

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN HIGH,

Defendant.

OPINION AND ORDER

11-cv-627-bbc
07-cr-91-bbc

Defendant John High filed a timely motion for post conviction relief under 28 U.S.C. § 2255 on September 12, 2011. The motion was denied in an order entered on November 28, 2011. On December 27, 2011, he filed a motion to alter or amend the judgment, to reconsider it, for audita querela relief or for extraordinary relief. Defendant did not identify any alleged errors in the November 28 order, but instead alleged new reasons for thinking that his sentence and conviction are illegal. The motion will be denied because defendant has not shown any reason to alter or amend the judgment; he has not shown any error in the November 28 order requiring reconsideration; he has not explained why the writ of audita querela would apply to his motion; and he has not shown any entitlement to extraordinary

relief.

BACKGROUND

Defendant was charged on June 6, 2007, with violating 18 U.S.C. § 922(g)(1) by possessing a firearm and ammunition as a convicted felon. He was found guilty of the charge by a jury and sentenced on April 10, 2008 as an Armed Career Criminal. He appealed and his case was remanded for resentencing under Begay v. United States, 128 S. Ct. 1581 (2008), because two of the crimes counted toward his Armed Career Criminal enhancement were not properly classified as violent felonies. Defendant was resentenced on November 10, 2009. He appealed from the new sentence but the appeal was denied as frivolous. He did not file a petition for a writ of certiorari. The court's mandate was filed on July 1, 2010 and he filed his motion for post conviction relief on September 12, 2010, before the conviction became final for purposes of § 2255. Clay v. United States, 537 U.S. 522, 525 (2003) ("for purpose of starting the clock on § 2255's one-year limitation period, we hold, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction").

In his § 2255 motion, defendant argued that both his trial counsel and his appellate counsel had denied him his constitutional right to the effective assistance of counsel: his trial counsel had failed to file a pretrial motion for suppression of evidence and his appellate

counsel had failed to petition for certiorari. I found that neither of these claims had any merit and denied the motion for post conviction relief on November 28, 2011.

In his new motion, defendant argues that Fed. R. Civ. P. 59(e) allows a federal court to alter or amend a judgment when presented with newly discovered evidence. I assume that defendant meant to cite Fed. R. Crim. P. 33, which applies to motions for new trials in criminal cases. A defendant who has filed one § 2255 motion is not precluded from filing a legitimate motion for a new trial under Rule 33 based on newly discovered evidence. Such a motion is not considered a second or successive § 2255 motion. United States v. Evans, 224 F.3d 670, 673-74 (7th Cir. 2000) (bona fide motion for new trial falls outside § 2255 because it does not contend that conviction or sentence violates Constitution or any statute).

Defendant contends that he has a legitimate motion for a new trial because he has “newly discovered evidence suppressed by the government” that he was never informed that his civil rights were not restored. This argument makes no sense. Defendant does not deny that he had been convicted of a number of felonies before he was charged with being a felon in possession of a firearm. Instead, he argues that he is factually innocent of being an ex-felon because the Wisconsin Department of Corrections never informed him that his civil rights had not been restored. He cites no case law to support his argument, but asks the court to take judicial notice of the Department of Corrections’ records, order the department to produce all records of defendant’s release from imprisonment, provide one copy for

defendant and hold an evidentiary hearing.

Defendant seems to be relying on a series of cases in which the Court of Appeals for the Seventh Circuit has held that states cannot trap a person into thinking that he is free to possess a firearm once his sentence for a felony has expired. In circumstances in which the state had sent a letter to a felon whose sentence has expired, telling him that certain rights have been restored to him without making it clear that gun possession is not one of them, the court has overturned sentences of persons convicted of possessing a gun as a felon under 18 U.S.C. § 922(g). E.g., United States v. Burnett, 641 F.3d 894, 895-96 (7th Cir. 2011); see also United States v. Buchmeier, 581 F.3d 581 (7th Cir. 2009).

This line of cases does not apply to defendant's situation. He alleges that he has learned that he was never told that his civil rights were not restored. In other words, he was never sent a letter of the kind that Burnett and Buchmeier received and thus, was never misled into believing that he could legally possess a firearm in Wisconsin. (It would be hard for defendant to argue that this "evidence" were newly discovered, since he is in the best position to know what letters he received from the state, but it is not necessary to discuss this point because his claim fails for other reasons.) Defendant's claim is not a bona fide motion for a new trial and must be dismissed.

Defendant's second claim is that the government did not charge him with the appropriate and applicable penalty provisions of 18 U.S.C. §§ 924(a)(1), 924(a)(2) and

924(e)(1). I read this as a claim that the court cannot increase a sentence above the statutory maximum on the basis of any prior sentence unless a jury has found the fact of the earlier sentence beyond a reasonable doubt. This claim *is* precluded as a second or successive attack on his sentence, presented after he had received a ruling on his first post conviction motion.

Even if the claim were not precluded, it would have to be denied for lack of merit. It is well established that evidence of prior convictions is not the sort of evidence that must be presented to the jury. United States v. Pittman, 418 F.3d 704, 709 (7th Cir. 2005) (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998) (“prior felony convictions [are] sentencing factors that need not be charged in indictment nor proven beyond reasonable doubt because they are not elements of the charged offense”)).

Defendant’s third claim circles back to his first one. He contends that his claim that the state never told him that his civil rights were not restored is a new rule of law. It is not clear what he means by this. If he is simply trying to show that this alleged new rule of law would entitle him to file a second or successive motion, he must apply to a panel of the Court of Appeals for the Seventh Circuit for permission to file such a motion. 28 U.S.C. § 2255(h). He has filed one post conviction motion in this court and is not entitled to file a second one without permission from the court of appeals. He should be aware however that it is unlikely that such permission would be granted because the claim is not one on which

he would be entitled to relief, as I explained in denying the first variation of this claim.

Finally, defendant argues that he is entitled to relief from the final judgment in this case under Fed. R. Civ. P. 60(b)(1-6) because the issues he wants to raise are jurisdictional and may be raised at any time. He reminds the court that because he is proceeding pro se, his pleadings should be held to less stringent standards than pleadings drafted by lawyers. He says he has newly discovered evidence relating to the medical records of Angela Sims, the person who first brought him to the attention of the Madison Police Department, as well as evidence that the state and federal government engaged in fraud by submitting perjured testimony and falsified evidence before the grand jury and this court.

Rule 60 applies to civil judgments; defendant is bound by the rules relating to criminal judgments and post conviction motions. The matters that defendant wants to raise in this new motion are ones he could have brought up on direct appeal or in his motion for post conviction relief. He is barred from raising them now unless he secures the permission of a panel of the court of appeals to file a successive motion for post conviction relief.

(I note that some of the arguments defendant makes in this section of his motion relate to his sentencing as an Armed Career Criminal. Either he has forgotten that the court of appeals found that he could not be sentenced as an Armed Career Criminal and remanded his case for resentencing or he is seeking additional relief for the fact that he was sentenced, temporarily, for the offense. He has since been resentenced without the Armed Career

Criminal enhancement and is not entitled to any relief for the erroneous original sentence.)

In summary, defendant has not shown any reason why he is entitled to any relief, including reconsideration of the November 28 order denying his motion for post conviction relief under § 2255.

ORDER

IT IS ORDERED that defendant John High's motion to alter or amend the judgment, for reconsideration, for a writ of audita querela or for extraordinary relief is DENIED.

Entered this 4th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge