

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

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

11-cv-718-bbc
09-cr-125-bbc

v.

THURMAN M. WYATT,

Defendant.

Defendant Thurman Wyatt has filed a motion to vacate his sentence under 28 U.S.C. § 2255. He contends that he was denied the effective assistance of counsel when his court appointed attorney failed to file a petition for a writ of certiorari on his behalf to the United States Supreme Court. It is not clear whether defendant's motion is timely but it must be denied in any case. Defendant cannot show that he was denied his right to the effective assistance of counsel because he was not prejudiced as a result of his counsel's alleged ineffectiveness. He may have a right under the Criminal Justice Act, 18 U.S.C. § 3006A, and specifically under the Seventh Circuit Criminal Justice Act Plan, to ask the Court of Appeals for the Seventh Circuit to withdraw the mandate it issued in June 16, 2010 so as to allow

him to file a petition for a writ of certiorari. This is a matter he would have to take up with the court of appeals.

BACKGROUND

Defendant was charged in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment was returned on August 26, 2009; he was arraigned on September 11, 2009; on November 5, 2009, he pleaded guilty and on January 4, 2010, he was sentenced to a term of 188 months as an Armed Career Criminal under 18 U.S.C. § 924(e)(1).

On appeal of his sentence, defendant raised two arguments: (1) the armed career criminal provisions of § 924(e) increased his sentence in violation of his Fifth and Sixth Amendment rights to have a jury determine the existence and nature of his prior convictions and (2) the sentencing court erred in ordering his sentence to run consecutively to sentences imposed on him in two state court cases. The court of appeals denied the appeal, holding that Almendarez-Torres v. United States, 523 U.S. 224 (1998), made it clear that defendant had no right to have a jury determine the proper classification of his prior convictions. It found also that, although it was error for the court to make defendant's federal sentence run consecutively to his state court sentences because those sentences had not been imposed as of the time of sentencing, the error was harmless. The day after defendant was sentenced

in this court, the state court judge sentenced defendant to time served on the state charges, so defendant's federal sentence began immediately.

The court of appeals' decision affirming defendant's sentence was issued on May 25, 2010. The mandate issued on June 16, 2010. The court's decision denying defendant's motion to file *instanter* for a rehearing *en banc* was issued on June 15, 2010. Defendant had 90 days from the issuance of the May 25, 2010 judgment in which to petition for a writ of certiorari to the Supreme Court. Clay v. United States, 537 U.S. 522, 532 (2003) (for defendants who do not file petition for certiorari with Supreme Court on direct review, § 2255's limitations period starts to run when time for seeking such review expires). He did not file such a petition.

Defendant had the same court-appointed counsel at his trial and on appeal. He filed this motion for post conviction relief on October 18, 2011 on his own behalf.

OPINION

The government argues that the court need not address defendant's motion for post conviction relief because it is untimely. Citing subsection (1) of § 2255(f), which sets out the ways in which the one-year limitation period is to be calculated, the government says that because defendant did not file his § 2255 motion within one year from the date on which his conviction became final, he is barred from proceeding on his post conviction

motion. Defendant does not deny that he did not file the motion until more than a year after the time he had for seeking certiorari had expired, but his statements in his reply brief suggest that he may have a possible argument for a longer limitations period under subsection (4), which provides that the one-year period of limitations does not start running until the prisoner could have discovered the facts underlying his claim had he exercised due diligence. Ryan v. United States, 657 F.3d 604, 607-08 (7th Cir. 2011) (under subsection (f)(4) of § 2255, limitations period did not start running until defendant learned of fact that his counsel had not filed appeal on his behalf or he could have learned fact through exercise of due diligence).

Defendant says that he did not learn that his motion to file instanter had been denied until early October 2011, when he was moved into a double cell at USP Pollock with a legally savvy cellmate who helped him ascertain what had happened to the motion. He does not say when he found out that his counsel had never filed a petition for certiorari, but he does say that he tried unsuccessfully to reach his court-appointed counsel on various occasions throughout 2010 and 2011. In deciding whether defendant could proceed under § 2255(f)(4), the question would be when defendant could have learned the fact that his counsel had not petitioned for a writ of certiorari, assuming he exercised due diligence.

But there is little point to be served in undertaking that determination. Even if defendant's motion is found to be timely and defendant is correct when he says that his

counsel failed to consult with him about filing a petition for a writ of certiorari, the motion for post conviction relief would have to be denied. Defendant could prevail on his motion only if he can establish that he was denied his constitutional right to effective representation.

It is well established that defendant has no constitutional right to have counsel when petitioning for a writ of certiorari in the Supreme Court. Austin v. United States, 513 U.S. 5, 8 (1994) (although indigent defendants pursuing *appeals as of right* are constitutionally entitled to brief filed on their behalf by attorney, they have no such right when it comes to *discretionary review*) (citing Ross v. Moffitt, 417 U.S. 600, 616-17 (1974)). This does not mean necessarily that they have no rights in that situation. In United States v. Price, 491 F.3d 613, 615 (7th Cir. 2007), Judge Ripple took up the question whether a defendant whose counsel had abandoned him when he wanted to file a petition for certiorari had any rights. Writing in chambers, Judge Ripple held that although Price had no constitutional right to the assistance of counsel in petitioning for a writ of certiorari, because he had been represented by court-appointed counsel, he had a statutory right to such assistance arising from the Criminal Justice Act, 18 U.S.C. § 3006A, as interpreted by the Seventh Circuit Criminal Justice Act Plan. Id. Judge Ripple pointed out that under that plan, counsel is required to prepare and file a petition if, after consultation, the defendant requests it and “there are reasonable grounds for counsel properly to do so.” Moreover, if counsel informs the defendant that reasonable grounds for petitioning do not exist, the defendant may ask

the court of appeals to order counsel to seek certiorari. Judge Ripple concluded that Price had been deprived of his right to consult with counsel and that the court should withdraw its mandate, appoint new counsel for the defendant and allow that counsel to choose whether to file an immediate petition for certiorari in the Supreme Court or a petition for rehearing in the court of appeals. Alternatively, if counsel determined after consultation with the defendant that petitioning for certiorari would be inappropriate, he was to tell that to the defendant, so that the defendant could decide whether to ask the court of appeals to determine whether it should order that the petition be filed. See also United States v. Shaaban, 514 F.3d 697 (7th Cir. 2008) (Ripple, J., in chambers) (granting motion to withdraw mandate when counsel left defendant with misapprehension that he had filed petition for rehearing on defendant's behalf).

Setting aside for now the question whether defendant might have a right to ask the court of appeals to withdraw the mandate in his case because of his counsel's failure to file a petition on defendant's behalf, I will take up the claim defendant has raised in his § 2255 motion, that he was deprived of his constitutional right to the effective representation of counsel. I will assume for the sole purpose of deciding this motion that defendant's counsel violated a statutory duty he had to defendant when he failed to file a petition for certiorari on his behalf and that in this respect his representation of defendant fell below the objective standard of reasonableness. This does not help defendant because he must still show that

he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984) (test for showing of constitutional ineffectiveness of counsel has two components: defendant must show both that counsel's representation fell below an objective standard of reasonableness *and* that reasonable probability exists that result of proceeding would have been different had it not been for counsel's unprofessional errors). He cannot make this showing.

It is certain that the Court would have not have granted the petition had it been filed. Defendant's goal in petitioning the Supreme Court was to persuade it to reconsider its holding in Almendarez-Torres, 523 U.S. 224, that the fact of prior convictions did not have to be proved to a jury before they could be used to increase a sentence. That was a quixotic goal at best. The Court has had numerous opportunities to overrule the decision but has never indicated that it would do so. Defendant suggests that a "strong argument" could be made for the Court's taking the case and coming to a different conclusion "by piggybacking on Justice Thomas's" concurrence in United States v. O'Brien, 130 S. Ct. 2169, 2183 (2010), but he misconstrues Justice Thomas's words.

O'Brien turned on the question whether the fact that a firearm was a machine gun was an element of a crime prohibiting carrying a firearm in relation to a crime of violence or a drug trafficking crime or whether it was merely a sentencing factor. The Supreme Court held that it was an element and had to be proved to a jury. In his concurrence, Justice

Thomas cited United States v. Harris, 536 U.S. 545, 550 (2002), for the proposition that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum’ whether the statute calls it an element or a sentencing factor, ‘must be submitted to a jury, and proved beyond a reasonable doubt.’” (Emphasis added.) Contrary to what defendant says, this is no indication that Justice Thomas has any interest in overruling Almendarez-Torres or that he could persuade four other justices to join him.

Defendant’s motion for post conviction relief will be denied. It may be, as Judge Ripple suggested in Price, that upon request, the court of appeals would withdraw the mandate it issued in June 2010 and appoint new counsel to consult with defendant about filing a petition for certiorari. That is a decision to be made by the court of appeals. I express no opinion about whether the court is likely to act in defendant’s favor.

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). In this case, defendant's motion raises questions about the appropriate remedy for a criminal defendant whose court-appointed counsel fails or refuses to file a petition for a writ of certiorari without consulting with his client or seeking the approval of the court of appeals. I cannot say that the matter is not one that is debatable among reasonable jurists. Therefore, a certificate will issue.

ORDER

IT IS ORDERED that defendant Thurman M. Wyatt's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED. A certificate of appealability will issue.

Entered this 21st day of December, 2011.

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