

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

---

QUADALE D. COLEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

OPINION AND ORDER

10-cv-736-wmc

Petitioner Quadale D. Coleman has filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct the prison sentence that he received in *United States v. Coleman*, Case No. 07-cr-80-jcs (W.D. Wis.), contending that his sentence was enhanced incorrectly under a provision in the Sentencing Guidelines that applies to “career offenders.” The government argues that Coleman’s motion is without merit. (Doc. #2.) Coleman also filed a motion for a status conference and a request for leave to supplement his original § 2255 motion to add a claim for relief under recent amendments to the Sentencing Guidelines. (Docs. #5, #6.) Because the court concludes that Coleman is entitled to be resentenced, the motion under 28 U.S.C. § 2255 will be granted.

FACTS

A. Probation Office Guideline Calculation

On August 8, 2007, Coleman pleaded guilty to charges of possession with intent to distribute a controlled substance -- cocaine base (*i.e.*, crack cocaine) -- in violation of 21 U.S.C. §§ 841(a)(1). *See United States v. Coleman*, Case No. 07-cr-80-jcs (W.D. Wis.).

According to the presentence report (PSR), Coleman possessed 121.939 grams of crack cocaine. Using the 2006 version of the United States Sentencing Guidelines, the Probation Office determined that Coleman's offense warranted a base level score of 32 under Guideline § 2D1.1. With a 2-level increase for having a firearm in proximity to the drugs and a 3-level reduction for acceptance of responsibility, Coleman's total offense score was adjusted to 31.

In calculating his criminal history score, the Probation Office determined that Coleman's record of felony convictions yielded 10 points. With a 2-level increase for committing the charged offense within 2 years of his release from custody for one of his prior convictions, Coleman netted a total of 12 criminal history points, placing Coleman within Criminal History Category V of the Guidelines. This meant that Coleman faced a guideline range of imprisonment of between 168 and 210 months.

However, the Probation Office also recommended an additional enhancement under § 4B1.1 of the Guidelines, which applies where a defendant is classified as a "career offender." A defendant is a career offender, and subject to an enhanced sentence under Guideline § 4B1.1(a), if the following criteria are met: "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." A "crime of violence" is defined in Guideline § 4B1.2(a) to mean "any offense under federal or state law, punishable by imprisonment for a term exceeding one year," that — (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; or (2) "is

burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

The Probation Office found two of Coleman’s prior felony convictions met the criteria for the career offender enhancement: (1) a conviction for possession with intent to distribute cocaine base in Dane County Circuit Court Case Number 95CF447; and (2) a conviction for sexual assault of a child in violation of Wis. Stat. § 948.02(2) in Dane County Circuit Court Case Number 95CF1672. The Probation Office treated these two prior convictions as a controlled substance offense and a crime of violence, respectively, for purposes of the career offender enhancement found in Guideline § 4B1.1(a).

As a career offender, Coleman moved from Criminal History Category V to VI. As a result, Coleman’s recommended range of imprisonment under the Guidelines moved to 188–235 months.

#### B. District Court Guideline Calculation

At sentencing on November 2, 2007, the district court used the 2007 version of the United States Sentencing Guidelines to determine Coleman’s sentence. This version of the Sentencing Guidelines incorporated amendments to the drug quantity table found in § 2D1.1, which took effect on November 1, 2007. Under this version of the Guidelines, Coleman’s base offense level was lowered to 30. With a 2-level increase for having a firearm in proximity to the drugs, and a 3-level reduction for acceptance of responsibility, the district court calculated a total offense level of 29.

With placement in Criminal History Category V, Coleman’s guideline range of imprisonment would have been 140 to 175 months in prison under the revised calculations.

Following the recommendation in the PSR, however, the district court determined Coleman was a career offender and applied the enhancement found in § 4B1.1. Because the statutory maximum for the offense was 40 years under 21 U.S.C. § 841(a)(1), the district court determined that Coleman's total offense level was 31, with credit for the 3-level reduction for acceptance of responsibility. With career offender status and the resulting placement in Criminal History Category VI, Coleman still faced an advisory imprisonment range of 188 to 235 months.

Coleman's trial attorney did not object to the career offender enhancement, but argued instead that the criminal history score and his placement in Criminal History Category VI overstated Coleman's record because he was not a "violent offender." The district court overruled the objections and sentenced Coleman at the upper end of the advisory guideline range to 225 months in prison, followed by a five-year term of supervised release.

### C. Appeal of Sentence

On direct appeal, Coleman argued that he was entitled to resentencing under *United States v. Kimbrough*, 552 U.S. 85 (2007), which recognized a lower range of punishment for certain convictions involving the possession of crack cocaine. As a career offender, the Seventh Circuit found Coleman ineligible for relief under *Kimbrough* and affirmed the conviction in an unpublished opinion. *See United States v. Coleman*, 349 Fed. App'x 109, 2009 WL 3427549 (7th Cir. Oct. 26, 2009). Coleman did not pursue a petition for a writ of certiorari and his conviction became final on January 26, 2010.

D. Present Motion

Coleman now seeks relief from his sentence under 28 U.S.C. § 2255 on the grounds that he was improperly classified as a career offender. In particular, Coleman argues that his prior conviction for second-degree sexual assault of a child under Wis. Stat. 948.02(2) does not qualify as a “crime of violence” for purposes of § 4B1.1 and that he was not eligible for the career offender enhancement. Acknowledging that he did not present this issue on direct appeal, Coleman also contends that his attorneys were deficient for failing to raise this specific objection because recent precedent reflects that he should not have been classified as a career offender or subjected to an increased sentence. In a supplement to his § 2255 motion, Coleman argues further that he is not a career offender and that he is entitled to a reduction in sentence under retroactive amendments to the Sentencing Guidelines, which went into effect on November 1, 2011, regarding the range of punishment for certain crack cocaine offenses.

OPINION

A motion for relief under 28 U.S.C. § 2255 invokes “an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process.” *Almonacid v. United States*, 476 F.3d 518, 520 (7th Cir. 2007) (citing *Kafo v. United States*, 467 F.3d 1063, 1068 (7th Cir. 2006)). To obtain relief under § 2255, a prisoner must show that the district court sentenced him “in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by

law, or that it is otherwise subject to collateral attack." 28 U.S.C. § 2255. Relief under § 2255 is appropriate where a defendant establishes "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Harris v. United States*, 366 F.3d 593, 594 (7th Cir. 2004) (quoting *Borre v. United States*, 940 F.2d 215, 217 (7th Cir. 1991)).

As outlined above, Coleman seeks relief from his conviction on the grounds that his sentence was improperly enhanced under the career offender provision found in Guideline § 4B1.1. In particular, Coleman argues that his sentence was improperly premised on a predicate offense for sexual assault of a child under Wis. Stat. 948.02(2), which does not meet the definition of a "crime of violence" for purposes of the career offender guideline. As support for this argument, Coleman relies on *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010). In that case, the Seventh Circuit used the "categorical approach" outlined in *Begay v. United States*, 553 U.S. 137 (2008), and *Shepard v. United States*, 544 U.S. 13, 17 (2005), to determine that second-degree sexual assault of a child in Wis. Stat. § 948.02(2), which prohibits "sexual contact or sexual intercourse with a person who has not attained the age of 16 years," is not a "crime of violence" for purposes of enhancing a sentence under Guideline § 4B1.2(a). *McDonald*, 592 F.3d at 813 (citations omitted).

The government maintains that review under 28 U.S.C. § 2255 is unavailable for issues concerning a district court's application of the Sentencing Guidelines. The Seventh Circuit has recognized that "sentencing errors" are not cognizable on collateral review because, as a general rule, those errors must be presented on direct appeal. *Scott v. United States*, 997 F.2d 340, 343 (7th Cir. 1993). The Seventh Circuit has recognized a "very

narrow exception,” however, limited to cases in which “[a] postconviction clarification in the law has rendered the sentencing court’s decision unlawful.” *Narvaez v. United States*, 674 F.3d 621, 627 (7th Cir. 2011) (citing *Welch v. United States*, 604 F.3d 408, 412-13 (7th Cir. 2010)). Coleman fits within this narrow exception because, in light of the decision in *McDonald*, it now appears that he should have been neither classified as a “career offender,” nor subjected to an enhanced range of punishment under § 4B1.1. Moreover, the Seventh Circuit has held that an unwarranted increase in the guideline range caused by an erroneous career offender classification constitutes a “miscarriage of justice” for which relief is appropriate under 28 U.S.C. § 2255. *Narvaez*, 674 F.3d at 630.

The government nevertheless argues relief is not warranted because the decision in *McDonald*, on which Coleman’s claim depends, is distinguishable.<sup>1</sup> The government notes

---

<sup>1</sup> The government argues further that collateral review is barred by the doctrine of procedural default, because Coleman’s attorneys did not raise a specific objection to the career offender guideline at sentencing or during his appeal. *See Theodurou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989) (citations omitted) (collateral review is not a substitute for an appeal). When an issue is not raised on direct appeal, the claim is barred from collateral review unless the petitioner can show good cause for failing to raise the issue and actual prejudice. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). Ineffective assistance of counsel can serve as “cause” excusing a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1996); *see also Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). The court need not address Coleman’s allegations of ineffective assistance because, under an alternative exception to the procedural bar, review is available if a refusal to consider the issue would lead to a “fundamental miscarriage of justice.” *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996) (citing *Reed v. Farley*, 512 U.S. 339, 354 (1994) (quotations omitted)). The procedural bar does not apply in this case because, as noted above, if the career offender designation does not apply to Coleman, and his sentence was enhanced improperly, this would qualify as a “miscarriage of justice” of the fundamental variety. *Narvaez*, 674 F.3d at 623 n.2, 630; *see also Addonizio*, 442 U.S. 178, 185 (1979) (observing that relief is authorized under 28 U.S.C. § 2255 where the claimed error constituted a “fundamental defect which inherently results in a complete miscarriage of justice”) (citing *Hill v. United States*, 368 U.S. (continued...))

that the decision in *McDonald* involved punishment imposed under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924, et seq., and not a sentence that was increased by the now-advisory Guidelines. In terms that are identical to the definition for a “crime of violence” under the career offender enhancement in Guideline § 4B1.2(a), the ACCA defines a “violent felony” to mean “any crime punishable by imprisonment for a term exceeding one year . . . that — (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). Indeed, because the definition for violent felony mimics the definition for a crime of violence found in the corresponding career offender guideline, § 4B1.1, the Seventh Circuit treats these provisions as “interchangeable.” *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008); *see also United States v. Rosas*, 410 F.3d 332, 336-37 (7th Cir. 2005) (citations omitted).

Likely for this reason, the Seventh Circuit has already rejected the distinction the government would make between a wrongful statutory enhancement as an “armed career criminal” under the ACCA and a regulatory enhancement as a “career offender” under the guidelines. In *Narvaez*, the Seventh Circuit found that the defendant did not qualify for career offender status for purposes of the enhancement in Guideline § 4B1.1 because one of his predicate offenses did not constitute a crime of violence. In finding this issue appropriate for review under 28 U.S.C. § 2255, the Seventh Circuit observed that the erroneous career

---

<sup>1</sup>(...continued)  
424, 428 (1962)).



offender designation rendered the defendant “eligible . . . for additional years of incarceration without *any* justification in the sentencing scheme established by law.” *Narvaez*, 674 F.3d at 627. The Seventh Circuit explained that “[t]he fact that [a defendant’s] sentence falls below the applicable statutory-maximum sentence is not alone determinative of whether a miscarriage of justice has occurred.” *Id.* at 629. By imposing the career offender classification in error, the defendant “was sentenced based upon the equivalent of a nonexistent offense.” *Id.* In the Seventh Circuit’s view, and perforce this court’s view, “[t]his error clearly constitutes a miscarriage of justice.” *Id.*

As Coleman’s trial attorney noted at sentencing, without the career offender designation Coleman faced an advisory imprisonment range of between 140 and 175 months. With the career offender enhancement, however, Coleman’s potential range of imprisonment increased to between 188 and 235 months. In imposing a term of 225 months in prison, the district court stated that such a sentence toward the high end of that guideline range was warranted because “it adequately depicts exactly what a career offender is and that is Mr. Coleman.” (Sentencing Tran., Doc. # 29, at 9.) To the extent that Coleman’s career offender status and his increased penalty range was based upon an invalid predicate offense, the court concludes that Coleman is entitled to relief in the form of resentencing without the career offender classification found in Guideline § 4B1.1.

#### ORDER

IT IS ORDERED that petitioner Quadale Coleman’s motion for relief under 28 U.S.C. § 2255 is GRANTED and that his case be set for resentencing. By virtue of this ruling,

Coleman's motions for a status conference (Doc. #5) and for leave to supplement (Doc. #6) are DISMISSED AS MOOT.

Entered this 3rd day of May, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY

District Judge