IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY McCOY,

Defendant.

OPINION AND ORDER

04-cr-181-bbc

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Defendant Jerry McCoy has filed a motion for a modification of his sentence under 28 U.S.C. § 3582(c)(2), contending that he is entitled to a lower sentence under the Supreme Court's recent opinion in Alleyne v. United States, 133 S. Ct. 2151 (2013). Defendant asks the court to change the nature of the proceeding if he cannot proceed under § 3582.

Defendant is right to be concerned about the suitability of § 3582 as the vehicle for seeking modification of his sentence. Section 3582 can be used only for sentence modifications based upon changes in the guidelines that have been ruled retroactive by the Sentencing Commission. Challenges such as defendant's are brought properly under 28 U.S.C. § 2255. Therefore, I will do as he has asked and construe his motion as one brought under § 2255 for post conviction relief. Even so construed, however, the motion is not one on which defendant can prevail because the holding in Alleyne has no application to him.

Ordinarily, post conviction motions must be filed within a year of the time at which the challenged conviction became final. Defendant's motion was not filed within a year after his original sentence became final (approximately July 7, 2007) or even within a year after his amended sentence became final (approximately December 26, 2008), so it would be untimely under § 2255(f)()1). However, under § 2255(f)(3), persons who have a claim based upon a right newly recognized by the Supreme Court that has been made retroactively applicable to cases on collateral review have until one year after the right has been recognized in which to file a post conviction motion.

Defendant says that he is basing his claim on Alleyne. It appears that Alleyne is retroactively applicable to cases on collateral review because its holding does not represent a change in procedure but a substantive rule that affects the length of the sentence that can legally be imposed upon the defendant. Cf., Teague v. Lane, 489 U.S. 288 (1989) (holding that Batson rule requiring trial juries to reflect a fair cross section of the community was not applicable to cases on collateral rule because it did not "place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe") (quoting Mackey , 401 U.S. 667, 692 (1971)). In Alleyne, the defendant was charged under 18 U.S.C. § 924(c)(1)(A) and found guilty by a jury of carrying a firearm in relation to a crime of violence. At sentencing, the court found that Alleyne had "brandished" the firearm he was carrying during the robbery and found that the defendant was subject to a mandatory minimum sentence of seven years, rather than the five-year mandatory minimum for simply carrying a firearm. Alleyne, 133 S. Ct. at 2156. The Supreme Court

remanded Alleyne's case for resentencing, reasoning that "[a]ny fact that, by law, increases the [mandatory minimum statutory] penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 313 S. Ct. at 2155.

In a similar case, Welch v. United States, 604 F.3d 408 (7th Cir. 2010), in which the issue was whether the defendant could rely on Begay v. United States, 553 U.S. 137 (2008), to challenge the lower court's finding that his prior offense of eluding a police officer was a violent felony under the Armed Career Criminal Act, the court of appeals found that Begay could be applied retroactively to Welch's § 2255 post conviction proceeding because the issue was one of punishment and therefore substantive. Welch, 604 F.3d at 415. It is reasonable to assume that it, and other courts as well, would find the holding in Alleyne to be substantive in nature.

I conclude therefore that, as a legal matter, defendant is not barred from bringing a § 2255 motion based on Alleyne. However, his motion cannot succeed because the holding in Alleyne does not apply to his case. Although his sentence was increased under the guidelines for possession of a dangerous weapon and for his role in the conspiracy, neither of these increases altered the legislatively prescribed range of sentences to which he was exposed, as the finding of "brandishing" did in Alleyne's case. Defendant's crime of conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 carried no potential mandatory minimum sentence. Therefore, the upward adjustments made to his base offense level affected only his guideline sentence, not the statutory maximum.

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 Jerry McCoy's motion is construed as a motion brought under 28 U.S.C. § 2255 and DENIED for his failure to show that he was sentenced in violation of the law. 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 16th day of July, 2013.

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