IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

14-cv-475-bbc

v. 06-cr-157-bbc

JERRY LEE WARD,

Defendant.

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Defendant Jerry Lee Ward filed a motion for post conviction relief under 28 U.S.C. § 2255, seeking a reduction in the sentence imposed on him in 2007 after he was convicted of distributing cocaine base. At the time of sentencing, he was found to be a career offender. He believes that this classification is now erroneous under the Supreme Court's opinion in Descamps v. United States, 133 S. Ct. 2276 (2013), and that his sentence should be amended. It is questionable whether Descamps has any application to to his career offender classification, but even if it did, sentencing errors are not subject to correction in § 2255 proceedings unless the error resulted in a sentence in excess of the statutory maximum. Defendant's sentence did not exceed the statutory maximum. Therefore, his motion for post conviction relief must be denied.

BACKGROUND

In an indictment returned in August 2006, defendant was charged with one count of conspiracy to distribute cocaine base and two counts of distribution of cocaine base. He entered a plea of guilty to one of the distribution counts and was found to be a career offender under the sentencing guidelines, U.S.S.G. § 4B1.1. He had two prior convictions for crimes considered to be violent felonies (failure to report to jail and false imprisonment in violation of Wis. Stat. § 940.30), as well as a controlled substances conviction for possession with intent to distribute THC. Defendant's guidelines sentence was 188-235 months; the statutory maximum was 40 years. He was sentenced on March 13, 2007 to a below-guidelines term of 144 months to differentiate between his sentence and that of his codefendant, who had employed him to distribute cocaine base.

Defendant did not appeal his sentence, but he filed a motion in March 2008 for modification of his sentence under 18 U.S.C. § 3582, contending that his sentence should be reduced in light of Amendment 706 to the sentencing guidelines. The motion was denied because Amendment 706 did not apply to persons classified as career offenders. Defendant took an unsuccessful appeal from the denial of his motion. Dkt. #7.

Defendant moved for post conviction relief under § 2255 on June 30, 2014, contending that he had been misclassified as a career offender, when he had only one prior conviction that would now be considered either a crime of violence or a controlled substance offense. First, he believed that his "failure to report" conviction could no longer be deemed a "crime of violence" because the Supreme Court had ruled in 2009 that failure to report to

serve a sentence was not a violent felony within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). Chambers v. United States, 555 U.S. 122 (2009) (Illinois's failure-to-report offense did not have as element use, attempted use or threatened use of physical force but was relatively passive offense that did not involve conduct presenting serious potential risk of physical injury to another). (The interpretation of "violent felony" in the Armed Career Criminal Act applies to the sentencing guidelines' "crime of violence" provision, U.S.S.G. § 4B1.1. United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008) (finding ACCA "violent felony" provision and guidelines' career offender "crime of violence" provision nearly identical and applying same interpretation to both provisions when determining whether prior conviction triggers enhancements).)

Second, defendant maintained that his prior conviction for false imprisonment conviction was invalid under Descamps v. United States, 133 S. Ct. 2276 (2013). His motion was denied on August 5, 2014 as untimely and he filed a motion for relief from judgment on September 8, 2014. That motion is now before the court.

OPINION

In the August 5, 2014 order, I assumed that defendant was filing his § 2255 motion under 28 U.S.C. § 2255(f)(3), which creates a new one-year period in which convicted persons may challenge their sentences after the United States Supreme Court has recognized a new right, if "the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Id. Defendant was asserting that he

was entitled to post conviction relief from his 2007 sentence because, he argued, the 2013 decision in Descamps had recognized a new right when it changed the way in which reviewing courts were to evaluate the elements of state crimes in determining whether those crimes should be considered violent felonies under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or crimes of violence under the sentencing guidelines.

Defendant's § 2255 motion was dismissed as untimely because it appeared from the document that defendant had not deposited it in the prison mail system within a year of the Descamps decision. Fed. R. App. P. 26(a)(4)(C). In his motion for reconsideration, defendant argued that the dismissal was erroneous and supplied evidence in support to show that he had deposited the motion in the prison mail system on the day he signed his motion for post conviction relief. For the purpose of deciding this motion, I find that the filing was timely.

However, timeliness is not defendant's only problem. There is not only the likelihood that Descamps does not apply to his conviction, as I explained in the August 5, 2014 order, but the Court of Appeals for the Seventh Circuit has held in at least two cases that an arguably erroneous sentence imposed after the guidelines were no longer mandatory is not a reason for granting relief under § 2255, so long as the sentence imposed does not exceed the statutory maximum. United States v. Coleman, — F.3d —, 2014 WL 3956731, *2 (7th Cir. Aug. 14, 2014); Hawkins v. United States, 706 F.3d 820 (7th Cir. 2013). As the court explained in Hawkins,"Not only do the guidelines no longer bind the sentencing judge; the judge may not even *presume* that a sentence within the applicable guidelines range would be

proper. He must determine whether it is consistent with the sentencing considerations set forth in 18 U.S.C. § 3553(a), and if he finds it is not he may not impose it even though it is within the applicable guidelines range." Id. at 822.

The decisions in Hawkins and in Coleman resolve any remaining question about defendant's right to relief under § 2255. Hawkins's two prior convictions were "walkaway escapes; one of Coleman's two prior convictions was second degree sexual assault of a child under Wis. Stat. § 948.02(2), which prohibits "sexual contact or sexual intercourse with a person who has not attained the age of 16 years." After the Supreme Court decided in Begay v. United States, 553 U.S. 137 (2008), that for Armed Career Criminal Act purposes, a "crime of violence" or "violent felony" encompassed only the types of crimes that categorically involved purposeful, violent and aggressive conduct, it was clear that the terms did not encompass a "walkaway" escape or a strict liability charge, such as sexual contact with a person under 16. Had Hawkins or Coleman been sentenced in 2009, they would not have been properly classified as career offenders. Nevertheless, neither defendant was successful in seeking resentencing. In Coleman, the court emphasized that relief under § 2255 is limited to "'extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice,'" Coleman *2 (quoting Blake v. United States, 723 F.3d 870, 878-79 (7th Cir. 2013)), which does not include an error in calculating the guidelines range now that the guidelines are advisory only. In Hawkins, the court saw no reason to find that a sentence well below the statutory maximum should be considered a miscarriage of

justice that can be collaterally attacked, just because the judge committed a mistake in imposing it. "That's the balance the cases strike between the interest in finality and the injustice of a possibly mistaken sentence." Hawkins, 706 F.3d at 825.

Defendant's 2007 sentence was well below the statutory maximum sentence of 40 years for his offense of possession of five grams or more of cocaine base and significantly above the mandatory minimum sentence of five years to which he was subject whether or not he was found to be a career offender. He has no ground for arguing that his sentencing as a career offender was a complete miscarriage of justice.

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.

Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that Jerry Lee Ward's motion for relief from judgment, dkt. #5, 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 18th day of September, 2014.

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