

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHERYL A. McNAMEE,

Defendant.

OPINION AND ORDER

13-cv-10-bbc

11-cr-142-bbc

Defendant Cheryl A. McNamee has moved for post conviction relief under 28 U.S.C. § 2255, contending that she was denied constitutionally effective representation by her retained counsel. A review of the motion shows that defendant has no grounds for her contention and that her motion must be denied.

RECORD FACTS

Defendant was charged by indictment with tax evasion. She entered a plea of guilty to this charge on April 18, 2012 and was later sentenced to a term of imprisonment of 24 months and directed to make restitution in the amount of \$469,413. In her plea agreement, she agreed that her plea would resolve all possible federal criminal violations, that her unreported income was \$595,473 and that she would make restitution to Thomas and Gary Hebl in the amount of \$469,413. Dkt. #3 (11-cr-142-bbc) at 2. At her plea hearing,

defendant told the court that she understood the terms of the plea agreement, which the government had set forth on the record, and she stated that no one had threatened her or forced her to enter her plea. Plea hrg. trans., dkt. #40, at 13, 14, 16.

After the presentence report was filed, but before sentencing, defendant's counsel advised the court that defendant was not contesting the application of an increase in her offense level for abuse of position of trust under U.S.S.G. § 3B1.3. Also before sentencing, defendant wrote the court letter for its consideration in sentencing her. Among other things, she wrote that counsel had "helped me through this journey more than any other person . . . He [helped] me emotionally by making me face the truth." Dkt. #20 at 3.

In her plea agreement, defendant agreed not to appeal from any sentence of less than 36 months. She abided by this agreement, but she filed a motion in August 2012, alleging that her restitution obligation had not been calculated properly. Two weeks later, she asked to dismiss this motion and her request was granted. She filed the present motion on January 3, 2013.

OPINION

The test for constitutional ineffectiveness of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984). The test 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. Id. at 694.

The defendant bears the burden of proof and must file a detailed and specific affidavit, demonstrating that she has actual proof of her allegations that go beyond mere unsupported allegations. Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996).

Courts presume that counsel make strategic decisions for the benefit of their clients. Traeger v. United States, 289 F.3d 461, 470 (7th Cir. 2002) (proving ineffectiveness is difficult “because counsel is strongly presumed to have rendered adequate assistance and to have made significant decisions in the exercise of his or her professional judgment”) (citing Strickland, 466 U.S. at 687)) Therefore, to prevail on a claim of ineffectiveness such as the one that defendant has raised she must show that “counsel’s actions were not supported by a reasonable strategy and that the error was prejudicial.” United States v. Cooper, 378 F.3d 638, 641 (7th Cir. 2004) (quoting Massaro v. United States, 538 U.S. 500, 505 (2002)).

Defendant has alleged only two grounds of allegedly inadequate representation: counsel’s failure to challenge the loss amount used for sentencing; and his failure to object to the enhancement to her offense level for abuse of a position of trust. As to the loss amount, she argues that her counsel did not tell the court that she should have been credited for the wages that were not paid her from the last quarter of 2005 through May 2010, which in her calculation, amounted to \$227,964.49.

Defendant has not made the showing necessary to rebut the presumption. Merely alleging that she should have been credited for unpaid wages does not establish that her counsel was ineffective in advising her to accept the plea agreement. One would have to know the full extent of the negotiations over the plea agreement before it would be possible

to say that counsel was not acting strategically when he decided not to contest the matter of unpaid wages. Defendant has not provided that information. Moreover, it is telling that although she alleges in her reply brief that the government amended the plea agreement she had already signed to include the restitution figure of \$469,413, she never raised any objection at her plea hearing either to having to make restitution or the amount. Instead, she stated under oath that she was agreeing to the terms of the agreement, which included the restitution figure.

It is unlikely that anyone, including her attorney, would have had more knowledge than defendant did about the embezzled funds and any setoffs to which she might be entitled. She had to have known at the time of her plea that the restitution amount to which she was agreeing did not make any provision for her allegedly unpaid wages, yet she said nothing to the court. I conclude that as to this claim of ineffectiveness, defendant has fallen far short of showing that counsel did not give her professional competent assistance.

As for the claim that counsel was ineffective in not objecting to the enhancement for abuse of position of trust under § 3B1.3, defendant has not explained what was ineffective about his failure to object. Again, the presumption is that his decision to refrain from objecting was strategic. In this instance, his strategy was obvious. An objection to the enhancement would have put defendant at risk of losing her downward adjustment for acceptance of responsibility and would have meant that the persons she had defrauded would have testified against her at length, which could well have led to a longer sentence.

Defendant denies all this, continuing to argue that the facts do not support a finding

that she was in a position of trust, but those arguments are irrelevant at this point. Her attorney made a reasonable strategic decision not to contest the position of trust enhancement. She is bound by that decision.

In summary, I conclude that defendant's motion for post conviction relief must be denied for her failure to show that her defense counsel was ineffective in any respect.

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 Cheryl McNamee's motion for post conviction relief

under 28 U.S.C. § 2255 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 28th day of February, 2013.

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