

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

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

05-cr-8-bbc

v.

ANTHONY HOWARD,

Defendant.

Defendant Anthony Howard was sentenced by the Hon. John Shabaz on July 13, 2005 to a term of 293 months for the crime of conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin and cocaine base. He appealed, but his appeal was denied a year later. He did not file a petition with the United States Supreme Court for a writ of certiorari.

On October 7, 2009, defendant filed a motion for post conviction relief under 28 U.S.C. § 2255, case no. 09-cv-620-bbc, contending that his counsel was ineffective and that the trial court had abused its discretion). On October 9, 2009, I denied the motion as untimely. On July 19, 2013, defendant filed a motion for relief from judgment that he called

a motion brought under Fed. R. Civ. P. 60(b)(b). Despite the title, defendant's motion was a second attempt to challenge the legality of his sentence. Accordingly, I construed it as a second request for relief under 28 U.S.C. § 2255 and denied it for lack of jurisdiction because defendant had not obtained permission from a panel of the Court of Appeals for the Seventh Circuit to file a second motion, as required under § 2255(h).

Now defendant has filed a document entitled "Petition for a Writ of Audita Quere[1]a under 28 U.S.C. § 1651," which is another unrecognized route to correction of a conviction or sentence. United States v. Kimberlain, 675 F.2d 866, 869 (7th Cir. 1982) ([audita querela] cannot lie simply to enable a defendant to file a section 2255 motion without complying with the rules governing such motions"). Defendant cannot show that he did not have the opportunity to file a § 2255 motion challenging his sentence because he had the same opportunity as every other federally convicted person to file a timely motion to vacate his sentence. Unfortunately for him, his failure to comply with the filing rules is not a sufficient reason to proceed by a motion other than one brought under § 2255. Id. An exception exists under 28 U.S.C. § 2241 for persons who can show that they are relying on a retroactive decision involving statutory interpretation that they could not have invoked when they filed their motions to vacate under § 2255 and the sentence enhancement is a grave enough error to be deemed a miscarriage of justice that can be corrected in a habeas corpus proceeding. Brown v. Caraway, 719 F.3d 583, 586 (7th Cir. 2013) (federal prisoner

may petition for writ of habeas corpus under § 2241 if his § 2255 remedy is inadequate or ineffective to test legality of his detention).

Defendant's problem is that even if he could proceed on § 2255 or § 2241, he would not succeed on his claim, which he derives from the recent opinion of the Supreme Court in Burrage v. United States, 134 S. Ct. 881 (2014). In that case, the Court held that a defendant could not be subjected to the penalty enhancement provision in 21 U.S.C. § 841(b)(1)(B) for selling heroin to a person who later died unless the government proved that the victim would have lived but for his heroin use. In Burrage, the victim was found to have had multiple drugs present in his body at his death, only one of which was heroin, and neither the forensic toxicologist nor the medical examiner could say that the victim would have lived if he had ingested only heroin. The Court found that the district court had erred in instructing the jury it could find Burrage guilty if it found that the heroin he had provided the victim was a "contributing cause" of his death. Instead, the district court should have told the jury it could find Burrage guilty only if it found that the death would not have occurred "but for" that heroin.

Defendant says that in his case, the sentencing judge gave him an above guidelines sentence on the basis of the judge's own finding that a person had died after ingesting heroin distributed by one of defendant's dealers. He contends the holding in Burrage applies to his sentence. In fact, the Supreme Court overturned Burrage's sentence in reliance on the

holding in Alleyne v. United States 133 S. Ct. 2151, 2162 (2013), that only a jury can make the findings to support a sentencing enhancement that increases the maximum and minimum sentences to which a defendant is exposed. Burrage, 134 S. Ct. at 887. Defendant's case did not involve a sentencing enhancement that a judge may impose only upon a jury finding of certain facts, but an "above-guidelines" sentence, which is within the sentencing court's discretion.

In other words, defendant was not subject to an enhanced penalty, although it might appear to him as if he were, because he received a sentence that was above the mandatory minimum for a different crime: causing death by making heroin and cocaine base available to the victim. Defendant was never charged with causing death, but with the separate crime of conspiracy to distribute and to possess with intent to distribute heroin and cocaine base. For that crime, he was sentenced under 21 U.S.C. § 841(b)(1)(A), which at the time he committed his crime (1999 through 2000), prescribed a penalty of not less than 10 years nor more than life for anyone convicted of selling one kilogram or more of heroin and cocaine base. He was sentenced to a term of 293 months, which was above the guideline range of 188 to 235 months, but well within the mandatory maximum term of life. Although the sentencing judge said when he sentenced defendant that he believed defendant was responsible for the death of a young man who had purchased drugs from someone selling drugs on defendant's behalf, the sentence he imposed was within the statutory range for any

person who had engaged in distributing heroin and cocaine that did not result in death. Therefore, defendant has no ground for his claim that he was sentenced illegally.

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 constitutional right so no certificate will issue.

ORDER

IT IS ORDERED that defendant Anthony Howard's "Petition for a Writ of Audita Quereia under 28 U.S.C. § 1651" is DENIED for lack of jurisdiction.

Further, IT IS ORDERED that if defendant files any further documents in this case, the clerk of court is directed to forward them to me before filing. If I determine that the document includes a challenge to defendant's conviction or sentence and is not accompanied by an order of the Court of Appeals for the Seventh Circuit permitting the filing, I will place

the document in the file of this case and make no response to it.

Entered this 28th day of March, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge