his post conviction motion. For his part, Habemehl testified that he never urged defendant to go to trial and would not have done so when the government's case against defendant was as strong as it was. He testified as well that he reviewed the guidelines with defendant, bringing the guidelines manual with him to the jail so that defendant could read for himself the applicable provisions of the guidelines, and that he explained the benefits of pleading guilty.

An evidentiary hearing in this case was necessary because resolution of defendant's motion turned on disputed matters of fact, but this does not mean that reasonable jurists would reach different conclusions about the outcome of the motion. Habermehl's testimony was more believable than defendant's, for two reasons. First, defendant was shown to have a history of not telling the truth and second, Habermehl's testimony was more consistent with reality and good sense.

Two examples of defendant's lack of credibility will suffice. Shortly after his arrest in this case, he gave a statement to the FBI in the hope that he would not be prosecuted for drug dealing if he provided information about drug dealing in Rock County, Wisconsin. (He

had reason to believe that this might be true because he had provided information to law enforcement in the past and had been rewarded with sentencing reductions.) At his sentencing in this case, he objected to the drug quantity attributed to him, which was based in part on the information he had provided to the FBI. Through his counsel, he maintained that the information he had given was not true and should not be used to increase his base offense level. Sentencing Trans., dkt. #122 (case no. 09-cr-19-bbc), at 4. Whichever way the conflict was resolved, the result would be a determination that defendant lied when he thought it was to his advantage. (After hearing evidence at the sentencing hearing from one of the agents who took the statement, I found that defendant had been telling the truth when he admitted to large scale drug dealing and that he was not telling the truth when he denied the drug dealing that contributed to the significant increase in his base offense level. Id. at 54.)

Second, as the jury found, defendant lied during his criminal trial when he testified that he gave a confidential informant diet pills and not crack cocaine. This was not a close question, as a review of the trial transcript will confirm. Defendant had been recorded on tape as having told a confidential informant during a transaction that he had "the best dope in the Midwest." At his trial, he testified that in prison, inmates from the Midwest refer to diet pills as "dope" and never use the term to refer to crack cocaine.

On the other hand, Habermehl's testimony was inherently logical. When he said that he would not have urged defendant to go to trial in light of the evidence against him, that made sense. After all, defendant had engaged in a drug deal under police surveillance and

his remarks in connection with the deal, such as "it's be the best dope in the Midwest," had been recorded on audiotape. Moreover, as Habermehl explained at the post conviction hearing, while he was representing defendant, his partner had had to leave the practice of law suddenly, leaving Habermehl with responsibility for most of his partner's abandoned cases. In that circumstance, he had no possible incentive to stretch out defendant's case and go to trial under circumstances in which no reputable lawyer would have recommended such a course.

The record of the case shows that Habermehl's representation of plaintiff was anything but lackadaisical: he filed extensive motions in this case, including an unsuccessful one to suppress the evidence of the drug deal at issue and he represented defendant vigorously at the evidentiary hearing on the motion. Defendant displayed no concerns about the representation he was getting until he was convicted. Earlier, he had assured the magistrate judge that he was comfortable with Habermehl. Suppr. Hrg. Trans., dkt. #29 (case no. 09-cr-19-bbc), at 46. Such assurances do not support his assertion that Habermehl never talked to him about the sentencing guidelines. Defendant was no newcomer to the federal system; as noted, he had been given guideline sentence reductions for assistance to the government in the past. If anyone would have been aware of his counsel's failure to go over the guidelines with him, it was he.

In short, defendant's allegations of the ineffectiveness of his trial counsel are internally inconsistent and inherently unbelievable. I conclude therefore that no reasonable jurist would believe that defendant's motion has any merit.

Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

ORDER

IT IS ORDERED that no certificate of appealability will issue in this case.

Entered this 26th day of December, 2012.

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