

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICKY D. SMITH,

Defendant.

Case No. 05-10057-01-JTM

MEMORANDUM AND ORDER

Presently before the court is defendant Ricky D. Smith's (Mr. Smith's) motion to vacate under 28 U.S.C. § 2255 or, in the alternative, to correct the sentence under Fed. R. Crim. P. 36. (Dkt. No. 55). For the following reasons, the court denies the motion.

On February 27, 2005, Mr. Smith was sentenced to a mandatory term of two years imprisonment following his conviction for aggravated identity theft, a violation of 18 U.S.C. § 1028A. Mr. Smith contends that his sentence was improperly enhanced as a result of the pre-sentence investigation report finding that there was a "pending assault/domestic" matter against the defendant, despite the fact that he claimed that he was not the defendant accused in the matter. The United States probation office looked into the matter, and discovered that Mr. Smith did raise a legitimate concern, in that although Sedgwick County Case No. 01-CR-642 reflects a charge and conviction in Mr. Smith's name, the corresponding date of birth and social security number do not match. Accordingly, it is reasonable to believe that Mr. Smith's criminal history score should be modified to reflect seven criminal history points, instead of the nine criminal

history points that were assigned to him, in part, because of the two point enhancement due to the Sedgwick County case.

However, this is of no moment, as 18 U.S.C. § 1028A carries a mandatory two-year sentence. The sentencing guidelines are inapplicable. Mr. Smith was advised of the mandatory sentence in his both his plea agreement, during the plea colloquy, and in the presentence report. Because Mr. Smith's sentence is not affected in any manner by either the offense level or criminal history, the court denies his request to vacate his sentence.

IT IS ACCORDINGLY ORDERED this 10th day of April, 2008, that defendant Ricky Smith's motion to vacate (Dkt. No. 55) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE