IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARCELO SANDOVAL,

OPINION and ORDER

Petitioner,

11-cv-255-bbc

v.

CAROL HOLINKA,

Respondent.

- -

Petitioner Marcelo Sandoval, a prisoner at the Oxford Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner asserts that he was erroneously sentenced to ten extra years of prison under 18 U.S.C. § 924(c), which provides longer penalties for carrying or using an automatic firearm in the furtherance of certain crimes, because the district court incorrectly considered the possession of an automatic firearm as a sentencing factor rather than as an element of the crime. In an order dated June 17, 2011, I directed respondent Warden Carol Holinka to show cause why the petition should not be granted. After reviewing the government's response and petitioner's traverse, I conclude that the petition must be dismissed.

OPINION

In the June 17, 2011 order, I noted that there was a threshold issue: petitioner did not state explicitly which of his criminal convictions is the subject of his petition. Following

a search of the federal judiciary's electronic docketing system (PACER), I asked petitioner to confirm whether he was referring to Central District of Illinois case no. 99-cr-40019-JBM-1. Petitioner agrees that this is the correct case so I will go on to consider the parties' substantive provisions.

I. Background

On February 18, 1999, Marcelo Sandoval was charged in a three-count indictment with one count of kidnapping, in violation of 18 U.S.C. § 1201(a)(1); one count of using and carrying a firearm during and in relation to the kidnapping, in violation of 18 U.S.C. §§ 924(c) and 2; and one count of conspiracy to distribute and possess marijuana, cocaine, and methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 2 of the indictment charged that petitioner and his co-defendant, Hector Sandoval, knowingly used and carried (1) an AA Arms 9mm handgun; and (2) a Colt .38 caliber handgun during the kidnapping.

On April 5, 1999, the government filed two notices of enhancement, one of which related to the weapons charge and was premised on petitioner's having knowingly carried, and aided and abetted the carrying of, a semiautomatic assault weapon as defined in 18 U.S.C. § 921(a)(30)(A) and (C), the AA Arms 9mm handgun. Therefore, under 18 U.S.C. § 924(c)(1)(B)(I), if petitioner was found guilty, he would be subject to an increased penalty of 10 years in prison.

On July 8, 1999, a jury returned verdicts against petitioner on all three counts of the

indictment. Regarding the weapons count, the jury was instructed that the government had to prove beyond a reasonable doubt that defendant had committed the crime of kidnapping as charged in count 1 and that defendant had knowingly used or carried a firearm during and in relation to the kidnapping. Also, the jury was given an aiding and abetting instruction with regard to the weapons count. The jury found petitioner guilty of using or carrying the AA Arms 9mm handgun during and in relation to the kidnapping; the jury did not find him guilty of using or carrying the Colt .38 caliber super semi-automatic handgun.

Before sentencing, petitioner filed a motion to set aside his § 924(c) conviction, arguing that he should be responsible only for the Colt .38 handgun he carried and not for the assault weapon (the AA Arms handgun) carried by the co-defendant. At sentencing, the court denied petitioner's motion, stating that petitioner was responsible for the assault weapon "under the aiding and abetting theory" and agreed with the government that "there was ample evidence to support [a finding] that he and [the co-defendant] used and carried these firearms during and in relation to the kidnapping." Petitioner was sentenced to concurrent terms of 240 months for the kidnapping count and 262 months for the drug conspiracy count and to a consecutive 10-year term on the § 924(c) count.

II. Discussion

Ordinarily, a prisoner seeking to attack his conviction or sentence must do so on direct appeal or by way of a motion filed under 28 U.S.C. § 2255. Unthank v. Jett, 549 F.3d 534, 534-35 (7th Cir. 2008); Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (per

curiam). A prisoner like petitioner who has filed one § 2255 motion may pursue relief under § 2241 only if he can satisfy the mandates of § 2255's so-called "savings clause," which provides that a prisoner can use § 2241 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, 347 F.3d at 217. Petitioner must first show that the legal theory he advances relies on a change in law that both postdates his first § 2255 motion and "eludes the permission in section 2255 for successive motions." In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998). This change must have been made retroactive to cases on collateral review by the Supreme Court. Id.

Second, petitioner must establish that his theory supports a non-frivolous claim of actual innocence. Taylor v. Gilkey, 314 F.3d 832, 835 (7th Cir. 2002) ("Every court that has addressed the matter has held that § 2255 is 'inadequate or ineffective' only when a structural problem in § 2255 forecloses even one round of effective collateral review—and then only when as in Davenport the claim being foreclosed is one of actual innocence.").

Petitioner argues that a recent decision, United States v. O'Brien, 130 S. Ct. 2169 (2010), makes it clear that a defendant can be sentenced under § 924(c)(1)(B) only if that violation is considered as an element of the crime by the jury rather than included as a sentencing factor by the court. In O'Brien, the United States Supreme Court concluded that the "machinegun provision" in § 924(c)(1)(B)(ii) (possession of a machine gun, destructive device, firearm silencer or firearm muffler) is an element of an offense that must be proven to the jury rather than used as a sentencing factor. O'Brien, 130 S. Ct. at 2180. Petitioner

states that he was sentenced to an extra ten years for "possession of an automatic weapon" although the prosecutor had not proven that charge to the jury.

Unfortunately for petitioner, he fails to meet the standard necessary for relief under § 2241. First, even if the Supreme Court's decision in O'Brien announced a change in the law, petitioner has not shown that decision applies retroactively. Tyler v. Cain, 533 U.S. 656, 662 (2001) (newly recognized right is retroactive only if the Supreme Court has held that new rule is retroactively applicable to cases on collateral review). Petitioner has not cited any authority recognizing the rule discussed in O'Brien as retroactively applicable and I am aware of none.

Second, petitioner fails to show that he is actually innocent of the firearm offense. Actual innocence is established when a petitioner can "admit to everything charged in [the] indictment, but the conduct no longer amount[s] to a crime under the statutes (as correctly understood)." Kramer, 347 F.3d at 218. O'Brien did not decriminalize the use or carrying of a semiautomatic assault weapon in furtherance of a crime of violence. Instead, it made it clear that the type of firearm is an element of a § 924(c)(1)(B) prosecution. Id. at 2180.

Petitioner does not argue that he is actually innocent in the sense that the AA Arms 9mm handgun fails to meet the definition of "semiautomatic assault weapon." Rather, he argues in his petition that he could not have committed the offense because "it is not possible . . . to aid[] and abet his co-defendant in the possession of a firearm in the commission of a crime of violence." Petitioner's assertion is incorrect. The Court of Appeals for the Seventh Circuit has stated that a criminal defendant "may be liable for aiding and

abetting the use of a firearm in violation of § 924(c) if the government proves that the defendant knowingly and intentionally assisted the principal's use or possession of a firearm during the violent felony or drug trafficking offense." United States v. Daniels, 370 F.3d 689, 691 (7th Cir. 2004); see also United States v. Smith, 576 F.3d 681, 687 (7th Cir. 2009). In the present case, the jury found petitioner guilty of aiding or abetting his co-defendant in using or carrying the AA Arms 9mm handgun.

ORDER

IT IS ORDERED that

1. Petitioner Marcelo Sandoval's petition for a writ of habeas corpus brought under 28 U.S.C. § 2241 is DISMISSED for petitioner's failure to show that he is in custody in violation of the Constitution or laws of the United States.

2. The clerk of court is directed to enter judgment for respondent Carol Holinka and close this case.

Entered this 29th day of November, 2011.

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