

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

TIMOTHY D. ROBINSON,

Petitioner,

v.

WARDEN KAREN F. HOGSTEN,

Respondent.

ORDER

11-cv-174-bbc

On March 12, 2009, petitioner Timothy Robinson pleaded guilty in this court to one count of possession with intent to distribute 50 grams or more of cocaine base and was sentenced to a term of imprisonment of 120 months. Petitioner did not file an appeal of his sentence. On March 29, 2010, petitioner filed a motion under 28 U.S.C. § 2255, alleging that his trial counsel failed to file a notice of appeal. I granted petitioner's motion, vacated the judgment and reinstated it as of July 21, 2010.

On July 28, 2010, petitioner filed an appeal of his sentence, arguing that the Fair Sentencing Act of 2010 should apply retroactively, thus lowering the 120-month mandatory minimum sentence in place at the time of his conviction. The Court of Appeals for the Seventh Circuit affirmed this court's judgment, stating that the general federal savings

statute, 1 U.S.C. § 109, bars the retroactive application of the Fair Sentencing Act's reduced mandatory minimum sentences. United States v. Robinson, 405 Fed. Appx. 72 (7th Cir. 2010) (citing United States v. Bell, 624 F.3d 803 (7th Cir. 2010)).

Now petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, again arguing that his right to equal protection is violated by the non-retroactive application of the Fair Sentencing Act.

At first glance, I note that it is uncertain whether petitioner is eligible for relief under § 2241 because this avenue is available only when a motion under 28 U.S.C. § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e). Assuming without deciding that a § 2241 motion is appropriate because petitioner has previously filed a motion under § 2255 and thus would not be able to file a successive petition based on changes to statutory law, the motion must be denied because petitioner's equal protection argument has already been considered by the court of appeals and rejected. Robinson, 405 Fed. Appx. 72.

Petitioner goes on to argue that his case is different from the usual "retroactive" case because "at the time the fair sentencing act was signed into law [he] had no final judgment." Not only is this incorrect (as noted above, I reinstated petitioner's judgment of conviction as of July 21, 2010, *before* the August 3, 2010 enactment of the Fair Sentencing Act), but it is also irrelevant. The court of appeals has ruled that the relevant date for a determination

of retroactivity is the date of the underlying criminal conduct, not the date of sentencing. United States v. Fisher, 635 F.3d 336, 340 (7th Cir. 2011). Since petitioner's criminal conduct predates August 3, 2010, the Fair Sentencing Act does not apply to his conviction.

ORDER

IT IS ORDERED that petitioner Timothy Robinson's petition for a writ of habeas corpus under 28 U.S.C. § 2241, dkt. #1, is DENIED.

Entered this 26th day of May, 2011.

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