

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

-----  
UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

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

v.

CHRISTOPHER C. BELL,

Defendant.  
-----

Defendant Christopher C. Bell has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that his conviction and sentence are illegal for a variety of reasons, including the constitutional ineffectiveness of the different counsel who represented him at various stages of his criminal proceeding and appeal. The government acknowledges that defendant's claim of ineffectiveness raises some issues that cannot be resolved without an evidentiary hearing, but it contends that the other claims are without merit and can be dismissed without a hearing.

The government is correct; defendant has no viable claim of ineffective assistance as it relates to the following claims: trial counsel's failure to move to suppress defendant's allegedly coerced confession to law enforcement agents following his arrest; trial counsel's failure to tell defendant that his confession could be used as relevant conduct at sentencing;

trial counsel's failure to consult with him about the consequences of testifying; sentencing counsel's failure to call witnesses at sentencing to rebut the testimony of FBI Agent Brookheiser; and appellate counsel's failure to provide effective assistance. In addition, defendant has no viable claim of a violation of his Sixth Amendment right to counsel, of prosecutorial misconduct or of a violation of the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). An evidentiary hearing will be scheduled on defendant's claims that his counsel was ineffective in the following respects: failing to advise him properly about pleading guilty, failing to tell him of possible plea options and failing to explain the Sentencing Guidelines.

## BACKGROUND

Defendant was charged in February 2009 with one count of distributing five grams or more of crack cocaine and one count of possession with intent to distribute five grams or more of crack cocaine. The government dismissed the possession charge (count two) before the trial. Defendant chose to go to trial on count one and was found guilty of distributing 5.6 grams of crack cocaine to Brian Dorenzo on one occasion. He was sentenced on November 20, 2009 to 292 months, the bottom of the advisory guideline range. On the same day, the term of supervised release he was serving on previous charges was revoked and he was sentenced to a term of imprisonment of 60 months to be served concurrently with his new sentence.

Defendant appealed from his conviction, arguing that the district court had abused its discretion in admitting certain evidence, that the government had engaged prosecutorial misconduct by using improper propensity arguments during its closing arguments and that the Fair Sentencing Act applied retroactively to his sentence. The court of appeals rejected all of these arguments. Defendant petitioned for certiorari; his petition was denied on April 18, 2011. Defendant filed this petition on April 17, 2012, one day before the expiration of the time for filing.

The case against defendant rested in large part on testimony from Brian Dorenzo, a former federal inmate living at the same halfway house in which defendant was staying. According to Dorenzo, defendant approached him about selling crack cocaine. Dorenzo took the information to law enforcement and became an informant. He arranged a controlled purchase from defendant that took place on January 13, 2009 with agents watching (and listening to the audio recorder Dorenzo was wearing.). Dorenzo went back to the same location the next day and paid defendant for the cocaine he had been fronted the day before, again with agents watching. Defendant was not arrested at this time.

About a month later, Beloit, Wisconsin police officers following defendant signaled him to stop for a traffic violation. Before he pulled over, they observed his teenaged son discarding crack cocaine from the vehicle before it came to a stop. Defendant was taken into custody and held for several hours awaiting the arrival of two agents from the Federal Bureau of Investigation and one from the Drug Enforcement Agency, who wanted to question him. As soon as they arrived and informed defendant of his Miranda rights, he started talking to

them about his drug sources and the quantities he had been buying and selling in the hope that he would receive credit for the information, as he had in the past.

Before trial, defendant filed a motion in limine to bar the government from using these statements on the ground that they were evidence of other acts and should be excluded because they merely showed his propensity to sell drugs. Dkt. #9. The motion was granted. Dkt. #46.

At trial, the government put into evidence an audio recording of the conversation between defendant and Dorenzo on January 13, 2009, with defendant claiming to have “the best dope in the Midwest.” Five law enforcement agents testified that they had watched defendant’s meeting with Dorenzo on January 13, when defendant fronted the crack, and the second meeting on January 14, when Dorenzo paid defendant. Defendant testified in his own behalf, denying that he had ever delivered crack cocaine to Dorenzo, but instead had met him to lend him \$200 and give him some diet pills. The government cross examined him about a letter he had written to Reggie Booker, a former resident at the halfway house, asking Booker to testify that defendant had been in the habit of lending money to other residents and using weight loss pills. At the top of the letter, defendant had instructed Booker to get rid of the letter in the toilet. On rebuttal, the government was allowed to call Booker to testify about the letter and about other matters, including defendant’s solicitation of Booker to cook crack cocaine for him.

Although the government was not allowed to put in any evidence at trial of defendant’s sales and purchases of crack other than the transaction with Dorenzo, after

defendant was convicted, the probation office used defendant's statements to the FBI and DEA to calculate the amount of crack and powder cocaine for which he was responsible, which it determined was the marijuana equivalent of 6,711 kilograms. Defendant had told the agents he purchased about 269 grams of crack from Antonio "Gambino" Rodriguez, about 255 grams of powder cocaine from someone named Roby and about 64 grams of crack from someone named Junior. To support the validity of these amounts and to show that defendant disclosed them without coercion, the government called FBI Agent Todd Brookheiser, who had participated in the post arrest interview with defendant. Brookheiser testified that defendant had been read his Miranda rights, said that he understood them, signed the Advice of Rights form and never asked for counsel. In addition to the amounts that defendant told the agents he had purchased, he also described sales that he had made. (These sales were not factored into the amount used as relevant conduct to avoid double counting.) Defendant told the agents he could give them helpful information, but much of what he gave them was already known to the agents or consisted of only the first names of alleged sources.

## OPINION

### A. Ineffectiveness of Counsel

Defendant's claim of ineffectiveness of his trial counsel has several parts to it. He alleges that counsel failed to give him effective representation in the following respects: (1) not filing a motion to suppress his allegedly coerced confession; (2) not advising him

properly about going to trial or entering a plea; (3) not telling him of possible plea options; (4) not telling him that his confession could be used as evidence of relevant conduct to increase his sentence; (5) not explaining the guidelines; and (6) not consulting properly with him about the consequences of testifying. Some of these claims overlap. For example, defendant's claim that counsel failed to file a motion to suppress is related to his claim that counsel failed to tell him that the confession could be used against him at sentencing. His claim that counsel did not explain the guidelines is part and parcel of his claim that counsel did not advise him properly about going to trial or entering a plea.

The legal standard for establishing ineffectiveness is set out in Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Under that standard, 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)).

The test for ineffectiveness has two components. The defendant must show both that counsel's representation fell below an objective standard of reasonableness, id. at 688, and that there exists a reasonable probability that the result of the proceeding would have been different had it not been for counsel's unprofessional errors. Strickland, 466 U.S. at 694. In other words, proving a lawyer ineffective requires a showing that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the

Sixth Amendment.” Id. at 687. Merely showing that counsel erred in a few specific respects may not be enough to show incompetence; counsel’s work must be evaluated as a whole. Id. at 690; see also Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005) (“it is the overall deficient performance, rather than a specific failing, that constitutes” ineffectiveness). Finally, even if a defendant can prove that his counsel was ineffective, he still must show a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

With Strickland’s principles in mind, I turn to defendant’s claims of ineffectiveness of his trial counsel.

1. Counsel’s failure to move to suppress defendant’s coerced confession

Defendant contends that he was coerced into confessing his drug deals after he was arrested, taken into custody, not allowed to call a lawyer and not given adequate Miranda warnings. He argues that his trial counsel should have moved to suppress his statements. In fact, counsel did file a motion to suppress the statements, but based the motion on the alleged illegality of defendant’s arrest. Counsel argued that any statements defendant gave after the arrest should be suppressed as resulting from the illegal arrest. Dkt. #9. This motion was denied because the evidence showed that the arrest was supported by probable cause. Dkt. #46.

Counsel’s failure to move to suppress defendant’s statements on the separate ground

that they had been elicited in violation of defendant's Miranda rights might have been an oversight (or a clear-eyed analysis that such a motion would not succeed), but the failure did not affect defendant's rights at trial. Before trial, defendant moved to preclude the government from putting into evidence his post arrest statements to law enforcement agents, on the ground that the statements would be evidence of other acts that were irrelevant to the question whether defendant sold drugs to Dorenzo. Trans., Final Hrg., Dkt. #120, at 8. This motion was granted.

However, defendant contends that he was prejudiced by the confession because the court relied on it in calculating his relevant conduct. I will take this contention up in a different section. Not only does it raise different issues, but the allegations relate to a different lawyer who was appointed to represent defendant at sentencing after defendant told the court after the trial that he could not work with his trial counsel any longer.

2, 3 & 5. Trial counsel's alleged failure to advise defendant properly about pleading guilty, about possible plea options and about the effect of the guidelines

The government concedes that these claims cannot be decided without an evidentiary hearing. I will appoint counsel to represent defendant and will schedule a prompt hearing.

4. Counsel's failure to consult properly with defendant about the consequences of testifying

The government argues that this claim does not require an evidentiary hearing. I agree. Defendant is arguing that counsel should have warned him about the consequences



of giving false testimony at trial. Even if counsel did not warn defendant that if he testified falsely he stood a good chance of receiving a two-level upward adjustment for obstruction of justice if the judge found that defendant that the false testimony was willful and relevant, United States v. Dunnigan, 507 U.S. 87, 94 (1993), counsel's omission would not constitute deficient performance by counsel and it would not have caused defendant any prejudice. Counsel is not under an obligation to tell his client not to lie. United States v. Delgado, 936 F.2d 303, 310 (7th Cir. 1991).

7. Counsel's alleged failure to tell defendant that his confession could be used as relevant conduct

Even if I assume that defendant is correct when he says that counsel never told him that his post arrest statements to the FBI and DEA could be used to calculate his relevant conduct for sentencing purposes, defendant has not shown how such a failure might have prejudiced him. It would make no sense for him to argue that counsel should have stopped him from making the statements because he made those statements well before counsel was appointed.

He argues in his reply brief that "if he knew that this drug amount was going to be used against him surely he would have plead guilty and entered into plea negotiations with the government." Dft.'s Reply Br., dkt. #18, at 4. This is a strange argument because the statements would have been used against him at sentencing whether he was found guilty on his plea or after a jury trial. Why would it have made him more likely to plead and not just

give him just one more reason to roll the dice and go to trial? If he prevailed, he would not face any sentence at all; if he lost, he would be no worse off in this respect than if he had pleaded guilty. I will deny his motion as to this claim.

#### B. Sentencing Counsel's Alleged Ineffectiveness

Defendant's complaint about his sentencing counsel is that he failed to persuade the court not to consider defendant's post arrest statements when sentencing him. Defendant says that counsel was ineffective in two respects: he did not challenge the truthfulness of defendant's statements to law enforcement and he did not put in evidence to rebut the government's showing that defendant was read his Miranda rights before he told the agents about his drug dealing. In other words, defendant is arguing, first, that his statements were mere puffery and not meant to be truthful, so that it was error for the probation office and the court to rely on them, and alternatively, that whether the statements were true or not, they should not have been used because they were obtained from him in violation of his Miranda rights or by coercion. (Although defendant uses the term coercion, he is not asserting that he was forced to make the statements; he is arguing that the agents misled him into making the statements by letting him think that they viewed him as an informant rather than as a potential defendant and telling him he would be on the streets right away if he gave them good information. Dft.'s Reply Br., dkt. #18, at 6 ("The statement that [defendant] was coerced to give, he was under the impression that he was talking to the agent's on an informant level.")).

Starting with the first argument, that his counsel should have challenged the credibility of his statements, defendant says that none of the statements he made to law enforcement agents after his arrest were truthful and that counsel should have made this clear to the court. In his telling, he made the statements only because he was trying to lead the agents into thinking he had more valuable information than he really did, so that they would release him from custody. To support his view of the statements, he cites Agent Brookheiser's testimony at sentencing that defendant's information did not interest Brookheiser enough to undertake any further investigation.

Counsel's decision not to challenge the truthfulness of the statements was a realistic one. Despite defendant's desire to distance himself from those statements, he is stuck with them and he has shown no reason for finding them unbelievable. Certainly, the fact that Brookheiser did not follow them up is not a reason; Brookheiser testified that much of the information from defendant jibed with what they already knew about drug activity in the area and some of it was too sketchy to constitute leads.

Defendant wants the court to believe that at a time when he knew he was facing a long term of imprisonment he would give false information and bad leads to the FBI and DEA so that they would persuade the United States Attorney that he should not be prosecuted but left on the street to solicit more information. To state the proposition is to expose its senselessness.

Defendant slips in an argument that it is improper for a court to rely on a defendant's own statements when calculating the drug quantity properly attributable to him, but this

argument cannot succeed because he did not raise it on direct appeal and he has shown no good cause for not doing so or any prejudice that will result if it is not addressed. A § 2255 motion cannot take the place of a direct appeal. Prewitt, 83 F.3d at 816 (“An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise the claims on direct appeal and actual *prejudice* from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice.”) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)); see also Galbraith v. United States, 313 F.3d 1001, 1006 (7th Cir. 2002).

Even if defendant’s argument were properly raised for the first time in this motion, defendant is operating on a misconception. It might be improper for a sentencing court to rely on statements made by a defendant in circumstances in which he is exaggerating his ability to secure drugs in an effort to promote more sales or make himself look like a more important player than he actually is, but that is not defendant’s situation. Defendant was talking to law enforcement agents; if anything, he had an incentive to downplay the amount of drugs unless, as he says, he thought he had a chance to avoid prosecution, in which case he had an incentive to give the agents accurate information to show that he was a reliable informant. Where it is reasonable to believe the statements of a defendant about quantities, courts will rely on the statements to determine relevant conduct. E.g., United States v. Corral, 324 F.3d 866, 871 (7th Cir. 2003) (reliance on statements made by defendant in tape recorded negotiations with source; United States v. Spiller, 261 F.3d 683, 691 (7th Cir. 2001) (reliance on reported statements in drug ledgers). See also United States v. Johnson,

342 F.3d 731, 734 (7th Cir. 2003) (“no one was more qualified than [the dealer] himself to put a number on the amounts of cocaine he was purchasing and re-selling”) (quoting United States v. Contreras, 249 F.3d 595, 602 (7th Cir. 2001)).

Defendant’s other argument is that his sentencing counsel was ineffective because he did not call witnesses to show that defendant had been questioned without being given his Miranda warnings and had been misled and tricked into thinking that he could tell the agents about his drug dealing and walk away without prosecution. At sentencing, I determined from Brookheiser’s testimony and the absence of any contrary evidence from defendant that the statements he made to the FBI and DEA after his arrest were made voluntarily and after the agents had read defendant his rights under Miranda. Defendant calls Brookheiser’s testimony about the Miranda rights unreliable and argues that counsel should have called as witnesses the Beloit police officer who denied his request to make a phone call and the two other federal agents who were present for his interview, but he does not say why he thinks that these witnesses would support his position. In the absence of such information, I will deny this claim in its entirety.

### C. Appellate Counsel’s Alleged Ineffectiveness

Defendant alleges in his motion, dkt. #1 at 7, that his appellate counsel deprived him of his right to the effective assistance of counsel. He makes no allegations to support this claim and, in fact, never refers to it again, either in his memorandum in support of his motion, dkt. #2, or his reply brief, dkt. #18.

#### D. Substitution of Counsel

Defendant contends that the court did not conduct a proper inquiry into his “implicit” request for substitution of counsel and because of this, he was prejudiced by having to proceed with ineffective counsel. The government argues, correctly, that this ground for relief is procedurally barred because defendant did not raise it on appeal. As I have noted, the failure to take a direct appeal of a claim can bar a defendant from raising that same claim in a § 2255.

Defendant has not explained why he did not raise this issue on direct appeal, other than to say that “Movant appeal counsel was ineffective for failing to bring this claim up on direct appeal.” Dft.’s Reply Br., dkt. #18, at 18. This is not sufficient to show good cause to excuse defendant’s failure to raise the issue, particularly when defendant has not even said that he asked his appellate counsel to do so.

Whether asked or not, appellate counsel had good reason not to raise the issue because there was no evidence to support it. In the letter that defendant wrote to the court about 11 days before trial, he complained that his counsel was not fully prepared for trial and he insisted that Brian Dorenzo should not be called at trial because the federal government never approved his use as an informant, in violation of the Attorney General’s guidelines. Dft.’s Ltr., dkt. #73. Defendant never moved for new counsel or even said he wanted a new lawyer, either in his letter or during the discussion with the court at the start of trial. Instead, he indicated that he and his counsel had some disagreements about the relevance of certain information, such as the government’s use of Dorenzo as a confidential informant, and that

counsel was not interviewing all of the witnesses that defendant wanted to call at trial.

Disputes between a defendant and his counsel are not unusual, particularly as the time for trial nears and the defendant becomes more concerned about the outcome. In the absence of a showing that the lawyer and his client have irreconcilable differences, courts are generally reluctant to grant a request for new counsel. In this case, there was no such showing and no explicit request for a change. I conclude that the motion must be denied.

#### E. Prosecutorial Misconduct

Defendant contends that the government failed to carry out its obligation under its “open file” policy to inform defendant’s counsel that Reggie Booker was an informant and that it violated policy by failing to obtain prior written approval to use Brian Dorenzo and Reggie Booker as confidential informants. As with his claim that the court failed to proactively appoint new counsel for him, defendant did not raise this claim on direct appeal, although he could have done so. Defendant has made no attempt to show that he had good cause for not raising the claim on direct appeal or how he might have been prejudiced by the government’s alleged violation.

#### F. Apprendi Argument

Defendant did not include in his motion any argument based on Apprendi v. New Jersey, 530 U.S. 466 (2000), but he argues in his brief that the holding applied in this case because the jury found only that defendant had distributed five grams or more of crack

cocaine, yet the court improperly took into consideration at sentencing 333 grams of crack, far more than the amount seized at the time of his arrest. Defendant is wrong. Appendi applies only if the sentence exceeds the statutory maximum sentence applicable to a defendant; it does not apply to changes in *guideline levels*. Defendant's sentence did not exceed the statutory maximum for his offense. Thus, this argument cannot succeed on the merits and, in addition, it is barred procedurally because defendant did not raise it on direct appeal and has not shown good cause or prejudice for his failure.

#### ORDER

IT IS ORDERED that defendant Christopher Bell's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED as to the following claims:

- He was denied the constitutionally effective assistance of counsel when his trial counsel failed to move to suppress his allegedly coerced confession to law enforcement agents following his arrest;
- He was denied the constitutionally effective assistance of counsel when his trial counsel failed to alert him to the consequences of testifying falsely;
- He was denied constitutionally effective assistance of counsel because neither his trial counsel nor his sentencing counsel told him that his confession could be used as relevant conduct in calculating his guidelines sentence;
- He was denied the constitutionally effective assistance of counsel by his sentencing counsel's failure to call witnesses at sentencing to rebut the



testimony of FBI Agent Brookheiser about defendant's post arrest statements;

- He was denied the constitutionally effective assistance of appellate counsel when his appellate counsel failed to appeal defendant's claim that the court had violated his Sixth Amendment right to counsel;
- His Sixth Amendment right to counsel was violated by the court's failure to grant his implicit request for new counsel just before the start of trial;
- The government was guilty of prosecutorial misconduct when it failed to inform defense counsel that Reggie Booker was an informant and when it failed to obtain prior written approval to use Brian Dorenzo and Reggie Booker as confidential informants; and
- His sentence violated the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000).

A ruling will be reserved on defendant's three remaining claims that he was denied the effective assistance of counsel because his counsel failed to advise him properly about pleading guilty, failed to tell him of possible plea options and failed to explain the guidelines. An evidentiary hearing will be scheduled on these claims once counsel has been appointed to

represent defendant.

Entered this 3d day of August, 2012.

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