

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNER D. BLACK,

Defendant.

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OPINION AND ORDER

12-cv-420-bbc

09-cv-109-bbc

Defendant Wayner D. Black has moved for post conviction relief under 28 U.S.C. § 2255, contending that his 2010 sentence for bank robbery by use of a dangerous weapon was improper because the sentencing court found him a career offender without adequate proof of his previous convictions. The motion must be dismissed because defendant raised the same issue on his direct appeal from his conviction and is foreclosed from arguing it again.

BACKGROUND

On August 6, 2009, the grand jury charged defendant Wayner D. Black in two counts of a three-count indictment with bank robbery by use of a dangerous weapon in violation of 18 U.S.C. § 2113(a) and (d) and with brandishing a firearm during and in connection with a crime, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Defendant pleaded guilty to the

first count on January 12, 2010 and was sentenced on March 19, 2010 to a term of 262 months' imprisonment as a career offender. For sentencing purposes his base offense level was subject to various enhancements, but because his guidelines range with the enhancements was lower than his guidelines range as a career offender, the only relevant enhancement that matters is the one for acceptance of responsibility, which would have reduced his career offender sentencing range, had he qualified for it.

Defendant appealed his sentence to the court of appeals, which rejected his claims that he was sentenced improperly as a career offender, that he should have received a reduction in his guideline range for acceptance of responsibility and that he should not have received an enhancement for physically restraining a teller. In rejecting his challenge to the career offender determination, the court of appeals considered whether the evidence before the sentencing court was sufficient to sustain the finding. Defendant argued that the district court had erred in relying on the documentation provided to support two of the three prior convictions that the probation office had identified when preparing the presentence report. He complained that the report included arrest reports and other documents in addition to the charging document, order and docket sheet and that the court considered this information when determining that he was a career offender. (He also argued that two signed orders that he produced were too illegible to be reliable and that it was error for the court to rely upon those orders. The court of appeals gave this argument short shrift, noting that defendant had never denied that he had been found guilty of the crimes, but had argued only that the ambiguity in the orders left open only "the possibility" that he might have been

found guilty of lesser charges that would not support career offender status. United States v. Black, 636 F.3d 893, 897 (7th 2011).)

The court of appeals was not persuaded by defendant's challenge to the basis for his classification as a career offender. It agreed with him that, under Shepard v. United States, 544 U.S. 13, 17 (2005), courts are required to take a categorical approach in analyzing prior convictions, limiting their determination to the fact of conviction and the statutory elements of the offense, and may not take into consideration the police report or other information about the crime. It found, however, that in defendant's case, the inclusion of other information in the report did not raise any question because the court had before it all of the information necessary to make a categorical determination. Therefore, the sentencing court had no occasion to resolve any factual disputes; the elements of the offenses of felony controlled substance crimes were clear.

The court of appeals denied defendant's claim that the sentencing court had erred in denying him a reduction in his offense level for acceptance of responsibility. It found that because he had received an enhancement for obstruction of justice, he would not be entitled to a reduction for acceptance of responsibility unless he could show the existence of extraordinary circumstances, which he had not done.

The court of appeals decision issued on March 7, 2011; defendant's one-year period for filing a post conviction motion began running 90 days later, on June 8, 2011. Defendant filed his motion on June 11, 2012, but certified that he mailed it on June 5, 2012, which makes it timely under Houston v. Lack, 487 U.S. 266 (1988).

## OPINION

Defendant sets out five claims in his motion but they are all variations on the same theme, which is that his career offender status was unsupported by any evidence that two of his previous convictions could be counted as either crimes of violence or felony drug crimes. He says that (1) the government failed to provide the Shepard-approved documents necessary to support a determination of his career offender status; (2) the sentencing court committed clear error by considering the documents that the government did submit; (3) two of the prior convictions could be for simple possession; (4) the court committed plain error “by adopting the facts regarding what [defendant] was sentenced for by the state”; and (5) his court-appointed counsel was ineffective for failing to investigate the prior convictions and submit the sentencing transcripts from the state sentencing and guilty plea proceedings to establish the elements of the crime to which defendant pleaded. I cannot consider these claims for two reasons.

The first is that § 2255 is not intended to be an opportunity to reargue matters decided on direct appeal. The “law of the case doctrine” prevents reargument. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007). It is well established that under § 2255 issues that have not been raised on direct appeal may not be reconsidered. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994); United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). Every claim that defendant has raised relates to his basic claim that he was misclassified as a career offender by the court’s reliance on inadequate information about two of his three previous felony convictions. His claim that his attorney was constitutionally

ineffective raises what might be a new issue had he not tied it to counsel's alleged failure to raise the same issue of the adequacy of the proof of the prior convictions that the court of appeals has ruled upon definitively. Counsel cannot be found to be ineffective for failing to produce evidence that the court of appeals has found would have been irrelevant.

Once the court of appeals found that it was not error for the sentencing court to rely upon the kind of information it had before it and that this information was sufficient to support its determination that defendant qualified for career offender status, it follows that counsel could not be found ineffective for any failure to challenge this reliance. Defendant raises no other allegation of ineffectiveness, so this claim cannot be considered.

The second reason for not taking up defendant's challenges is related to the first. It is that in a hierarchal court system such as ours, a lower court has no authority to overrule the decision of a higher court. Thus, even if I were to take up defendant's claims, I could not reach a conclusion different from the one reached by the court of appeals. I am bound by its ruling. Because any review of defendant's motion is barred by law, the motion will be dismissed.

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). Defendant has not made a substantial showing of a denial of a constitutional right 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 defendant Wayner D. Black's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. Further, it is ordered that no certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under

Fed. R. App. P. 22.

Entered this 27th day of June, 2012.

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