IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

98-cr-15-bbc

v.

MICHAEL P. DeANGELO,

Defendant.

- -

Defendant Michael P. DeAngelo has moved to modify the judgment in his case as it relates to the amount of restitution he is obligated to pay. He contends that because he has reached an agreement with his victim to accept an unspecified amount of money in full satisfaction of his debt to the victim, his restitution should be considered paid in full.

Defendant brings his motion under Fed. R. Civ. P. 60(b)(5) and a variety of civil and criminal statutes, none of which support his motion. I conclude, therefore, that the motion must be denied. This does not mean that defendant is without options; if his financial circumstances have changed materially, he may notify the Attorney General of the United States of the change. Upon the attorney general's certification to the court that the victim has been notified of the change in circumstances, the court may adjust the payment

schedule. 18 U.S.C. § 3664(k).

BACKGROUND

Defendant was charged in this case with a scheme to defraud an insurance company by claiming falsely that he had become partially temporarily disabled after falling at his place of employment. He pleaded guilty, was sentenced to a term of 46 months in prison and ordered to make restitution in the amount of $97,174.27, as he had agreed to do as part of his plea agreement. Dkt. #9 at 2 ("The defendant agrees to pay restitution for all losses relating to the offense of conviction and all losses covered by the same course of conduct or common scheme or plan as the offense of conviction. The parties agree that the appropriate restitution figure in this case is $97,174.27 payable to the Cincinnati Insurance Company.")

Although defendant agreed to assume the restitution obligation, never objected to it at the time of sentencing and never challenged it on appeal, United States v. DeAngelo, 167 F.3d 1167 (7th Cir. 1999), he has been asking to be relieved of the obligation ever since his direct appeal was denied. He has filed two unsuccessful motions seeking post conviction relief. He filed the first in January 2000, labeling it correctly as brought under 28 U.S.C. § 2255, and contending that the court had erred in ordering him to make restitution without giving adequate consideration to his asserted lack of financial resources. He added another contention, which was that his court-appointed counsel had deprived him of his right to

constitutionally effective representation by failing to object to the restitution order. The motion was denied. Defendant's financial resources were irrelevant to the court's order in light of his promise in the plea agreement to make full restitution to the victim. In addition, it would have been futile for counsel to object to an order to which defendant had agreed. Dkt. #21. The question was so clear cut that defendant was denied a certificate of appealability. Dkt. #24. He took an unsuccessful appeal of the denial of the certificate to the court of appeals. Dkt. ## 26 & 31.

On September 4, 2001, this court transferred jurisdiction over defendant to the Middle District of Florida for supervision purposes under U.S.C. § 3605. Dkt. #33.

In March 2004, defendant filed a motion, supposedly brought under 18 U.S.C. § 3614, which provides for resentencing in certain circumstances if a defendant knowingly fails to pay a delinquent restitution obligation. Dkt. #34. Defendant never explained in the second motion why he was suing under § 3614; in fact, he never discussed the possibility of resentencing. Instead, he contended that he had received ineffective assistance of counsel in connection with his plea. Accordingly, the second motion was re-labeled as a motion for post conviction relief under § 2255 and dismissed because it was defendant's second such motion and he had not obtained the requisite certification from a panel of the court of appeals. § 2255(h).

Defendant says that his supervised release term expired in 2004. Apparently, at some

time in 2007, the victim insurance company domesticated the restitution order in this case as a final judgment in state court in Florida. Subsequently, defendant says, he negotiated a settlement of his debt with the company by paying an "up front discounted lump sum" in an undisclosed amount of money. Def.'s M., dkt. #39, at 3. He says that the insurance company filed a "Satisfaction of Domesticated Final Judgment" in Florida, acknowledging "full payment and satisfaction of its judgment." Id. & exh. C. He does not say how much the settlement amount was or how he obtained the funds to pay it, although in his previous filings he had discussed his alleged impoverishment at length.

The Department of the Treasury has notified defendant that it will begin deducting up to 15% of his monthly Social Security benefits until his entire restitution obligation has been paid in full.

OPINION

A. Jurisdiction

An initial question is whether this court's 2001 transfer of jurisdiction over defendant to the United States District Court for the Middle District of Florida means that he has to file his motion for modification of his sentence in that court. The law on the issue is sparse. The Court of Appeals for the Seventh Circuit has said that the applicable statute, 18 U.S.C. § 3605, "merely regulates venue." United States v. Bass, 233 F.3d 536, 537 (7th Cir. 2000).

In this case, with defendant's supervised release having expired seven years ago, it makes little sense to require him to file his motion in the Middle District of Florida. It makes more sense to proceed in this court, where he was sentenced, if he can proceed at all.

I have found no case law that would suggest that this court has no jurisdiction to hear defendant's motion, assuming he has any ground on which to bring it. Accordingly, I will assume that § 3605 does not deprive this court of jurisdiction to hear defendant's motion.

B. Basis for Proceeding

The next question is whether defendant has met his burden of showing some ground on which he can bring his motion. Defendant has advanced a number of possible avenues why he should be allowed to, but none are convincing. There is also the question whether he waived his right to bring a legal attack on the restitution order when he agreed as part of his plea bargain to make full restitution in a specific amount. Ordinarily, such an agreement would operate as a relinquishment of a defendant's right to challenge any restitution order that did not exceed that amount, in the absence of any showing that the plea agreement was invalid in some respect.

In a case with similar facts, United States v. Pappas, 409 F.3d 828 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit refused to hear the defendant's direct appeal of a restitution order because he had agreed in the plea agreement to make restitution to the

victim in the amount ordered. After entry of his plea but before sentencing, Pappa negotiated a civil settlement with the victim in the amount of $15,000 and then asked the court to relieve him of any obligation to pay more than that amount in restitution. The sentencing court denied the motion, but entered an order of restitution in the amount agreed upon, less the $15,000 already paid. On appeal, the court found that Pappas had waived any right to challenge the district court's order of restitution by agreeing expressly to the full amount in his written plea agreement. "If a defendant knowingly agreed to relinquish a specific right in exchange for concessions from the government, then that right has been intentionally abandoned and thus waived." Id. at 830.

It does not appear from the case that Pappas raised any challenge to the validity of his agreement, so the court of appeals had no reason to consider whether there would be circumstances in which a defendant like Pappas might be relieved of his waiver. It is possible to think of several, such as those discussed in United States v. Sines, 303 F.3d 793, 798 (7th Cir. 2002) (holding that defendant who waives right to appeal "does not lose the right to pursue a claim that relates directly to the negotiation of the waiver, such as a claim that the waiver was involuntarily made, was based on an impermissible factor such as race, exceeds the statutory maximum, or was made without the effective assistance of counsel"), but defendant did not raise any of these claims in his direct appeal or in his first (and only valid) § 2255 motion. He has presented no evidence that he agreed to anything less than

the unconditional payment of the full amount of the agreed upon restitution. He received the full benefit of the bargain into which he entered and he has shown no reason why the government should receive anything less than the full benefit of *its* bargain.

Defendant contends that whatever the effect of Pappas, it does not decide the issue he is raising, which is whether a defendant can rid himself of a restitution obligation by reaching a settlement with his victim. Relying on Sines, 303 F.3d at 793, 799 (7th Cir. 2002), for the proposition that the Court of Appeals for the Seventh Circuit "takes care to enforce waivers only to the limited extent of the agreement," he argues that "nowhere in the plea agreement is there a waiver or any confession that [he was forgoing] *ad infinitum* his opportunity to resolve his obligation to Cincinnati Insurance Company in an amount satisfactory to the victim." Dft.'s Reply Br., dkt. #44, at 6. This is true but not persuasive. The plea agreement contained nothing that could be read as allowing defendant to satisfy his restitution obligation in any way other than through full payment of his obligation.

Defendant notes the "quirky legal procedural history" of Pappas, 409 F.3d 828, and specifically Pappas's failure to file a reply to the government's brief on the question of restitution, without explaining how this failure affected the court's decision. He notes also that the facts in Pappas were different from those in this case, in which he is pursuing a change in the court's restitution order after he has completed his sentence and has been discharged from supervised release. Again, he does not explain why these different facts

require a different resolution of his motion.

C. Basis for Challenge to Restitution Obligation

Even if defendant could show that he did not waive his right to challenge the amount of his restitution order, he has not identified any statute or rule that would allow him to raise a legal challenge in court at this time. He has cited a number of statutes and one rule that he contends provide him a procedural basis for obtaining a modification of his restitution obligation, but none of them support his contention.

The Federal Debt Collection Procedure Act, 28 U.S.C. §§ 3203-06, governs the government's collection of a debt to the United States; it says nothing about the circumstances in which a defendant can petition the United States for relief from a restitution obligation. 18 U.S.C. § 3613 allows the government to enforce a judgment imposing a fine or restitution in the manner provided for enforcement of a civil judgment under federal or state law. Like §§ 3203-06, it is silent with respect to petitions for relief from these judgments by defendants.

18 U.S.C. § 3664 comes closest to providing a means by which defendant might accomplish the outcome he is seeking in this case. That statute governs the procedure for issuance and enforcement of orders of restitution and provides in subsection (k) for notification of the attorney general and the court of any material change in a defendant's

economic circumstances and authorizes the court to adjust the payment schedule. (18 U.S.C. § 3572(d)(3) contains a similar provision.)

Although § 3664 is written to authorize actions brought by the government to enforce restitution obligations, it provides a safety valve for a defendant whose financial resources are dramatically diminished, impairing his ability to make restitution. Under subsection (k), a defendant may notify the court and the Attorney General of the United States of a change in his financial circumstances that affects his ability to make restitution obligation. The attorney general is then to notify the victims owed restitution of the change in circumstances, after which the court may adjust the payment schedule.

Section 3664 has no applicability to defendant at this time. Defendant does not say that he notified the attorney general of any change in his financial circumstances and the court's records do not show that he gave the court such notice.

The last source that defendant cites as a mechanism for modifying his restitution obligation is Fed. R. Civ. P. 60(b)(5), which authorizes a court to relieve a party from a final judgment when the judgment has been satisfied, released or discharged or when applying it prospectively is no longer equitable. Defendant does not cite any authority that would permit him to use this rule of civil procedure to avoid the effects of his criminal sentence. Defendant cites a number of Seventh Circuit cases holding that restitution is essentially a civil remedy in the nature of a recovery in tort, e.g., United States v. Behrman, 235 F.3d

1049, 1054 (7th Cir. 2000); United States v. Bach, 172 F.3d 520 (7th Cir. 1999); United States v. Newman, 144 F.3d 531 (7th Cir. 1998), but these cases do not hold that a defendant may use Rule 60(b)(5) to modify a restitution obligation imposed as part of a criminal sentence. Neither does United States v. Lee, 659 F.3d 619, 620-21 (7th Cir. 2011), another case cited by defendant. In Lee, the proceeding was a government-initiated petition for Lee to turn over certain assets to satisfy his unpaid restitution obligation. Lee appealed the district court's order granting the turnover order; his appeal was filed 28 days after the order had been entered. The court of appeals held that the appeal was timely under the Federal Rules of Appellate Procedure applicable to civil proceedings because the turnover proceeding was essentially a civil one. The court noted that the government had sought the turnover order under the Mandatory Victim Restitution Act, "which permits courts to enforce restitution orders using the same practices and procedures for the enforcement of a 'civil judgment' under federal or state law." Id. at 620.

This statement by the court might suggest that defendants saddled with restitution orders could use the same practices and procedures for relief from full enforcement of restitution orders. There is a certain symmetry to the suggestion until one considers the extensive provisions in Title 18 that govern restitution. Without exception, those provisions are directed to actions brought by the government to enforce restitution orders, not by defendants seeking to escape them. Defendants have the right (and obligation) to advise the

government of changes in their finances and to seek relief from their restitution obligations if their finances decline, §§ 3572(d)(3) & 3664(k), but they have no statutory right under Title 18 to initiate a proceeding for relief from a restitution order.

One other case is worth noting. In United States v. Lilly, 206 F.3d 756, 763 (7th Cir. 2000), the court of appeals discussed a "petition for clarification," brought in the district court by a defendant convicted of securities fraud and tax evasion, seeking a declaration that his obligation had been satisfied. That case differs from this one in two significant respects. First, the government had no objection to the court's issuing an order in the case clarifying the matter, although it objected to any finding that the defendant had satisfied his obligation, and second, the defendant was still on supervised release. The district court granted the motion for clarification, but not to the defendant's liking. It explained that its sentencing order required the defendant to pay $25,000 in restitution to one of its victims and that this obligation was not satisfied by the turnover of escrow funds to the victim, as the defendant had argued. The court of appeals refused to hear the defendant's appeal from the court's clarification of his restitution obligation because the defendant did not file a timely appeal from the order. In doing so, it noted that the defendant's motion for certification invoked the district court's jurisdiction over the conditions of his supervised release, "in accordance with the court's supervisory role over the conditions of Mr. Lilly's supervised release." Id. at 763 & n.4.

Nothing in the extensive provisions of the Mandatory Victim Restitution Act suggests that a defendant in a criminal case may use Rule 60(b) to obtain relief from a restitution order imposed in a criminal proceeding or any other civil proceeding once he is no longer on supervision. Such an omission is not surprising: the government has no reason to encourage or even accept private settlements reached by a criminal defendant with his victim because of the possibilities for intimidation. Defendant argues that this case involves no question of undue influence because the victim is a commercial insurance company, well equipped to protect itself in any settlement negotiation. That may be true, but it is not a persuasive reason for allowing defendant to take an end run around the Mandatory Victim Restitution Act and proceed under Rule 60(b). The next case might involve a far more vulnerable victim.

In short, defendant's motion to modify the judgment and conviction entered against him on July 22, 1998, will be dismissed. Defendant has not shown that any provision of the United States Code or the Federal Rules of Civil Procedure authorizes the challenge he is bringing to the 1998 judgment.

D. Distribution of Remaining Restitution Payments

One last matter is worth noting. The government takes the position that defendant has not satisfied his restitution agreement by entering into a settlement agreement with the

victim, because his obligation is to the government and cannot be waived or excused by the victim. It cites a number of cases from circuits other than the Seventh that make that point, without acknowledging the fact that the Seventh Circuit disagrees with the positions of those circuits. E.g., United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999) (Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, is not subject to Constitution's ex post facto clause because it is not penal; "[t]he Act requires the courts to identify the defendant's victims and to order restitution to them in the amount of their loss. In other words, definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs.") See also In re Towers, 162 F.3d 952, 955 (7th Cir. 1998) (order of restitution that required defendant to pay victims' losses not to victims but to government for its own use and benefit would be considered to be fine rather than restitution); United States v. Newman, 144 F.3d 531 (7th Cir. 1998) (MVRA is not penal and therefore not subject to ex post facto clause).

Defendant agreed to pay his victim $97,174.27. He is under a court order to do so. The fact that the victim agreed to take a lesser amount in full payment does not relieve defendant of his court-ordered obligation to pay the victim the full amount.

ORDER

IT IS ORDERED that defendant Michael DeAngelo's motion for modification of the judgment and conviction entered against him on July 22, 1998 and for discharge of his

restitution obligation is DENIED.

Entered this 3d day of January, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge