

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

TIMOTHY MICHAEL McDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA and
R. STIFF, Warden of FCI Oxford, Wisconsin,

Respondents.

ORDER

00-C-595-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Timothy Michael McDonald is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, serving a sentence imposed in the District of Minnesota. Petitioner has paid the \$5 filing fee. (Petitioner's action is not subject to the various restrictions of the 1996 Prisoner Litigation Reform Act. See Walker v. O'Brien, 216 F.3d 626, 628-629 (7th Cir. 2000) ("the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255").)

Petitioner is asking this court to evaluate his claim that the District Court for the District of Minnesota lacked authority to impose the sentence he is serving under the

enhancement provisions of 21 U.S.C. § 841 because a sentencing enhancement notice was not filed and served as required by 21 U.S.C. § 851(a). Petitioner recognizes that ordinarily such a claim can be brought only by a motion filed pursuant to 28 U.S.C. § 2255 in the court that sentenced him. He contends that this is an unusual case in which the remedies provided by 28 U.S.C. § 2255 are inadequate or ineffective to test the legality of his detention. The asserted reason for the ineffectiveness is that neither the district court nor the Court of Appeals for the Eighth Circuit would allow him to file a successive petition challenging the government's failure to file a notice of intent to enhance petitioner's sentence. In petitioner's view, these courts are ignoring the existence of case law holding that such a challenge may be brought at any time because it goes to the jurisdiction of the court. Therefore, petitioner asks this court to hear his claim under § 2241. I conclude that petitioner has failed to show that his § 2255 remedies are inadequate. Both the factual and legal bases for the claim of lack of proper notice of enhancement were known to petitioner at the time he filed his first § 2255 motion and he could have raised the issue at that time.

In support of his petition, petitioner avers the following material facts.

FACTS

On July 8, 1992, petitioner was named in one count of a five-count second superseding

indictment filed in the District of Minnesota, charging him with violations of 21 U.S.C. §§ 841 and 846. On October 26, 1992, a sentencing enhancement notice pursuant to 21 U.S.C. § 851(a) was filed against petitioner. On November 2, 1992, petitioner pleaded guilty to a one-count information in return for the government's dismissal of the indictment against him. There was no new sentencing enhancement notice filed with the district court or served on petitioner pursuant to 21 U.S.C. § 851(a) before petitioner pleaded guilty to the one-count superseding information. The superseding information charged petitioner with one count of a violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. On March 11, 1993, petitioner was sentenced pursuant to the enhancement provisions of § 841 to a term of 240 months' incarceration, to be followed by eight years of supervised release. The district court dismissed the five-count indictment for which a sentencing enhancement notice had been filed pursuant to 21 U.S.C. § 851(a).

Subsequently, petitioner appealed his sentence to the Court of Appeals for the Eighth Circuit, which affirmed the sentence in an unpublished decision. The plea bargain agreement prevented petitioner from raising the lack of jurisdiction issue on direct appeal. Petitioner then filed a motion pursuant to 28 U.S.C. § 2255 in the United States District Court for the District of Minnesota, which was dismissed on July 29, 1997. Petitioner did not argue in his § 2255 motion that the district court lacked jurisdiction to sentence him.

On April 16, 1999, petitioner filed a motion pursuant to Fed. R. Civ. P. 60(b), asking the District of Minnesota to reconsider and set aside its judgment denying petitioner relief on his initial § 2255 motion. On May 17, 1999, the motion was denied. Neither the district court nor the Court of Appeals for the Eighth Circuit issued a certificate of appealability.

Petitioner then filed an application for authorization to file a successive § 2255 motion with the Court of Appeals for the Eighth Circuit. Authorization was denied on September 15, 2000.

OPINION

The primary avenue for collateral attack on a federal conviction is 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act. Under the amended statute, a prisoner may file only one motion to vacate, correct or set aside his sentence with the court that imposed the sentence and must file that motion within strict deadlines set out in the statute. No successive § 2255 motion may be filed except with leave of the court of appeals, which may grant leave only when there is newly discovered evidence or the Supreme Court establishes a new constitutional right that is available retroactively. See § 2255.

For federal prisoners, § 2255 is nearly a complete substitute for the writ of habeas corpus. The Court of Appeals for the Seventh Circuit has carved out one narrow exception

allowing a federal prisoner to seek a writ of habeas corpus under § 2241 when the remedies of § 2255 are “inadequate or ineffective to test the legality of his detention.” In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998).

A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.

Id., at 611. In Davenport, the court considered the cases of two federal prisoners. Sherman Nichols contended that his conviction was unsound in light of the Supreme Court’s new interpretation of a federal statute. The court held that Nichols would be allowed to petition for a writ of habeas corpus under § 2241 in the district court for the district in which he was imprisoned. Nichols could not file a second § 2255 petition because he did not fit within the statutory exceptions: he was relying neither on newly discovered evidence or a new constitutional right, but a matter of the interpretation of a federal statute. For Nichols, the remedies afforded under § 2255 were inadequate to allow him to argue that he had been found guilty of conduct that the Supreme Court later ruled was not prohibited by the statute under which he was charged. See Bailey v. United States, 516 U.S. 137 (1995) (“use” of a weapon in 18 U.S.C. § 924(c) does not include mere possession).

Petitioner is not arguing that a change in federal law following his conviction puts in doubt the validity of his conviction. Rather, he is arguing that he should be able to proceed

under § 2241 because, as in Davenport, the courts have denied him the chance to file a successive petition. Petitioner's argument is not supported by Davenport. His situation is more similar to that of James Davenport, whose case was considered with Nichols's, than to that of Nichols. Although Davenport challenged the fundamental legality of his sentence, the court of appeals determined that

allowing [Davenport] to seek habeas corpus is not needed to give him a reasonable opportunity to obtain a reliable judicial determination of that legality. He had a chance to raise the question about the 1981 burglary conviction when he appealed from his conviction for being a felon in possession and later when he filed a section 2255 motion challenging the conviction. Nothing in section 2255, including limitations on successive motions that obviously were not applicable to his first motion – because it was a first motion and also because it was filed before the Antiterrorism Act was passed – prevented Davenport from obtaining relief against being imprisoned for a crime that he had not committed. Nothing in 2255 made the remedy provided by that section inadequate to enable Davenport to test the legality of his imprisonment. He had an unobstructed procedural shot at getting his sentence vacated.

Davenport, 147 F.3d at 609. Petitioner's situation is indistinguishable from Davenport's in all relevant respects and is vitally different from Nichols's. Nichols could not have raised his argument on his first § 2255 motion because the law had not yet been changed. In petitioner's case, he had an opportunity to raise his argument in his first § 2255 motion. Therefore, the remedies provided by § 2255 were not ineffective to provide petitioner relief; petitioner simply failed to invoke the protection of the statute at the appropriate time.

Petitioner contends that Kelly v. United States, 29 F.3d 1107 (7th Cir. 1994), stands

for the proposition that a jurisdictional defect, such as the government's failure to file and serve a proper sentence enhancement notice, can never be procedurally barred and must be addressed by the courts whenever it is raised. In Kelly, the petitioner argued for the first time in his § 2255 motion that the court had no jurisdiction to impose an enhanced sentence if the government did not file a proper notice under § 851(a). See id. at 1112. The district court found that Kelly had procedurally defaulted the argument by not showing cause for his failure to raise the issue on direct appeal. The court of appeals reversed, noting that compliance with § 851(a) was a jurisdictional prerequisite. "Because jurisdictional defects are nonwaivable, Kelly need not provide us with an excuse ('cause and prejudice') adequate to convince us to forgive his waiver." Id. at 1112, 1114. Relying on Kelly, petitioner urges that the "Davenport 'adequacy' decision . . . be broadened to accommodate entertaining a challenge to a jurisdictional defect via § 2241 habeas corpus since the usual avenue for relief is impaired by AEDPA requirements." Ptr.'s Mem., dkt. # 2, at 7-8. However, Davenport applies only where relief is barred under § 2255. See Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999) ("It is only when a fundamental defect exists in the criminal conviction - a defect which cannot be corrected under § 2255 - that we turn to § 2241."). The alleged fundamental defect in petitioner's conviction is one that he could have raised in a § 2255 motion. The statute provides explicitly that a federal prisoner may bring a motion under § 2255 on the ground "that

the court was without jurisdiction to impose [his] sentence.” 28 U.S.C. § 2255.

Petitioner contends that “[s]ince jurisdictional defects can be raised ‘at any time,’ but do not form the basis for permission to file a successive § 2255 motion, the § 2255 as amended by AEDPA is inadequate or ineffective to test the legality of petitioner’s illegal sentence regarding a jurisdictional challenge.” Ptr.’s Mem. at 7. Although Kelly contains language to the effect that “parties can raise jurisdictional defects at any time,” Kelly, 29 F.3d at 1113, that language does not mean that plaintiff need not comply with the requirements of the subsequently enacted Antiterrorism and Effective Death Penalty Act. Kelly is also distinguishable because in that case, the jurisdictional argument was raised in the petitioner’s first § 2255 motion. More important, Kelly dealt only with the situation in which a petitioner had been barred from bringing a § 2255 claim because he was held to have waived or procedurally defaulted the claim by not raising it on direct appeal. Nothing in the court’s reasoning suggests that it was holding inapplicable other procedural requirements, such as those imposed by the Antiterrorism and Effective Death Penalty Act.

Petitioner admits that he could have raised his present argument in his initial § 2255 motion, but failed to do so. In Davenport, the court rejected the argument that the restrictions imposed by the Antiterrorism and Effective Death Penalty Act always make § 2255 an inadequate remedy:

The retention of the old language [creating an exception where the remedy “is inadequate or ineffective to test the legality of his detention”] opens the way to the argument that when the new limitations prevent the prisoner from obtaining relief under 2255, his remedy under that section is inadequate and he may turn to 2241. That can’t be right; it would nullify the limitations.

Davenport, 147 F.3d at 608.

Accordingly, I find that this court lacks jurisdiction to entertain petitioner's § 2241 petition.

ORDER

IT IS ORDERED that petitioner Timothy Michael McDonald’s petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 is DISMISSED.

Entered this 22nd day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge