2012 WL 3765022
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Zachary BALLARD, Movant,
v.
USA, Respondent.

No. 11 Civ. 7162(JSR)(RLE).
|
Aug. 30, 2012.

Attorneys and Law Firms

Zachary Ballard, Pine Knot, KY, pro se.

Benjamin A. Naftalis, Assistant United States Attorney, Southern District of New York, New York, NY, for Respondent.

OPINION AND ORDER

RONALD L. ELLIS, United States Magistrate Judge.

I. INTRODUCTION

***1** *Pro se* prisoner Zachary Ballard, currently incarcerated at the United States penitentiary in Florence, Colorado, moved for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 on October 3, 2011. In his motion, Ballard advances several claims: 1) suggestive identification; 2) insufficiency of evidence with regard to his 924(c) counts; 3) improper jury instructions at trial; 4) improper admission of evidence; 5) denial of his due process rights; 6) prejudicial remarks made by the prosecution; 7) ineffective assistance of counsel; 8) excessive sentence in violation of the Constitution; and 9) prosecutorial manipulation of his sentence. Mot. at 3. Pending before the court is Ballard's motion for appointment of counsel. For the reasons set forth below, the request for appointment of counsel is **DENIED** without prejudice.

II. DISCUSSION

Appointment of counsel under 28 U.S.C. § 2255(g) is governed by 18 U.S.C. § 3006A(a)(2)(B). There is no constitutional right to representation by counsel in habeas corpus proceedings. *Green v. Abrams,* 984 F.2d 41, 47 (2d Cir.1993) (citing *United States ex rel. Wissenfield v. Wilkins,* 281 F.2d 707, 715 (2d Cir.1960)); *see also Coita v. Leonardo,* 1998 WL 187416 (N.D.N.Y. Apr. 14, 1998). However, a court may in its discretion appoint counsel where "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). Where movant's claims may fairly be heard on written submissions, the appointment of counsel is not warranted and such applications should ordinarily be denied, *Coita,* 1998 WL 187416, at *1 (citing *Adams v. Greiner,* 1997 WL 266984 (S.D.N.Y. May 20, 1997)).

The Second Circuit has provided guidance to district courts in determining whether to appoint counsel for an indigent civil litigant in habeas corpus proceedings. *See* *Hodge v. Police Officers,* 802 F.2d 58 (2d Cir.1986). In *Hodge,* the court noted that, in deciding whether to appoint counsel, the district court should first determine whether the indigent's position seems likely to be of substance. *Id.* at 61. If the claim meets this threshold requirement, the district court should then consider: (1) the indigent's ability to investigate the crucial facts; (2) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the factfinder; (3) the indigent's ability to present the case; (4) the complexity of the legal issues; and (5) whether any special reason exists why appointment of counsel would be more likely to lead to a just determination. *Id.* at 61–2. As the Second Circuit has indicated, this is not to say that all or any of the factors must be controlling in a particular case. *Id.* at 61. "Each case must be decided on its own facts." *Covington v. Kid,* 1998 WL 473950, at * 1 (S.D.N.Y. Aug. 5, 1998).

Ballard satisfies the threshold requirement of indigent status. However, while at least one of his claims appears to be substantial, [1] Ballard does not merit appointment of counsel. His claims do not appear so overwhelmingly complex that he cannot be afforded a just determination without legal representation. Contrary to Ballard's allegations that he is completely unfamiliar with the law and is thus unable to represent himself, thus far he has demonstrated the ability and knowledge to present his case adequately. Though his appellate counsel has stated in a memorandum to the Court that Ballard cannot present the issues himself because he is uneducated, inarticulate, and does not fully understand legal standards and the significance of facts relevant to the issues (*See* Ex. 1. at 1). Ballard has reasonably presented his arguments in a cohesive manner in his motion. Further, his communications to the Court demonstrate his ability to

pursue his motion and, absent a change in circumstances, to adequately represent himself in the instant action. Ballard's claims have been fairly presented and can be heard in his present habeas submission and the written submissions presented on his previous appeals, which offer enough information for the Court to justly consider his request. *Newton v. Coombe,* 1998 WL 418923. at *2 (S.D.N.Y. July 23, 1998). Ballard has not demonstrated any marked difficulties in presenting his case and fails to state why appointment of counsel would increase the likelihood of a just determination in this case, other than his general comment that he is "completely unfamiliar with law." *Mackey v. DiCaprio,* 312 F.Supp.2d 580, 582 (S.D.N.Y.2004).

***2** The interests of justice do not require the appointment of counsel in this case and therefore, Ballard's application is **DENIED** without prejudice.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3765022

Footnotes

1 Although the Second Circuit denied most of Ballard's claims on direct appeal, his claim based on ineffective assistance of counsel was allowed to proceed.

1997 WL 118379
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Jeanette HARMON, Plaintiff,
v.
Marvin T. RUNYON, Postmaster General, United States Postal Service, Defendant.

No. 96 CIV. 6080(SAS).
|
Mar. 17, 1997.

Attorneys and Law Firms

Jeanette Harmon, pro se.

Aaron Katz, Asst. U.S. Atty., New York, N.Y., for Defendant.

MEMORANDUM ORDER

SCHEINDLIN, District Judge.

***1** On August 12, 1996, plaintiff filed this action pursuant to 42 U.S.C. §§ 2000e to 2000e–17 and § 29 U.S.C. §§ 621 to 634 for employment discrimination on the basis of her age, race and gender. On November 21, 1996, plaintiff applied for the appointment of counsel on the grounds that she lacks sufficient knowledge of the law to continue to maintain her claims *pro se.* For the reasons set forth below, plaintiff's application for appointment of counsel is denied with leave to renew.

Discussion As an initial matter, there is no constitutional right to appointed counsel in civil cases. Moreover, due to the scarcity of volunteer attorneys, the Second Circuit has cautioned against the routine appointment of *pro bono* counsel in civil cases. *See Cooper v. A. Sargenti Co. Inc.,* 877 F.2d 170, 172 (2d Cir.1989). In *Hodge v. Police Officers,* 802 F.2d 58, 61–62 (2d Cir.1986), *cert. denied,* 502 U.S. 986, 112 S.Ct. 596, 116 L.Ed.2d 620 (1991), the Second Circuit set forth the factors courts should consider in deciding whether to grant a *pro se* plaintiff's request for the appointment of counsel. As a threshold requirement, the court must decide whether the plaintiff's claim "seems likely to be of substance." *Hodge,* 802 F.2d at 61. If the plaintiff meets this requirement, the court must next consider factors including:

> the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.
>
> Id. at 61–62. As plaintiff is not indigent, the court is also required to consider plaintiff's efforts to obtain a lawyer. *Cooper,* 877 F.2d at 172, 174.

In the instant case, plaintiff has not met the threshold requirement set forth in *Hodge.* Plaintiff has presented no evidence whatever to support her claims regarding defendant's allegedly improper actions. Without presenting any evidence to support her claims, Harmon cannot meet the first requirement of the *Hodge* test described above. Accordingly, plaintiff's application is denied.

Given the early stage of these proceedings, it is possible that plaintiff eventually will be able to provide some evidence to support her claims. Plaintiff's application is therefore denied with leave to renew. If plaintiff wishes to apply again for the appointment of counsel, she must make some attempt to refer to evidence which supports her claims.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1997 WL 118379