

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY L. ALLEN,

Defendant.

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OPINION AND ORDER

10-cr-40-bbc

12-cv-183-bbc

Defendant Gregory L. Allen has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel both at the trial stage and on appeal and that the sentencing court denied him due process when it imposed a sentence allegedly beyond its authority. The motion must be denied. His claims of ineffectiveness of counsel and denial of due process are based on his contention that it was error for him to be sentenced as a career offender. Both this court and the court of appeals have held that he was sentenced correctly as a career offender. He cannot relitigate the correctness of this decision, no matter how he clothes it, so his motion must be denied.

## BACKGROUND

Defendant was charged by the grand jury on February 18, 2010 with bank robbery and with knowingly and intentionally concealing money taken from the bank. He entered a plea of guilty to the bank robbery charge on May 18, 2010. A presentence report was prepared, showing that he qualified for career offender status under U.S.S.G. § 4B1.1(a) because he was at least 18, the offense for which he was being sentenced was a felony crime of violence and he had two prior convictions for felony crimes of violence. Presentence Rep., dkt. #64, at ¶¶ 57-58. In fact, defendant had four prior convictions for aggravated robbery, a crime classified as a violent felony, but only two of those counted in determining career offender status because the first three crimes were not separated from one another by an intervening arrest.

The first three convictions arose out of three robberies that occurred in March 1998. Defendant was arrested on March 13, 1998, after committing a robbery that same day. A grand jury sitting in Shelby County, Tennessee returned an indictment against him on May 28, 1998, charging him with one count of aggravated robbery. Ten months later, on March 9, 1998, a grand jury in Shelby County returned two separate indictments against defendant for two crimes of “Especially Aggravated Robbery” committed on March 9, 1998. He was not sentenced for those crimes until August 28, 2000, when he was also sentenced for his fourth violent felony, another aggravated robbery, committed on March 15, 2000.

## OPINION

A § 2255 motion is not intended to be a substitute for a direct appeal. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007). Unless the movant can show changed circumstances, this court will not reconsider any issue the movant raised on direct appeal. Id.

Defendant raised his objection to his sentencing as a career offender on direct appeal. He has not cited any “changed circumstances,” such as an intervening change in the law, that would give him a second chance to take an appeal of his claim that his criminal history score was calculated improperly so that he does not qualify as a career offender. Therefore, his post conviction motion must be dismissed. It does not matter that he is contending that he was denied effective assistance of counsel and due process. Both claims rest on his contention that he is not a career offender: his trial and appellate counsel were ineffective for not pursuing that contention and the sentencing court denied him due process when it rejected the contention and sentenced him as a career offender. If he is a career offender in actuality as both this court and the court of appeals have found, there is no basis for his claims of ineffectiveness of counsel or denial of due process. Therefore, his motion must be denied.

Because defendant does not seem to understand how his criminal history score was calculated, I will make another effort to explain it. Defendant seems to think there was no

intervening arrest between his commission of the first three crimes on March 9, 1998 and his commission of the fourth crime on March 13, 2000, but this contention is not borne out by the records submitted by defendant or those summarized in the presentence report. These three crimes are counted as only one; they cannot be counted as three separate crimes because no intervening arrest separated them. § 4A1.2(a)(2). However, the aggravated battery that defendant committed on March 15, 2000 is counted as a separate crime of violence because it was committed two years after defendant had been arrested on the three earlier crimes. The fact that he was sentenced for all four crimes on the same day does not mean that the court cannot consider the fourth crime committed in 2000 separately from the three crimes committed in 1998.

As long as defendant was arrested after the last of the three aggravated robberies he committed in 1998 and before he committed the fourth aggravated robbery in 2000, he can be charged as a career offender. U.S.S.G. § 4A1.2 (a)(2) provides that “[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense.) If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B), the sentences were imposed on the same day.”

Defendant argues that he was never arrested for “the charge.” If he is referring to the

2000 charge, the lack of an arrest is irrelevant (if mysterious). The only arrest that matters for the purpose of determining whether he is a career offender is the arrest that took place on March 13, 1998, after he had committed the first three violent felonies. Because it did take place, the court may count the fourth crime as separate from the other three, for a total of two previous violent felonies.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this case, defendant has not made the necessary showing, so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that Gregory L. Allen's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. No certificate of appealability shall issue.

Entered this 9th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge