

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

MAXIMO PINEDA-BUENAVENTURA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

08-cr-100-bbc

Petitioner Maximo Pineda-Buenaventura has filed a motion “to modify and reduce sentence,” which I construe as a motion for post conviction relief under 28 U.S.C. § 2255. Petitioner contends that he is entitled to be re-sentenced in light of the Supreme Court’s recent decisions in Johnson v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257 (2016), but he is wrong. Not only was his sentence not affected by either of the decisions in Johnson or Welch, but he has not obtained permission from a panel of the Court of Appeals for the Seventh Circuit to file a second motion for post conviction relief, as he must do under 28 U.S.C. § 2255(h). Accordingly, his motion will be denied.

RECORD FACTS

Petitioner and others were charged in July 2008 with ten counts of drug distribution.

A superseding indictment was returned in October 2008, adding additional counts. On December 10, 2008, petitioner entered a plea of guilty to count 1 of the superseding indictment, charging him with conspiring with others from about July 2006 to about June 2008 to possess with intent to distribute five kilograms or more of a mixture or substance containing cocaine, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846.

Petitioner's base offense level was 32 because his relevant conduct involved at least five kilograms but less than 15 kilograms of cocaine. The offense level was increased by two levels because he possessed a handgun during the commission of the offense. He received a four-level enhancement for his role in the offense and a three-level reduction for acceptance of responsibility, giving him a total offense level of 35. He was in criminal history category I. (The "Statement of Reasons" that is part of the judgment, dkt. #159, shows that defendant was given a mandatory minimum sentence, but this appears to be a mistake. Nothing in the judgment itself supports the statement.)

Petitioner was sentenced to a term of 210 months, which was the top of the guideline range to which he was subject. In December 2010, he moved for post conviction relief under 28 U.S.C. § 2255, contending that both his trial counsel and his counsel on appeal had provided ineffective representation. Dkt. #1, 10-cv-793-bbc. The motion was denied for lack of a sufficient showing that either counsel had been ineffective. Petitioner did not appeal.

In 2015, petitioner moved for a modification of his sentence under 18 U.S.C. § 3582(c)(2) after the Sentencing Commission had reduced the guideline level for his crime

by two levels. The motion was granted and he was resentenced to the top of the new guideline range, which was 168 months.

OPINION

The federal rules governing habeas corpus actions such as this one bar a second or successive petition for post conviction relief unless the petitioner has obtained certification by a panel of the court of appeals under 28 U.S.C. § 2255(h). To obtain such certification, the petitioner must show that he has either “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,” or that he can cite “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Id.

Petitioner has not made the showing required by § 2255(h). He has shown neither that he has newly discovered evidence that would demonstrate he was not guilty of the offense nor that he can rely on a new rule of constitutional law. Although he cites Johnson, 135 S. Ct. 2551, and Welch, 136 S.Ct. 1257, neither case has any application to his situation. In Johnson, the Supreme Court held that it was unconstitutional to rely on what is called the “residual clause” in 18 U.S.C. § 924(e)(2)(B)(ii) to increase a sentence imposed on a person subject to the Armed Career Criminal Act. In Welch, the Court held that persons who had been sentenced under § 924(e)(2)(B)(ii) before Johnson was decided were entitled to be resentenced.

Petitioner was not sentenced under 18 U.S.C. § 924(e)(2)(B)(ii), so the holding in Johnson has no application to him. It is possible that the decision will apply to persons sentenced under the career offender guidelines in the Sentencing Guidelines, but petitioner was not sentenced under those guidelines. In any event, petitioner's motion is doomed by his failure to obtain certification to file a second motion for post conviction relief from a panel of the court of appeals. Accordingly, his motion must be denied.

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. No reasonable jurist would agree with petitioner that his petition should have been granted. Therefore, 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 petitioner Maximo Pineda-Buenaventura's second motion for post conviction relief is DENIED for petitioner's failure to obtain certification from a panel of the Court of Appeals for the Seventh Circuit under 28 U.S.C. § 2255(h). 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 8th day of June, 2016.

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