

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

BASHIR ABRO,

Petitioner,

v.

RICHARD STIFF,
Warden, FCI-Oxford, Wisconsin,

Respondent.

ORDER

02-C-0444-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Bashir Abro is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He contends that he is being imprisoned beyond his required prison term because the Bureau of Prisons has not given him credit on his federal sentence for time spent serving his state sentence. He has paid the \$5.00 filing fee and he alleges that he has exhausted all administrative remedies.

Petitioner contends that he is entitled to a writ of habeas corpus for two reasons: (1) because his trial attorney should have advised him about the consequences of scheduling his federal sentencing before his state court sentencing; and (2) because he is entitled to credit

on his federal sentence for the time he served on his state sentence under United States v. Croft, 450 F.2d 1094 (6th Cir. 1971). I conclude that petitioner cannot bring a challenge to his attorney's conduct under 28 U.S.C. § 2241, because such a challenge implicates the validity of his sentence. He may proceed only under 28 U.S.C. § 2255 and only in the court in which he was sentenced. Petitioner was not sentenced in this court but in the United State District Court for the Eastern District of Michigan. Therefore, I must dismiss that portion of his petition directed to his attorney's alleged ineffectiveness. Petitioner's challenge to the computation of his sentence is properly brought in this court under 28 U.S.C. § 2241, but it fails on the merits.

The following allegations of fact are drawn from petitioner's petition, accompanying brief and exhibits.

ALLEGATIONS OF FACT

On June 23, 1995, petitioner was convicted in the United States District Court for the Eastern District of Michigan of food stamp fraud, possession of a firearm and money laundering. While he was awaiting sentencing on the federal charges, he was arrested on two state of Michigan charges: receiving and concealing stolen property and being an habitual offender. On November 16, 1995, petitioner was convicted of the state charges and remanded to state custody. Petitioner was then "writted" back to federal court for

sentencing. On January 16, 1996, he was sentenced on the federal charges to a 78-month term of imprisonment. The federal court did not order petitioner's sentence to run concurrently with petitioner's state sentence because the state sentence had not yet been imposed. Three weeks later, on February 6, 1996, petitioner was sentenced on the state charges to a 5-7 ½ year term of imprisonment. The state court did not specify how the state sentence was to run in relation to the federal sentence.

The federal sentencing hearing took place before the state sentencing hearing because petitioner's trial attorney did not accept the federal prosecutor's offer to postpone the federal sentencing until after the state sentencing. In sentencing petitioner, the federal judge took into consideration petitioner's conduct underlying the state conviction. Had the trial attorney accepted the offer of postponement, the provisions of United States Sentencing Guideline § 5G1.3(b) would have been triggered and would have mandated that petitioner's federal sentence run concurrently with petitioner's state sentence. Petitioner has finished serving his state sentence and is serving his federal sentence.

On direct appeal from his federal sentence, petitioner argued to the Court of Appeals for the Sixth Circuit that his state and federal sentences should have been ordered to run concurrently. The Sixth Circuit affirmed the federal district court's judgment, holding that “[a] district court does not have the authority to impose a federal sentence to run concurrently [with] a state sentence that had not yet been imposed.” United States v. Abro,

116 F.3d 1480 (6th Cir. 1997). Petitioner then filed a petition pursuant to 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Michigan, alleging ineffective assistance of counsel, presumably for counsel's failure to accept the prosecutor's offer to postpone sentencing. The sentencing court dismissed the petition as untimely. In its dismissal order, the court included a footnote, stating "[t]he Court observes, however, that, to whatever extent Petitioner's argument is based on United States v. Croft . . . it is conceivable that 28 U.S.C. § 2241 may offer the Petitioner an avenue of relief." Petitioner then filed this petition pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Wisconsin. The petition was subsequently transferred to this court because petitioner is incarcerated in this district.

OPINION

Generally, prisoners are not entitled to credit on their federal sentences for time spent serving state sentences because that time is credited to the prisoner's state sentence. See 18 U.S.C. § 3585 (2002); United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (noting § 3585(b)'s explicit language). However, petitioner advances two theories in support of his petition: (1) he is entitled to receive credit on his federal sentence for time spent serving his state sentence because his trial attorney should have advised him to postpone federal sentencing until state sentencing was completed; and (2) he is entitled to receive credit on

his federal sentence for time spent serving his state sentence under the rule of law established in Croft.

A. Credit Pursuant to Attorney's Failure to Advise

In his brief, petitioner alleges that the federal prosecutor offered petitioner's trial attorney the opportunity to postpone federal sentencing until after the state sentencing and that the trial attorney did not understand the significance of this offer, that is, that the federal judge would then have to order the state and federal sentences to run concurrently. Petitioner argues that United States Sentencing Guideline § 5G1.3(b) requires a federal sentence to run concurrently with a state sentence when 1) the federal offense was not committed while the defendant was serving the state sentence and 2) the undischarged term of imprisonment for the state sentence resulted from offenses that have been fully taken into account in the determination of the offense level for the federal sentence. In his brief, petitioner argues that he did not commit the federal offense while he was serving the state sentence and that the offenses underlying the state sentence were taken into account by the federal sentencing judge. In his view, the only reason § 5G1.3 did not require the federal sentencing judge in his case to impose a sentence to be served concurrently with his state sentence was because the state offense was not yet subject to an undischarged term of imprisonment. He argues that his trial counsel provided him constitutionally ineffective

assistance by failing to advise him of the advantages of postponing the federal sentencing until after the state sentencing.

It is unlikely that petitioner is correct about the way § 5G1.3(b) would have operated in his case. The guideline requires a trial court to impose a concurrent sentence only if it has taken the state offenses into account *in determining the offense level*. In other words, if the conduct giving rise to the state charges is the same conduct as that underlying the federal charges or related to it, the guideline would apply. The guideline does not apply if the court merely takes the state conduct into account in determining the offender's criminal history score. I cannot say with certainty that petitioner's state conduct (receiving and concealing stolen property and being an habitual offender) is unrelated to his federal conduct (food stamp fraud, possession of a firearm and money laundering), but it seems to be of an entirely different nature. Under subsection (c) of § 5G1.3, the sentencing court may authorize a sentence to run concurrently with an undischarged state sentence; it is not required to do so.

However, even if petitioner is correct that he suffered significant consequences resulting from counsel's failure to accept the federal prosecutor's offer of postponement, he is not entitled to relief under 28 U.S.C. § 2241. His claim of ineffective assistance of counsel goes directly to the validity of his sentence and for that reason, is a claim that may be heard only under 28 U.S.C. § 2255 in the sentencing court. See Waletzki v. Keohane,

13 F.3d 1079, 1080 (7th Cir. 1994).

Under a narrow safety valve, a prisoner may attack his federal sentence collaterally under § 2241 when a motion under § 2255 is "inadequate or ineffective to test the legality of his detention." See In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998). Petitioner does not qualify for this safety valve because he cannot demonstrate that a § 2255 petition is inadequate or ineffective to test the legality of his detention to the extent it rests on his claim of ineffective representation. He could have tested his sentence had he brought a timely § 2255 motion. See Montenegro v. United States, 248 F.3d 585, 594-95 (7th Cir. 2001), overruled on other grounds by Ashley v. United States, 266 F.3d 671 (7th Cir. 2001).

2. Credit Pursuant to Croft

In the portion of his petition brought properly under § 2241, petitioner relies on Croft, 450 F.2d 1094, as the basis for his argument that he is entitled to credit toward his federal sentence for time spent in a state prison, but he fails to explain how his case is akin to Croft. In Croft, the Court of Appeals for the Sixth Circuit held that a defendant was entitled to credit toward his federal sentence when a state court sentenced him to serve a term to run concurrently with the already imposed federal term, and a federal marshal returned him to state custody rather than delivering him to a federal institution immediately, as ordered by the federal judge. Id. at 1099. See also Vaughn v. United States, 548 F.2d

631, 633 (6th Cir. 1977) (limiting Croft to cases in which a state court orders its sentence to be served concurrently with a federal sentence).

The facts alleged in petitioner's petition are unlike the facts material to the decision in Croft. Petitioner does not allege that either the state court or the federal court ordered his sentence to run concurrently with the other court's sentence; he does not allege that the federal sentencing judge ordered his immediate commitment to a federal prison to begin service of his sentence; and he does not allege that a federal marshal failed to follow the directive of the federal sentencing judge to petitioner's detriment. Moreover, he alleges no facts suggesting malfeasance by federal authorities. See Jake v. Hershberger, 173 F.3d 1059, 1066 (7th Cir. 1999)(*if* courts have equitable power to give prisoners credit on federal sentences for time served in state prison, they cannot exercise that power in absence of showing of malfeasance).

ORDER

IT IS ORDERED that petitioner Bashir Abro's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 is DISMISSED for petitioner's failure to show that

he is in custody in violation of the Constitution or the laws of the United States.

Entered this 1st day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge