IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROLAND C. SPERBERG,

ORDER

Petitioner,

08-cv-610-bbc

v.

HELEN MARBERRY,
Warden, Federal Correctional Institution,
Terre Haute, Indiana,

Respondent.[1]

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Petitioner Roland Sperberg pleaded guilty in 2004 to unlawful transport of a firearm in violation of 18 U.S.C. § 922(g). Generally, the maximum penalty for that crime is 120 months, 18 U.S.C. § 924(a)(2), but petitioner's sentence was increased to 210 months under 18 U.S.C. § 924(e) because the sentencing judge concluded that petitioner had three previous convictions for violent felonies, including escape from custody (Wis. Stat. §

[1] Petitioner named the "United States of America" as the respondent. However, under 28 U.S.C. § 2242, the proper respondent is "the person who has custody over" the petitioner. I have amended the caption accordingly. Although petitioner's custodian is in Indiana rather than Wisconsin, suggesting that venue may not be proper in this court, questions of venue may be waived. Moore v. Olsen, 368 F.3d 757 (7th Cir. 2004).

946.42), maliciously threatening to injure another person (Wis. Stat. § 943.30(1)) and operating a vehicle while intoxicated, eighth offense (Wis. Stat. § 346.63(1)(a)). United States v. Sperberg, 04-CR-84-S-1 (W.D. Wis. Nov. 24, 2004) (Shabaz, J.), Sentencing Tr., dkt. #26. In his petition for a writ of habeas corpus under 28 U.S.C. § 2241, petitioner contends that the enhancement is unlawful because drunk driving is not a "violent felony" within the meaning of § 924(e).

Normally, a prisoner seeking to attack his conviction or sentence must do so on direct appeal or in a motion filed under 28 U.S.C. § 2255. Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003). Relief under § 2241 is available only when a motion under § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention," 28 U.S.C. § 2255(e), which means that "a structural problem in § 2255 forecloses even one round of effective collateral review" and "the claim being foreclosed is one of actual innocence." Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002).

In this case, relief may be foreclosed under § 2255. Petitioner filed one § 2255 motion in 2006 and it was denied by Judge Shabaz. United States v. Sperberg, 04-CR-84-S-1, dkt. #50. Thus, petitioner is allowed to seek leave from the court of appeals to file a second § 2255 motion only if he has "newly discovered evidence" or if he is relying on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h). Petitioner concedes that neither of these possibilities applies

to him.

Petitioner *is* relying on a new rule of law, but it is a new interpretation of a statute rather than the Constitution. He points to Begay v. United States, 128 S. Ct. 1581 (2008), in which the Supreme Court held that New Mexico's felony drunk driving statute was not a "violent felony" under 18 U.S.C. § 924(e) because the offense did not "involve purposeful, violent, and aggressive conduct" like each of the other crimes expressly listed in § 924(e)(2)(B)(ii). Id. at 1586 (internal quotations omitted). Of course, petitioner could not have benefitted from Begay on direct appeal (in 2005) or in his § 2255 motion (in 2006) because the Court did not decide Begay until 2008. In fact, on direct appeal, petitioner argued that drunk driving did not qualify as a "violent felony," United States v. Sperberg, 432 F.3d 706, 708 (7th Cir. 2005), but the court of appeals rejected his contention, relying on United States v. Rutherford, 54 F.3d 70 (7th Cir. 1995), in which it had held that similar language in the sentencing guidelines encompassed drunk driving. Thus, it appears that § 2255 "foreclose[d] even one round of effective collateral review" for petitioner's claim. Taylor, 314 F.3d at 835.

The second question is whether petitioner's claim "is one of actual innocence." Id. Although petitioner is not claiming innocence for his crime of unlawful transport of a firearm, he contends that he was "sentenced . . . for a status . . . that [was] not made criminal by the statut[e] under which [he was] sentenced," which is sufficient under In re Davenport,

147 F.3d 605, 609-10 (7th Cir. 1998), because it is a challenge "to the fundamental legality of [his] sentenc[e]." In other words, under Davenport, it is enough that petitioner is claiming "innocence" of his status as an armed career criminal offender under § 924(e). Id.

"The only potential procedural stumbling block to [petitioner's] presentation of his claim under § 2241 is Davenport's requirement that the change of law has to have been made retroactive by the Supreme Court." United States v. Prevatte, 300 F.3d 792, 800 (7th Cir. 2002) (internal quotations omitted). The Supreme Court has not yet declared whether its holding in Begay should be applied retroactively. Thus, if that is a condition of success for a claim under § 2241, petitioner's claim fails. However, the court held in Prevatte, 300 F.3d at 800, that "the scope of this requirement is uncertain" and noted that

> in other circuits, statutory cases such as this one have been treated as not involving a retroactivity issue. Rather, the courts have taken the view that a decision of the Supreme Court that gives a federal criminal statute a narrower reading than it previously had been given necessarily raises the possibility that an individual previously convicted under the broader reading now stands convicted of activity that Congress never intended to make criminal.

Since Prevatte, the court of appeals has not revisited the retroactivity requirement; the court ignored it in two subsequent cases in which the court applied the "actual innocence" requirement for bringing a claim under § 2241. Morales v. Benzy, 499 F.3d 668 (7th Cir. 2007); Kramer, 347 F.3d at 217-18. Thus, although there is some room for doubt, petitioner's claim is strong enough to require a response from the government.

This leaves the merits of the petition, which appear to be strong as well. In Begay, the Court did not consider directly whether Wisconsin's drunk driving statute was a "violent" crime, but there are no differences between New Mexico's law and Wisconsin's that would suggest a different conclusion. Again, the key reasoning in Begay is that New Mexico's drunk driving law did not require "purposeful or deliberate" conduct. Begay, 128 S. Ct. at 1587. See also United States v. Smith 544 F.3d 781, 786 (7th Cir. 2008) ("We must conclude that, after Begay, the residual clause of [§ 924(e)] should be interpreted to encompass only "purposeful" crimes. Therefore, those crimes with a mens rea of negligence or recklessness do not trigger the enhanced penalties mandated by" § 924(e).) Like the New Mexico law, Wis. Stat. § 346.63(1)(a) does not require purposeful conduct; it criminalizes any unsafe driving caused by the influence of an intoxicant. In any event, the court of appeals has held that the holding in Begay extends to Wisconsin's drunk driving law. United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008).

Two other matters remain. First, petitioner has brought a second claim, which is that he is entitled to withdraw his guilty plea because of the change in law brought about by Begay. He contends that he did not make his plea knowingly and voluntarily because Judge Shabaz told him that drunk driving was a crime of violence under § 924(e)(1). Petitioner does not say whether Judge Shabaz told him this before he gave his plea or whether it had any effect on his decision to plead guilty. It would be surprising if it did have any effect:

under petitioner's view, he believed that he was subject to an automatic 15-year enhancement under § 924(e) rather than a 10-year maximum sentence under § 922(g), meaning that he thought at the time that he had *more* to lose by pleading guilty than he believes now.

In any event, this claim cannot succeed. "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757 (1970). At the time he entered his plea, the law in this circuit was that drunk driving was a violent crime under § 924(e).

Finally, I note that the sentencing judge relied on petitioner's crime "escape from custody" under Wis. Stat. 946.42 in concluding that petitioner had three previous convictions for a violent felony. In Templeton, 543 F.3d at 383-84, the court of appeals held that escapes are not violent felonies under Begay when they involve "passive" conduct only, such as leaving house arrest or failing to return from a work furlough. However, regardless whether petitioner's escape was "passive" or "aggressive," he cannot challenge the designation of that crime as a violent felony at this time. The Supreme Court has granted certiorari on the question whether escape qualifies as a violent felony. United States v. Chambers, 473 F.3d 724 (7th Cir. 2007), cert. granted, Chambers v. United States, 128 S. Ct. 2046 (2007). In Morales, 499 F.3d at 672-73, the court held that a prisoner may not

bring a claim under § 2241 for actual innocence when the claim rests on a question that is before the Supreme Court. The court reasoned that "it would be paradoxical to deem [a petitioner] innocent by virtue of our decisions though within a year it may turn out that he is guilty by virtue of the Court's rejecting those decisions." Id. at 673. Rather, the petitioner must wait until the Supreme Court decides the issue and then bring a petition under § 2241 if the case is decided in the petitioner's favor. Id. However, this is not fatal to petitioner's claim. Because § 924(e) applies only if a defendant has three previous violent felony convictions, petitioner may be entitled to relief if he shows that the sentencing judge incorrectly classified any one of his previous convictions as a violent felony.

Under Fed. R. Civ. P. 4(i)(2), a party suing a federal employee in his official capacity "must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the . . .employee"; under Rule 4(i)(1)(A), to serve the United States, a party must "deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought, . . . send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office" and "send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C." For the sake of expediency, I will send the petition to respondent, the local United States attorney and the United States Attorney General by certified mail. Petitioner should not attempt to complete service on his own behalf.

ORDER

IT IS ORDERED that

1. Respondent Helen Marberry may have 20 days from the date of service of the petition upon the United States Attorney for this district to show cause why petitioner Roland Sperberg's petition for a writ of habeas corpus should not be granted. Petitioner may have 20 days from the date of service of the response to file a traverse.

2. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

3. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 20th day of November, 2008.

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