

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

GREGORY J. PHILLIPS,

ORDER

Petitioner,

10-cv-439-bbc

v.

CAROL HOLINKA, Warden,
Oxford Federal Correctional Institution,

Respondent.

On November 18, 2010, I denied petitioner Gregory Phillips' petition for a writ of habeas corpus under 28 U.S.C. § 2241. Now before the court is petitioner's motion for reconsideration of the order denying his petition. Because petitioner has not shown a fundamental defect in his sentence, his motion will be denied.

In his petition, petitioner contended that his sentence for one count of conspiracy and one count of possession with intent to distribute cocaine base was enhanced unlawfully under the career offender provision, U.S.S.G. § 4B1.1. Specifically, one of his two prior felony convictions used as the basis for the enhancement was a conviction under Wisconsin law for first-degree reckless endangerment, Wis. Stat. § 941.30(1), a crime that is no longer considered a crime of violence for purposes of the career offender provision according to the

Supreme Court’s decision in Begay v. United States, 553 U.S. 137 (2008), and subsequent appellate decisions. I concluded that petitioner’s claim could not be brought under § 2241 because his claim did not satisfy the mandates of § 2255’s so-called “savings clause,” which provides that a prisoner can use § 2241 only if he can show that “the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e); Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (per curiam). To satisfy the savings clause, petitioner had to show a fundamental defect in his sentence that would lead to a complete miscarriage of justice if not corrected. In re Davenport, 147 F.3d 605, 610-11 (7th Cir. 1998).

I noted that there may be some situations in which a prisoner may challenge his sentence under § 2241, such as when an improper recidivist enhancement increases a prisoner’s sentence beyond the otherwise applicable legal maximum. E.g., Sperberg v. Marberry, 09-cv-22-WTL-DML (S.D. Ind. Oct. 26, 2010) (granting petition under § 2241 after finding that prisoner was serving sentence enhanced erroneously under the Armed Career Criminal Act that exceeded otherwise applicable statutory maximum for his crime). In such a case, the prisoner’s claim is based on a misapplication of a statute, satisfying the requirement in § 2241 that the prisoner establish that he is “in custody in violation of the laws of the United States.” However, petitioner’s sentence falls within the statutory maximum set for his crime, which is life. In addition, I noted that the Court of Appeals for

the Seventh Circuit has concluded that claims based merely on erroneous application of the sentencing guidelines are not fundamental defects that would result in a miscarriage of justice if not corrected. Unthank v. Jett, 549 F.3d 534, 535 (7th Cir. 2008) (holding that prisoner may not bring claim under § 2241 contending merely that his sentence is too high under sentencing guidelines); see also Taylor v. Gilkey, 314 F.3d 832, 835-36 (7th Cir. 2002) (holding that claim involving erroneous application of guidelines did not present defect cognizable under § 2241).

In his motion for reconsideration, petitioner contends that his sentence did exceed the statutory maximum, at the time it was given. At the time petitioner was sentenced in 2003, the sentencing guidelines were considered mandatory. This court found petitioner's guidelines range to be 262 to 327 months and sentenced him to 262 months. Petitioner contends that his guidelines without the enhancement would have been a mandatory 188 to 235 months and thus, the sentence of 262 months exceeded the guidelines maximum of 235 months that was in place at the time he was sentenced. Petitioner contends that because his sentence was imposed before the Supreme Court held in United States v. Booker, 543 U.S. 220 (2005), and subsequent decisions that the sentencing guidelines are advisory, the mandatory guideline maximum of 235 months was equivalent to a statutory maximum, which his sentence exceeded. In addition, petitioner contends that it is irrelevant that, following a limited post-Booker remand, this court informed the court of appeals that it

would impose the same sentence under advisory guidelines because it was not until the court of appeals decided United States v. Corner, 598 F.3d 411 (7th Cir. 2010), that district courts were free to disagree with the crack/powder disparity reflected in the career offender guideline. Before the court's decision in Corner, circuit precedent held that the disparity in U.S.S.G. § 4B1.1 was mandatory. E.g., United States v. Welton, 583 F.3d 494 (7th Cir. 2009). Thus, it was only recently that petitioner could raise his specific challenges and benefit from the Supreme Court's rulings in Booker and Begay.

Although petitioner's motion for reconsideration raises interesting arguments, petitioner has still failed to show that his particular challenge to his sentence may be brought under 28 U.S.C. § 2241; he has not shown that his sentence suffers from a fundamental defect that would result in a complete miscarriage of justice if not remedied. Petitioner relies heavily on Welch v. United States, 604 F.3d 408, 412-13 (7th Cir. 2010), in which the court of appeals held that claims arising out of circumstances in which "a change in law reduces the defendant's statutory maximum sentence below the imposed sentence," may be brought under § 2255. Petitioner contends that Welch overruled Unthank, Davenport, Kramer and other cases addressing the circumstances in which a claim may be brought under § 2241. However, in Welch, the court does not mention these cases, no doubt because the court was considering when a motion may be brought under 28 U.S.C. § 2255. It had no reason to discuss explicitly whether sentencing claims arising from a misapplication of the sentencing

guidelines may be brought under § 2241. To the extent that the court of appeals' opinion in Welch is relevant in the § 2241 setting, the opinion applies the familiar “fundamental defect” and “miscarriage of justice” language and states that when a prisoner is challenging a sentence, as petitioner is doing, the prisoner must be able to show that his sentence imposes “a punishment that the law cannot impose on him.” Welch, 604 F.3d at 413 (citing Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004)). See also Scott v. United States, 997 F.2d 340, 342 (7th Cir. 1993) (holding that claims alleging misapplication of then-mandatory federal sentencing guidelines may not be brought under § 2255(a) absent showing of “fundamental defect which inherently results in a complete miscarriage of justice”); Reed v. Farley, 512 U.S. 339 (1994) (habeas review is available to check violations of federal laws when error “qualifies as ‘a fundamental defect which inherently results in a complete miscarriage of justice’”) (citing Hill v. United States, 368 U.S. 424, 428 (1962)); Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999).

Defendant cannot make that showing. The application of the career offender guidelines increased petitioner's then-mandatory guideline range within the authorized statutory range (ten years to life in prison), but it did not raise the available range of statutory penalties by requiring this court to impose a sentence above the statutory maximum that would apply otherwise. Although guidelines ranges may have had the effect of statutory minimums and maximums at the time petitioner was sentenced, the guidelines

are discretionary now, and it is the current sentencing standards that should be considered when determining whether petitioner's claim is viable under § 2241. If petitioner were granted relief on his habeas petition and were resentenced today, the proper guideline range would be discretionary, his maximum statutory penalty would be life in prison and thus, this court could still sentence him to the same 262-month sentence. In fact, the court could sentence him to a sentence exceeding 262 months.

The fact that an identical sentence remains legally available at an advisory guideline resentencing demonstrates that petitioner is not raising a claim that his sentence suffers from a fundamental defect that would result in complete injustice if not corrected. Rather, petitioner's claim is that he should be resentenced so that the sentencing judge may apply discretion in giving him a sentence that may or may not be lower than his present sentence. Petitioner's claim is far different from the claim allowed to proceed in Welch. There, the movant was challenging a sentence that was unlawful under current law. Petitioner has not received a punishment that the "law cannot impose" under current sentencing standards. Thus, his claim is more akin to the claims challenging errors in application of sentencing guidelines that were dismissed in Unthank, Taylor and Harvey.

In sum, petitioner has not presented a claim that his sentence involves an inherent miscarriage of justice warranting § 2241 relief. Therefore, his motion for reconsideration will be denied.

ORDER

IT IS ORDERED that petitioner Gregory Phillips' motion for reconsideration, dkt. #10, is DENIED.

Entered this 4th day of January, 2011.

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