IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

12-cv-28-bbc
08-cr-124-bbc,

v.

PHILLIP C. LATHROP,

Defendant.

- -

In August 2003, a fire did extensive damage to Player's Bar and Grill, a sports bar in Hayward, Wisconsin, owned by Phillip Lathrop. Five and a half years later, Lathrop was found guilty by a jury of one count of arson and four counts of mail fraud and sentenced to 84 months in prison. After appealing unsuccessfully to the Court of Appeals for the Seventh Circuit, which affirmed his conviction and sentence on March 2, 2011, and petitioning for a writ of certiorari, which the Supreme Court denied on October 11, 2011, defendant Lathrop filed this motion for post conviction relief on January 9, 2012.

Defendant raises six claims in his motion and amended motion. (1) The government engaged in misconduct when it knowingly used David Maki's perjured testimony at the trial.

(2) The government engaged in further misconduct when it withheld photographs taken of the crime scene that showed pictures of three boxes that Maki testified he had used to start the fire; these pictures would have shown that Maki was lying about how the fire started. (3) The government engaged in misconduct when it intimidated a defense witness, Jeff Campbell, who would have testified on behalf of the defense about conversations he had had with Maki to the effect that defendant had nothing to do with the fire. (4) Defendant's counsel was constitutionally ineffective when he failed to investigate the witnesses and allowed the government to use perjured testimony. (5) Defendant's counsel was ineffective in failing to move for dismissal of the indictment on the ground that it was based on perjured testimony. (6) Defendant's conviction was a miscarriage of justice because he is actually innocent.

Defendant's first, fourth and fifth claims will be dismissed because defendant either raised them on direct appeal or had the opportunity to do so. His second, third and sixth claims will be dismissed because he had an opportunity to raise them on direct appeal but failed to do so, which means that they are procedurally defaulted.

BACKGROUND

At defendant's trial, the government introduced evidence that David Maki, who did odd jobs for defendant, agreed to defendant's request to burn down his bar in return for

$5000 and some cocaine. Maki was to break into the bar, remove the tiki torches from the deck outside the bar and use them to start a fire in the building's attic. The idea was to suggest a break-in by careless burglars who negligently set off a fire. The plan went into effect in the early morning of August 16, 2003; Maki started a fire in the bar's attic, which burned for some time before firefighters arrived, and defendant later collected insurance for the damage. Maki remained silent about his involvement in the scheme until August 2007, when he went to the police to confess. He was a critical witness at the grand jury as well as at trial.

Maki was the only witness who testified to personal knowledge of defendant's plan to burn the bar, but the government introduced other evidence that supported Maki's testimony, including testimony by bar employees that the bar had been less successful in recent months, that defendant had listed the bar for sale for more than a year; that he had not paid his property taxes and seemed to be having other financial problems; that his insurance coverage was about to expire; and that he was having difficulty finding an affordable replacement insurance. The government also put in evidence of an attempted coverup for the fire, with a disgruntled customer as the supposed arsonist.

OPINION

1. Claims 1, 4 and 5

The Court of Appeals for the Seventh Circuit has made it explicit that a § 2255 motion is not intended to be a substitute for a direct appeal. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007). Unless the movant can show changed circumstances, the court will not reconsider any issue the movant raised on direct appeal. Id.

Defendant raised his ineffective assistance of counsel claims on direct appeal. "Changed circumstances" may include an intervening change in the law, but defendant has not cited any such change or any other circumstance that would give him a second chance to assert his claims of ineffectiveness of counsel. Defendant appears to concede that he cannot raise his two claims, 4 and 5, of ineffectiveness of counsel again because he does not even mention the claims in his reply brief. He is correct. He is barred from proceeding on those two claims because he raised them on direct appeal.

However, defendant argues that the court of appeals never "litigated" his first claim, that the government engaged in prosecutorial misconduct when it used perjured testimony from David Maki. He is wrong about this; the subject is discussed in the opinion. United States v. Lathrop, 634 F.3d 931, 940 (7th Cir. 2011) ("Lathrop first claims that the government acted improperly when it knowingly relied on perjured testimony proffered by Maki during its closing."). The court of appeals began its discussion by deciding whether

Maki did perjure himself, because if he had not, the government could not be held to have acted improperly in using his testimony. The court found that Maki did not commit perjury; therefore, the government did not act improperly in relying on his statements. Id.

Defendant devotes a good part of his reply brief, dkt. #7, to explaining what additional examples of prosecutorial misconduct he wants to raise in this proceeding, particularly Maki's alleged perjury about his employment relationship with defendant. That is not the way the law works. Plaintiff had one chance, and only one, to appeal the issue of prosecutorial misconduct. If at that time he did not raise every example of misconduct, whether by choice or by accident, he is barred from doing so now. Unless he can show a change in circumstances, which he has not done, he cannot proceed on his first claim, for prosecutorial misconduct, as a ground for post conviction relief.

2. Claims 2, 3 and 6

Section 2255 motions are not intended to serve as substitutes for direct appeal. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996). This means that if the defendant could have raised an issue on direct appeal, but chose not to, he is barred from raising that issue in a post conviction motion. The rule has two exceptions: the first applies if the movant can show that he has both good cause for his failure to raise the claim on direct appeal, and that he would suffer actual prejudice if he cannot raise the claim; the second

applies if the movant can show that a failure to raise the issue will result in a fundamental miscarriage of justice. Id. (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). See also Massaro v. United States, 538 U.S. 500, 504 (2003) (general rule is that claims not raised on direct appeal may not be raised on collateral review unless petitioner shows cause and prejudice). "Cause" requires a showing that something beyond the movant's control prevented him from raising the claim, United States v. Smith, 241 F.3d 546, 548 (7th Cir. 2001); "prejudice" requires a showing that the result of the trial would have been different without the error. Strickler v. Greene, 527 U.S. 263, 289 (1999).

Ineffective assistance of counsel on appeal can suffice for a showing of cause. Defendant contends that ineffective assistance accounts for his failure to raise claim 2, relating to the government's alleged misconduct in not producing certain photographs of the attic above the bar and in withholding impeachment evidence that would have been useful in cross examining David Maki. In support of his claim of ineffective assistance, he says only that he asked his attorney to raise the two issues.

In this circuit, a defendant alleging that his counsel failed to raise particular issues on appeal must submit a detailed and specific affidavit showing that he has actual proof of his allegation. Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002). Mere unsupported allegations are not enough. Id.; see also Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir. 1989). Defendant Lathrop has not submitted such an affidavit and

has not suggested that he would be able to prove that he made the request of counsel. He might do this by describing the conversation he had with counsel, when and where it took place and whether anyone else was present at the time who could confirm the substance of the conversation.

If I thought that defendant's contention had any chance of succeeding, I would give him an opportunity to file the necessary affidavit to try to establish cause, but the fact is that even if he could prove the cause prong by showing that his appellate counsel failed to provide constitutionally effective assistance, he would still have to show that he was prejudiced by his counsel's failure to argue these two issues. As to the photographs, he has not explained the basis for his claim that the government withheld critical pictures of the burned attic area that would have been favorable to him. He seems to be saying that he knows the photographs exist because they were used at an "examination under oath" four years before trial. It is not entirely clear, but he may be referring to an examination of him undertaken by the insurance company. Defendant has not submitted a copy of that examination and it is not part of the court record.

If I understand defendant's argument, it is that the withheld pictures would have shown intact boxes of clothing and decorations in the area in which the fire was allegedly set, thereby casting doubt on Maki's story of how he started the fire. Defendant says in his brief that "Investigator VanKueran found no traces of boxes of Holiday Decorations or children's

clothes in the area of the bar . . . [which] corroborates [defendant's] claim that the boxes were still located in the attic after the fire." Dft.'s Reply Br., dkt. #7, at 11.

The government denies that it concealed any photographs of the attic after the fire and points out that it introduced several photographs into evidence that showed the area in which the fire started. Even assuming for the purpose of argument that the government had concealed certain photographs, defendant has not explained how a picture of the boxes would have helped his case. If he is saying that other photographs (perhaps of a different area of the attic) would show the intact boxes, he does not explain how this would contradict the government's theory of the origin of the fire. If he thinks that the photographs would establish David Maki's unreliability, he is wrong. That subject was well plumbed by defense counsel, who explored many areas of inconsistency between Maki's story and the physical evidence.

Because that cross examination was so extensive, I am also not persuaded by defendant's suggestion that he was prejudiced by not having documents from the Hayward Police Department relating to Maki's previous work as a drug informant. In any event, defendant has not shown that "the government," that is, the United States Attorney, withheld documents from him that were in the possession of the federal government or that were prepared by state or local agencies working in conjunction with the federal government on a joint investigation. According to him, they were in the possession of the Hayward

Police Department, which is not a federal agency. He has not explained why in this case, the prosecutor should be held responsible for documents in the possession of a municipal police department. The documents were as readily available to him as to the prosecutor; after the trial, his new defense counsel was able to obtain them with no difficulty.

As I have noted, even if the prosecutor had some responsibility for the documents, defendant has not shown how the documents would have changed the outcome of the case. Defendant's counsel cross examined Maki thoroughly and attacked his credibility in many different ways: through his drug use, the different stories he told, his long wait until he confessed his involvement in the fire, the possibility that he started the fire on behalf of a disgruntled customer and the many inconsistencies between his version of how he started the fire and the physical evidence. It would not have come as any surprise to the jury that he had been untruthful in his role as a police informant for the Hayward police.

Defendant has not established that he can show cause for his failure to raise the issue of the government's alleged misconduct, which allegedly consisted of not producing all of the photographs of the attic and the reports from the Hayward Police Department (which he knew about before he took his appeal) or that he could prove that he was prejudiced by the failure, so he is barred from pursuing this claim for prosecutorial misconduct.

Defendant's claim 3 is that the government engaged in misconduct when it intimidated a defense witness, Jeff Campbell, who would have testified on behalf of the

defense about conversations that he had had with Maki to the effect that defendant had nothing to do with the fire. Defendant has introduced no proof of this alleged intimidation, such as an affidavit from Campbell. This alone is enough to make the claim untenable, but he has also failed to say anything about having good cause for failing to raise the claim on direct appeal or how he was prejudiced by the alleged misconduct.

Defendant's his last claim, 6, is that his conviction was a miscarriage of justice because he is actually innocent. This claim is an attack upon the sufficiency of the evidence that he could have raised on appeal. He has shown no cause for his failure to do so or any prejudice he would suffer if he is not allowed to raise it now. The evidence at trial *was* sufficient to find him guilty of the charges against him.

In summary, I conclude that defendant's post conviction motion must be dismissed because defendant raised claims 1, 4 and 5 on his direct appeal and is barred from raising them again on a motion for post conviction relief and because he could have raised his remaining claims, 2, 3 and 6, on direct appeal, but did not, thereby procedurally defaulting those claims.

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 Phillip C. Lathrop's motion for post conviction relief is DENIED. No certificate of appealability shall issue.

Entered this 9th day of April, 2012.

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