IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

12-cv-320-bbc
10-cr-188-bbc

v.

DEMETRIUS PETTY,

Defendant.

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Defendant Demetrius Petty filed a motion for post conviction relief under 28 U.S.C. § 2255 on May 1, 2012. He contended that he had been sentenced illegally but there was nothing to that contention, as I explained in an order entered on May 9, 2012. Defendant had argued that it was unreasonable and harsh for him to be sentenced to a term of ten years when he had possessed less than 26 grams of crack cocaine. In fact, he was sentenced for conspiracy to distribute 280 grams or more of crack cocaine. His sentence was the minimum mandatory sentence set by Congress, which had determined that conspiring to distribute this amount of crack cocaine warranted a mandatory minimum sentence of ten years. I had no authority to impose a sentence on defendant below a mandatory minimum sentence set by Congress, because he did not qualify for any exception to the minimum mandatory sentence.

Also in his motion, defendant argued that he had been misled by his counsel about the sentence he would face if he pleaded guilty. He said he had been promised a sentence

of less than ten years. I gave him an opportunity to flesh out this claim, which he has now done. He submitted a declaration signed under penalty of perjury, saying that his lawyer had persuaded him to plead guilty by telling him that the government could not prove he had more than 25 grams of crack cocaine and that he would receive a sentence of less then ten years if he pleaded guilty, but he could receive a life sentence if he went to trial and was found guilty. Petty Decl., dkt. #3, at 1-2. In addition, he says that counsel told him not to say anything during sentencing and counsel would take care of everything. Id. at 2.

As I told defendant in the May 9 order, he told the court under oath at his guilty plea proceeding that he had talked with his counsel about entering a plea of guilty and the consequences of doing so and he confirmed his understanding that he would be subject to a minimum term of ten years up to a maximum of life. Plea Hrg. Trans., dkt. #141, at 3-5. He also agreed when asked that the government could prove that he had made deliveries of crack cocaine from the fall of 2006 through 2009. He admitted in his own words that he had done so. Id. at 13-14. When asked whether anyone had made him any promises about the sentence he would receive, he said "no" and he said the same thing when asked whether anyone had told him he was going to receive a particular sentence and whether he had any reason to believe that he would receive a particular sentence. Id. at 10-11.

Even with the extra opportunity to submit evidence, defendant has not come up with any good reason for overturning his conviction and allowing him to go forward with a full trial of his drug distribution activities. He has not even said that he wants to withdraw his plea of guilty. He would be foolish to do so, because he received the lowest possible sentence

that could have been imposed upon him, helped by the three-level downward adjustment he received for entering a timely plea of guilty. If he went to trial, the government could introduce additional evidence about his involvement in the conspiracy that could lead to a significantly higher sentencing guideline range than the one that applied at the time of his original sentencing. His chances of being found not guilty would be slim. Presumably, both his co-defendant Jennifer Chaney and his brother would be available for testimony, along with some of the buyers to whom he delivered crack cocaine for the three years of the conspiracy and the undercover officers who bought crack cocaine from him on two occasions.

Defendant says that his counsel talked him into pleading guilty, which was the best advice he could have given defendant. The evidence against him was strong (hand-to-hand sales to undercover officers). He says also that his counsel told him that he would get a sentence of under ten years, but as I said in the May 10 order, defendant never told the court about this promise by counsel, although he had a full opportunity to do so at his plea hearing. He raised no objection when he was told that his minimum sentence would be ten years and he told the court that no one had promised him a particular sentence.

Giving defendant the opportunity for an evidentiary hearing on his motion would mean giving him an opportunity to contradict under oath the statements he gave under oath at his plea hearing. Not only would this put defendant in a position in which he could be prosecuted for perjury under 18 U.S.C. § 1623(c), but he would have the problem of trying to persuade this court that he is telling the truth now when he testified under oath to the contrary at a previous time. United States v. Stewart, 198 F.3d 984, 986 (7th Cir. 1999)

("Why should the district judge believe Stewart a second time, when he has already declared his willingness to lie under oath in order to achieve a lower sentence?")

"Entry of a plea is not some empty ceremony, and statements made to a federal judge in open court are not trifles that defendants may elect to disregard." Id. See also United States v. Peterson, 414 F.3d 825, 827 (7th Cir. 2005) ("Judges need not let litigants contradict themselves so readily; a motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction.") Defendant has not shown a compelling reason why this court should hold an evidentiary hearing on his motion for post conviction relief. He has said only that his counsel assured him he would receive a sentence under ten years if he pleaded guilty—a promise that, if made, was thoroughly undercut at the plea hearing. Under the circumstances, that alleged promise is so lacking in credence as not to require further investigation. Accordingly, defendant's motion for post conviction relief will be denied.

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 Demetrius Petty's motion for post conviction relief is DENIED. No certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 30th day of May, 2012.

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