

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOMMIE C. BENDER,

Defendant.

ORDER

05-CR-0111-C-01
07-C-0014-C

Defendant Tommie C. Bender has filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Defendant contends that the court sentenced him unconstitutionally when it relied on his prior controlled felony convictions to sentence him as a career offender. Defendant believes that it is error for a court to rely on prior convictions for any purpose unless the prior convictions have been charged in the indictment and proven to the jury beyond a reasonable doubt.

Defendant was convicted of one count of distributing heroin. Had he not qualified as a career offender, his offense level would have been 12 (less two levels for acceptance of responsibility), his criminal history category would have been IV and his guidelines sentencing range would have been 15-21 months. However, defendant had two prior

convictions, one state conviction for possession with intent to deliver a controlled substance and one federal conviction for possession with intent to distribute cocaine base. Under U.S.S.G. § 4B1.1, this made him a career offender. The charge against him carried a maximum penalty of 20 years, so his base offense level became 32 (less three levels for acceptance of responsibility) and his criminal history category became VI. The resulting guidelines range was 151-188 months, or approximately ten times the sentence he would have received had he not been a career offender.

Defendant was sentenced on January 10, 2006, to 151 months, the bottom of the guidelines range. He did not appeal his sentence. The failure to appeal makes it necessary to determine whether he can bring a challenge to his sentence in a postconviction proceeding. Ordinarily, a defendant who fails to take a direct appeal waives his right to bring a postconviction challenge based on any issue he could have raised on appeal. This is because a postconviction motion is not intended to be a substitute for appeal. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996). There are two exceptions to this general rule: (1) if the defendant can show cause and prejudice for his failure to raise the issues on appeal; or (2) if he can show that the court's refusal to consider the issue he is raising would lead to a fundamental miscarriage of justice, that is, that he is "actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998) (citing Murray v. Carrier, 477 U.S. 478, 485 (1986)).

Defendant has not alleged that he was prevented from appealing from his sentence. He does not say, for instance, that he asked his trial counsel to appeal and was refused. He cannot say that the claim he is raising is so novel that its legal basis was not reasonably available to counsel at the time he could have appealed, id. at 623, because all of the cases on which he relies were decided before he was sentenced.

The second exception of a fundamental miscarriage of justice is not available to defendant because he is challenging only the legality of his sentence and is not claiming actual innocence. Id. He admits that he distributed heroin. I conclude, therefore, that defendant may not pursue his postconviction motion.

Even if I had not reached this conclusion, defendant would not succeed on the merits of his claim. In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Supreme Court held that prior convictions were sentencing factors, not elements of the crime that had to be charged and found by the jury beyond a reasonable doubt. Although Justice Thomas suggested in United States v. Shepard, 544 U.S. 13, 27 (2005), that Almendarez-Torres had been decided incorrectly, the Court has not overruled it or held that courts sentencing under the advisory sentencing guidelines regime set out in United States v. Booker, 543 U.S. 220 (2005), are barred from relying on prior convictions not included in the charging documents.

ORDER

IT IS ORDERED that defendant Tommie C. Bender's motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that he could not have raised the same challenge to his sentence on a direct appeal of his sentence.

Entered this 31st day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge