

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN L. LOREDO,

Defendant.

ORDER

10-cr-16-bbc

12-cv-291-bbc

Defendant Juan Loredó has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, asserting that he was denied the effective assistance of counsel because his attorney (1) either failed to negotiate a plea agreement or failed to present a plea agreement to defendant and (2) failed to file a motion for a judgment of acquittal based on the insufficiency of the evidence under Fed. R. Crim. P. 29.

Defendant's allegations regarding the plea offer are unclear. Defendant entered a plea of not guilty and was convicted after a trial. In his supporting facts, defendant states in full:

The Supreme Court ruled that when a defendant is not offered or the defendant's attorney does not negotiate a plea bargain for the defendant and instead causes the defendant to go to trial his counsel is ineffective as in the present case defendant was not offered a plea bargain.

Dkt. #1 at 5. From this statement, I cannot determine whether defendant is asserting that the government never made a plea offer; or the government made a plea offer and his attorney failed to inform him about the offer; or the government made a plea offer and his attorney gave him inadequate information and advice about that offer.

A defendant has no constitutional right to a plea offer from the government. Weatherford v. Bursey, 429 U.S. 545, 560-561 (1977). However, a defendant does have a Sixth Amendment right to effective assistance of counsel during the plea negotiation process. McMann v. Richardson, 397 U.S. 759, 771 (1970). To succeed on such a claim, 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).

Plaintiff suggests that he is filing his motion in light of recent Supreme Court cases regarding effective assistance of counsel in plea bargaining. In Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) the United States Supreme Court held that a defendant was denied effective assistance of counsel when the government sent a plea deal to his attorney but the attorney failed to communicate the offer to his client before it expired. In Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012), the court held that a defendant was denied effective assistance of counsel when his defense attorney received a formal plea offer but, relying on an unreasonable misunderstanding of the law, advised his client to reject the offer. It is not

clear how plaintiff's situation is similar to either of the situations in these two cases.

In addition, if defendant is to prevail on his motion, he must prove that he was prejudiced or harmed by defense counsel's ineffective assistance. Lafler, 132 S. Ct. at 1384-88. To meet the prejudice prong, defendant must demonstrate "a reasonable probability" that he would have accepted the plea offer if not for counsel's deficient performance and that he received a harsher sentence than he would have received under the plea bargain. For instance, in Lafler, the defendant alleged that he rejected the government's plea offer, stood trial, and received a harsher sentence as a result. Id.

Defendant's second claim is that he was denied effective assistance of counsel because his defense attorney failed to file a Rule 29 motion, arguing that the evidence was insufficient to support his conviction. This claim is without merit. In its May 11, 2011, order dismissing defendant's appeal, the court of appeals concluded that it would be frivolous for defendant's appellate counsel to argue that the evidence was insufficient to sustain his conviction. Even if defendant's trial counsel had filed a Rule 29 motion at the end of the trial, that motion would have been denied and the denial would have been upheld on appeal, as it in fact was. Therefore, it is not clear how defendant could establish that he was harmed by defense counsel's failure to file a Rule 29 motion.

In light of the lack of clarity in his first ground for relief and the defects in his second ground, I will give plaintiff a chance to amend his motion. In particular, defendant should

describe in clear, simple terms what happened with respect to any plea bargains that the government offered.

ORDER

IT IS ORDERED that defendant Juan L. Loreda may have until May 14, 2012 to amend his claim for post conviction relief under 28 U.S.C. § 2255.

Entered this 30th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge