IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ARTHUR CONNER,

Defendant.

OPINION AND ORDER

12-cv-8-bbc
07-cr-31-bbc

- -

Defendant Arthur Conner filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel at trial. He asserts that his counsel was ineffective in four respects: (1) failing to present an adequate defense against the charge of drug distribution; (2) failing to impeach the government's witness with his prior inconsistent statements; (3) failing to investigate and interview a witness who could have provided exculpatory evidence; and (4) failing to recall a police officer to impeach a government witness's trial testimony. As a fifth ground, defendant contends that even if none of these alleged instances of ineffectiveness requires a new trial, the cumulative effect does.

Defendant's claims raised issues of contested fact, so counsel was appointed and an evidentiary hearing scheduled. At the hearing, it became clear that defendant had no factual support for any of his allegations of ineffectiveness. Accordingly, his motion for post

conviction relief must be denied.

For the purpose of deciding this motion, I make the following findings of fact from the record and from the evidence produced at the evidentiary hearing.

BACKGROUND

On March 8, 2007, the grand jury charged defendant, along with Michael Hughes and Darrick Robison, with distributing cocaine base in violation of 18 U.S.C. § 841(a)(1). Defendant was named in only the first of the three counts charged; he and Hughes were charged with distributing more than five grams of cocaine base on December 20, 2006. Defendant went to trial, represented by Kelly Welsh.

At trial, the government introduced evidence that on December 20, 2006, the drug task force in Beloit, Wisconsin set up a drug purchase with defendant, using a confidential informant, Abdul Harriel. At the direction of Aaron Dammen, a member of the task force, Harriel placed a call to Michael Hughes and arranged to buy a quarter-ounce of crack cocaine from him at 700 West Grand Avenue in Beloit. Hughes told Harriel that he did not have the drugs himself but would get them for Harriel. Dammen outfitted Harriel with a body wire for his meeting with Hughes. (The resulting recording did not produce any useful evidence and was never introduced into evidence at trial.)

Task force members watched Harriel's arrival in the 700 block of West Grand Avenue at about 1:00 p.m. Harriel parked his car and got into the back seat of Hughes's car. Harriel knew Michael Hughes but he did not know the black male in the front passenger seat. The

three men talked among themselves until defendant arrived at about 1:20 p.m. Defendant got into the back seat of the car. What happened next is disputed. One version is that defendant handed the crack cocaine to Harriel and that Michael Hughes handed defendant the money; another is that Michael Hughes gave defendant money in return for the drugs, which Hughes then handed to Harriel. The task force members could not see inside the car. However, they did see Harriel get out of the car three minutes after defendant arrived and drive away in his own car. He went directly to the designated safe spot where he met with Dammen, turned over the cocaine and submitted to a search.

Michael Hughes's trial testimony was similar to Harriel's: when Harriel had called him, he told him that he did not have crack cocaine himself but knew he could get some. He told Harriel to meet him in the 700 block of West Grand Avenue. Hughes and Harriel waited in Hughes's car for defendant to arrive; defendant arrived and got into Hughes's car "and that's how it was transferred right then and there inside the car." Tr. Trans., dkt. #97 (07-cr-31-bbc), at 32. Hughes confirmed that the buyer was Harriel and the seller was defendant, but he did not say who handed what to whom. Id.

Defendant's counsel tried to cast doubt on Harriel's testimony that it was defendant who provided the crack cocaine to Harriel by showing that it could have been either Michael Hughes or his cousin, Vernon Hughes, the passenger in the front seat, and that either one of them could have had the crack cocaine with them from the outset. She impeached Harriel with his prior inconsistent statements three times during her cross examination of him at trial. Id. at 16, 18 & 20.

Harriel admitted that at his meeting with Officer Dammen immediately after the drug transaction he had told Dammen that defendant had handed Hughes something as soon as he got into Hughes's car and that Hughes "immediately turned around and handed me [Harriel] the crack cocaine." Id. at 16. This was contrary to his earlier testimony in response to the government's questioning that defendant had handed the crack cocaine directly to him, id. at 10. It was also contrary to his written statement to Dammen, Govt.'s Hrg. Exh. 3, that defendant had handed the drugs directly to him. Welsh never questioned Dammen at trial about Harriel's statement to him about how the transaction had taken place, but she did determine from him that he could not see the transaction inside the car. Tr. Trans., dkt. #116 (07-cr-31-bbc), at 138. Welsh attempted to introduce the statement Harriel wrote out for Dammen during her questioning of Harriel but the government objected to it government as hearsay and the court sustained the objection. Tr. Trans., dkt. #97 (07-cr-31-bbc), at 16.

Welsh examined Michael Hughes about his plea bargain with the government and what he stood to gain from it. She also impeached his trial testimony. In response to her questioning, Hughes admitted that when he had met with the police in April 2007 for a proffer interview, he told them that the December 20 transaction had taken place in Harriel's car, not Hughes's and that both he and defendant were in Harriel's car. He told the police that defendant handed the crack cocaine to Harriel as soon as he stepped into the car and that Harriel had handed the money over to defendant, not to Michael Hughes. Id. at 36-39.

In her closing argument, Welsh argued that it was not defendant's burden to prove anything; it was the government's burden to prove that "no one else already had the crack in the car or that nobody else [other than defendant] brought it to the car and that Mike Hughes didn't already have it in the car." Tr. Trans., dkt. #116 (07-cr-31-bbc), at 186-87. She also argued that either Michael or Vernon Hughes might have been the source of the drugs and questioned why the government had not subpoenaed Vernon Hughes for trial. Id. at 187-89. Counsel did not succeed in her attempts to suggest that the government could not prove beyond a reasonable doubt that defendant was the source of the crack cocaine that Harriel obtained on December 20, 2006. The jury found him guilty of the charge of distribution.

Defendant was sentenced under the guidelines by the Hon. John Shabaz to life imprisonment. Defendant did not say at sentencing that he had evidence that he was never present at the drug deal with Harriel. He appealed, raising two claims of error by the court in (1) instructing the jury that he could be found guilty for knowingly aiding and abetting the criminal offense; and (2) allowing the government to put in evidence of a January 10, 2007 sale in which defendant was not involved and of defendant's prior drug dealings with Hughes and Robison. He also asked for a remand for resentencing in light of the Supreme Court's decision in Kimbrough v. United States, 552 U.S. 85 (2007), holding that in crack cocaine cases sentencing judges do not abuse their discretion by determining that the disparities in the sentencing guidelines between crimes involving crack cocaine and those involving powder cocaine yield sentences greater than necessary. He did not ask for a new

trial on the ground of new evidence.

The court of appeals found that defendant's counsel had waived any objection to the aiding and abetting instruction. United States v. Conner, 583 F.3d 1011, 1027 (7th Cir. 2009). The court agreed with defendant that it was error for the district court to have admitted evidence of the January 10 cocaine sale that did not involve defendant, along with evidence of other drug deals in which defendant had been involved, but concluded that the error was harmless because the jury would have convicted defendant in any event. Id. at 1025. The court remanded the case for resentencing to allow the district court to reconsider the sentence in light of Kimbrough.

By the time the case returned to this district for resentencing, Judge Shabaz was on medical leave, so the case was transferred to this court. I resentenced defendant to a term of 25 years, which was five years below his guideline range of 30 years to life. Defendant appealed the sentence, but the court of appeals denied the appeal on October 29, 2010. United States v. Conner, 400 Fed. Appx. 82 (7th Cir. 2010). Before the appeal was decided, defendant filed a motion for post conviction relief in this court. This motion was dismissed without prejudice on October 27, because defendant's direct appeal was pending. United States v. Romaine, 8 F.3d 398 (7th Cir. 1993) (in absence of extraordinary circumstances, court should not consider post conviction motion while appeal is pending).

On January 3, 2012, defendant filed a new, timely motion for post conviction relief, dkt. #179, in which he raised the three claims of ineffectiveness of counsel: (1) failing to present an adequate defense; (2) failing to impeach Harriel with his prior inconsistent

statements; and (3) failing to investigate and interview a witness who could have provided exculpatory evidence. On January 30, 2012, defendant filed a supplemental motion, dkt. #7 (12-cv-8-bbc), raising an additional claim of ineffectiveness: failing to call Dammen back to the witness stand to impeach Harriel. He added a fifth claim that the cumulative effect of counsel's failings required a new trial.

The evidence at the hearing focused on defendant's claim that Welsh did not try to find Vernon Hughes, the passenger in the front seat of Michael Hughes's car on December 20, 2006. According to his affidavit of October 8, 2010 and his testimony at the hearing, Hrg. Trans., dkt. #40, at 12, defendant called Welsh from the Dane County jail on July 5, 2006 to tell her that he had talked with Vernon Hughes and that Hughes was willing to testify on defendant's behalf. Id. at 22. The government questioned defendant about an affidavit he had submitted to the court in support of his post conviction motion that appeared to have been signed by Vernon Hughes on October 9, 2007. Vernon Hughes Aff., dkt. #189-1 (07-cr-31-bbc) at 31 (Govt.'s Hrg. Exh. 8). The affidavit appeared to have been notarized on July 20, 2010, by a notary public in Arizona, who averred that Vernon had appeared before her that day to acknowledge his signature. Id. Defendant testified that he prepared the affidavit using the computer at the Dane County jail, Hrg. Trans., dkt. #40, at 22, and sent it to Hughes sometime before October 9, 2007, id. at 25-26. Hughes signed it on October 9, 2007 and had it notarized on July 20, 2010. Id. at 22-26; Govt.'s Exh. 8. The affidavit contains averments by Vernon Hughes that he had been in the front seat of Michael Hughes's car on December 20, 2006 and that "BD Shawn" [Harriel] got into the

back seat of the car and handed money to Michael Hughes. Michael Hughes then reached between his seat and the armrest and fumbled around for 10-15 minutes before he emerged with a brown paper bag. He placed the bag on the armrest and Harriel grabbed it. He averred further that all of this happened before defendant entered the car. Govt.'s Hrg. Exh. 8, ¶¶ 5-9.

In the same affidavit, Vernon Hughes averred that on July 4, 2007, he told defendant what he remembered about the December 20, 2006 transaction. Id., ¶¶ 9, 10. He told defendant he had been available and willing to talk with defendant's counsel about it and to testify on defendant's behalf, but he never received a call from defendant's counsel or her investigator. Id. at ¶ 12.

At the hearing, Vernon Hughes testified by telephone from the Maricopa County jail, in Phoenix, Arizona. He said that defendant never got into the car on December 20, 2006 and that he had been prepared to testify to that in 2007 but he was never contacted. Hrg. Trans., dkt. #41, at 7, 8. He said he did not see defendant enter the car and did not see him hand anyone any drugs. Id. at 6. (This testimony and his later testimony at page 15 of the hearing transcript, dkt. #41, contradict the statement in his affidavit that defendant did get into the car but not until after the drug deal had been completed. Govt.'s Hrg. Exh. 8, ¶ 9.)

Vernon Hughes testified that he typed his affidavit, Govt's Hrg. Exh. 8, at his sister's house in Phoenix. (This statement contradicts defendant's testimony that he typed the affidavit in jail and sent it to Hughes.) Neither Hughes nor defendant explained the discrepancy in the date on which Hughes supposedly signed it and the date on which he

supposedly signed it before the notary public.

During questioning by the government, Hughes could not explain why he said in his affidavit that defendant entered the back driver's side door of the Michael Hughes's car, why he said in the same affidavit that defendant was not in the vehicle at the time of the transaction or why he said in his direct testimony at the evidentiary hearing that defendant never got into the car. Hrg. Trans., dkt. #41, at 15.

Defendant never told Hughes the name of his defense counsel, never told Hughes to call Welsh to say he would be willing to testify and never called Hughes to ask him to testify for him. Despite defendant's testimony that he called Welsh on July 5, 2007 to tell her about Hughes, Welsh's records of telephone calls received from Inmate Calling Solutions do not show that she received a collect call from defendant on July 5, 2007. They do show that she received her first collect call from defendant on July 10, 2007, during which she confirmed that she would be visiting him the next day.

At Welsh's July 11 visit to the jail, defendant said at first that he was not sure that Vernon Hughes had been in the car because his memory had been impaired by his use of pot, but as the conversation continued, he became more certain about Vernon Hughes. He wanted Welsh to cross examine Michael Hughes about Vernon's presence in the car but he told her that Vernon had disappeared and no one knew how to reach him. Hrg. Trans., dkt. #39, at 21. Defendant did not tell Welsh that Vernon Hughes had told him he had seen Michael Hughes reaching down between the seat of his vehicle and retrieving something in brown paper that he put on the armrest for Harriel before defendant entered the car. Id. at

22.

Before trial, Welsh reviewed her defense strategy with defendant, who voiced no objections to it. He was adamant about going to trial and he told Welsh unequivocally, that he had no intention of testifying. Id. at 10. She chose to call no other witnesses; defendant understood this decision and acquiesced in it. Id. at 11, 34. Defendant never expressed any disagreement during trial or afterward with Welsh's strategy to create reasonable doubt about whether he was the one who actually handed something to Harriel. He was an actively involved client who took many notes and sent pages and pages of questions to Welsh that he thought she should ask. Id. at 25.

Welsh hired an investigator in the case but only after defendant was accused of threatening a witness while they were in the same holding cell and she wanted to confirm that defendant was actually in the same cell as his supposed victim. She did not ask the investigator to look for Vernon Hughes because defendant had never told her that Vernon Hughes would swear that the entire transaction took place between Harriel and Michael Hughes and did not involve defendant. Even if she had been told this, she had no idea where to begin looking for Vernon Hughes. Id. at 21-22.

OPINION

Defendant bases his entire motion for post conviction relief on his counsel's alleged ineffectiveness. To succeed on his motion and show that either his trial or his appellate counsel's representation was constitutionally ineffective, he 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)). As for the prejudice prong, "the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. In this case, it is not necessary to reach the question of prejudice because defendant has failed to show that his counsel's representation of him fell below an objective standard of reasonableness.

Because defendant's post conviction counsel did not file either a pre or post hearing brief, I have addressed the claims that defendant raised in his post conviction motion and supplemental motion, dkts. #1 and 7 (12-cv-8-bbc), even though it appeared at the evidentiary hearing that defendant may have abandoned some of his claims..

A. Failure to Develop an Adequate Defense Strategy

Defendant begins by asserting that counsel's failure to develop an adequate defense strategy shows that her work fell below the lowest level of competence, but his assertion is unpersuasive. Although counsel did not succeed in winning an acquittal for defendant, the failure was not the result of any omission or mistake on her part. It was an inevitable

consequence of the strength of the case against defendant.

Defendant's counsel came up with the only defense available to her, which was to try to raise doubts in the jury's minds about the facts of the actual drug transaction, such as whether the drugs were handed first to Michael Hughes and then to Harriel or whether defendant handed them directly to Harriel, as both Harriel and Hughes testified. Of course, she understood that just making the showing that the drug deal had been a triangular one (defendant to Hughes to Harriel) would not exonerate defendant. He could still be found guilty of distribution. It is well established that a defendant can be charged for a substantive offense solely as a principal and convicted as an aider and abettor. Familia Rosario v. Holder, 655F.3d 739, 744 (7th Cir. 2011); 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."). Her aim was simply to try to show that the government's case was not as airtight as it may have seemed.

Working with what she had, Welsh impeached Harriel about his prior statement to the police in which he had said that defendant had handed something to Michael Hughes, not to him, in contradiction of his trial testimony that defendant had been the one to give him the crack cocaine after receiving the money from Michael Hughes. Counsel then tried to create a reasonable doubt in the minds of the jurors that what defendant had handed to Michael Hughes or to Harriel was crack cocaine and not something else and also about the source of the cocaine, suggesting it might have come from either Michael or Vernon Hughes.

Defendant challenges his counsel's failure to object to a question the prosecutor asked

witness Abdul Harriel and to take advantage of her opportunity before the trial to prevent the government from asking the question. He says that, at a pretrial hearing, the Assistant United States Attorney advised the court that Harriel would testify that "Mr. Conner showed up, pulled up behind him and got in the car and handed the crack cocaine to Mr. Harriel," and that counsel failed to object to this proposed testimony either then or later at trial. Apparently, defendant believes that counsel can object to a question or statement by the government on the sole ground that it does not fit defendant's view of the facts. If so, he misunderstands the law. Counsel cannot object to such a statement unless she can show that the government has no good faith basis for its assertion; the way to oppose such a statement is by introducing evidence to the contrary. In this case, counsel knew that the government had evidence to support its description of Harriel's anticipated testimony, so her only recourse was to try to prove at trial that the statement was not supported by the facts.

B. Impeachment Failures

In his motion for post conviction relief, defendant contended that his counsel was ineffective in failing to impeach confidential informant Harriel; in his supplemental motion, he contended that counsel was ineffective because she failed to question Officer Dammen about Harriel's written statement. Neither of these two contentions required an evidentiary hearing. It is clear from the trial transcript that Welsh did an admirable job of impeaching the testimony Harriel gave on direct examination. On three occasions, Harriel admitted in response to her questioning that Michael Hughes, not defendant, had handed the drugs to

him.

In addition, Welsh had no need to go into this subject with Officer Dammen because of her successful impeachment of Harriel on cross examination. Moreover, she could not have gone into it even if she had wanted to. Judge Shabaz had made it clear that he would not allow counsel to ask Dammen about the truthfulness of Harriel's written statement because the answer would have been hearsay. No one was questioning whether Harriel had made the statement, which is the only matter on which Dammen could have testified. He could not testify to the truthfulness of the statement itself because he had no personal knowledge of the subject matter of the statement.

C. Failure to Investigate and Interview an Exculpatory Witness

The only significant issue that had to be determined at the evidentiary hearing was defendant's contention that his counsel should have investigated and interviewed Vernon Hughes about the December 20, 2006 drug transaction. Neither defendant nor Vernon Hughes gave credible testimony on this issue. Neither provided any reason to believe that the two talked with each other on July 4, 2007, that Vernon Hughes agreed to testify on defendant's behalf or that defendant had any knowledge of Vernon Hughes's whereabouts in early July. Counsel's telephone records do not show the call from defendant he said he made on July 5. Defendant can point to nothing in the voluminous notes he wrote for counsel that makes any reference to Vernon Hughes, to his address or to his telephone number, much less that Hughes was willing to be a witness and would supply evidence that

defendant never entered Michael Hughes's car until after Harriel had obtained the crack cocaine. Moreover, it is not plausible to believe that if defendant knew about this evidence when he says he did that he would not have raised the issue before the court, either in a motion for new counsel or at sentencing. Neither defendant's affidavit nor Vernon Hughes's affidavit is worthy of belief.

Defendant's counsel had no credible information about Vernon Hughes's whereabouts in July 2007 or any knowledge that Vernon Hughes might have testimony helpful to defendant. Accordingly, she had no obligation to send an investigator out to look for him. Moreover, as Hughes's equivocating testimony at the hearing demonstrated, he would not have been an effective witness for defendant.

D. The Cumulative Effect of Counsel's Errors

Defendant argues that even if the errors committed by his counsel are not individually sufficient, their cumulative effect is prejudicial. As a theory, this is correct. "Even errors that are individually harmless, when taken together, can prejudice a defendant and violate his right to due process of law." Conner, 483 F.3d at 1027 (citing United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001)). In this instance, however, defendant has not shown that his counsel committed any errors, so it is not necessary to consider their cumulative effect.

E. Certificate of Appealability

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). Defendant has not made a substantial showing of a denial of a constitutional right 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 Arthur Conner's motion for post conviction relief is DENIED. FURTHER, IT IS ORDERED that no certificate of appealability shall issue.

Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 20th day of September, 2012.

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