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

MICHAEL A. SVEUM,

Petitioner, OPINION AND ORDER

v. 00-C-563-C

JUDY P. SMITH, Warden, Oshkosh Correctional Institution,

Respondent.

Michael Sveum, an inmate at the Oshkosh Correctional Institution, has filed a motion under Fed. R. Civ. P. 60(b)(6) to vacate this court's December 14, 2000, judgment dismissing his petition for a writ of habeas corpus. Sveum contends that this court committed a manifest error of law when it denied his petition for a writ of habeas corpus without holding an evidentiary hearing on the issue of ineffective assistance of postconviction counsel.

A court addressing a Rule 60(b) motion seeking reconsideration of the dismissal of a habeas petition must first determine whether it has jurisdiction to entertain the motion. Under certain circumstances, a Rule 60(b) motion must be treated as a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b); otherwise, the limitations established by the Antiterrorism and Effective Death Penalty Act (AEDPA) on collateral attacks would be rendered naught. Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002) (collecting cases);

Harris v. Cotton, 296 F.3d 578, 579-80 (7th Cir. 2002) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions . . . by styling their collateral attacks as motions for reconsideration under Rule 60(b)."") (citations omitted). If a Rule 60(b) motion is in effect a second or successive petition, a district court lacks jurisdiction to consider it unless the court of appeals has granted the petitioner permission to file such a petition. See 28 U.S.C. § 2244(b)(3); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996). A Rule 60(b) motion must be treated as a second or successive petition only when it conflicts with the AEDPA. Dunlap, 301 F.3d at 875.

The Seventh Circuit and other courts have held that a Rule 60(b) motion does not conflict with the AEDPA if it contains allegations that implicate "the integrity of the court's habeas proceeding" as opposed to those that implicate the validity of the conviction. See Rodwell v. Pepe, 324 F.3d 66, 70 (1st Cir. 2003) (citing mistake and fraud as examples of circumstances that might justify setting aside judgment denying habeas relief); Dunlap, 301 F.3d at 875-876 (Rule 60(b) could be used if petitioner alleged that court's dismissal of first habeas proceeding was based upon state's fraudulent representations); Banks v. United States, 167 F.3d 1082, 1083-84 (7th Cir. 1999) (alleged failure of petitioner's counsel to consult with petitioner before filing § 2255 petition undermined legitimacy of federal habeas proceeding and could be raised under Rule 60(b)). Accord Abdur'Rahman v. Bell, 537 U.S. 88, 94-95, (2002) (Stevens, J., dissenting from dismissal of certiorari) (Rule 60(b) motion should be treated as second or successive petition only when it challenges constitutionality

of state court criminal conviction and not when it focuses on integrity of proceeding in district court). "When the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition." Rodwell, 324 F.3d at 70.

Applying this approach to petitioner's motion, I conclude that the motion presents a direct challenge to the constitutionality of his state court conviction and therefore is not properly brought under Rule 60(b). Petitioner argues that this court erred in denying his ineffective assistance of postconviction counsel claim without an evidentiary hearing because the record was devoid of any factual findings by the state courts on this issue. Petitioner appears to believe that because his claim that he should have been granted an evidentiary hearing is "procedural" in nature, it does not implicate the constitutionality of his underlying conviction. Petitioner is mistaken. His claim that this court should have held an evidentiary hearing is nothing more than a challenge to the correctness of this court's decision. Petitioner does not allege that the state misrepresented any facts in the habeas proceeding or that this court's decision rested on any procedural irregularities; he simply disagrees that there was enough evidence to support this court's adjudication of his ineffective assistance claim. This goes directly to the constitutionality of his underlying conviction. Moreover, the basis for petitioner's motion would have been apparent to him back in December 2000 when he received a copy of this court's order denying his petition, in which case he could

have filed a motion for reconsideration or raised the issue on appeal. Rule 60(b) cannot be used to circumvent the deadlines for filing an appeal.

In short, petitioner's motion is simply another attempt to attack his state court conviction. Accordingly, his claim cannot be considered in the context of a motion under Rule 60(b); rather, he must present it in a successive habeas petition. Dunlap, 301 F.3d at 876 (Rule 60(b) cannot be used to seek relief on basis that movant's conviction was based on mistake of law). In order to file such a petition, petitioner must first obtain permission from the court of appeals as provided by 28 U.S.C. § 2244(b)(3)(A).

ORDER

IT IS ORDERED that the motion of petitioner Michael Sveum to vacate the December 14, 2000 judgment denying his habeas petition is DENIED as improperly filed under Fed. R. Civ. P. 60.

Entered this 15th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge