

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY PORTER,

Defendant.

OPINION & ORDER

14-cr-130-jdp

Defendant, Gregory Porter, was convicted in 1995 in Wisconsin state court of two counts of Second Degree Sexual Assault. As a consequence of this conviction, he is a “Tier III” sex offender who is required under the federal Sex Offender Registration and Notification Act (SORNA) to maintain a registration as a sex offender for life. Defendant has been charged in this court with failing to update his registration as required by SORNA, in violation of 18 U.S.C. § 2250.

Defendant has moved to dismiss the indictment on the grounds that his 1995 state conviction is constitutionally unsound because he was deprived of his right to counsel. Dkt. 12. In the alternative, defendant moves to stay this case to give him time to pursue reversal of that conviction in state court. The government opposes the motion, Dkt. 13; defendant has not filed a reply.

Defendant was convicted after a jury trial in which he represented himself, despite his stated desire to have an attorney. Based on defendant’s submission, he raises serious doubt about whether he knowingly and voluntarily waived his right to counsel.¹ But the validity of defendant’s state conviction is irrelevant to the charge he now faces in federal court. The

¹ Defendant was, however, represented at his state-court sentencing. He does not present this court with sufficient information about any appeal or post-conviction relief to determine whether the denial of his right to counsel claim has been heard by a state court.

SORNA registration requirement applies to “sex offenders,” which means “an individual who was convicted of a sex offense.” 42 U.S.C. § 16911(1). Thus, under the plain language of § 16911(1), defendant is a sex offender, even if his state sex offense conviction turns out to be constitutionally unsound. Defendant contends, however, that as a matter of fundamental fairness, the SORNA registration requirement should apply only to those validly convicted of sex offenses, and that he should be able defend the SORNA charge on the ground that his predicate sex offense conviction is invalid.

Defendant points to nothing in the text of the applicable statutes that would support such a construction of SORNA. The definitional section, 42 U.S.C. § 16911(1), does not say “validly convicted,” nor does the registration section, 18 U.S.C. § 2250, provide any affirmative defense for convictions subsequently invalidated. Defendant acknowledges a recent First Circuit opinion that squarely rejects the position he advances here. *United States v. Roberson*, 752 F.3d 517, 519 (1st Cir. 2014). The First Circuit followed the reasoning in *Lewis v. United States*, 445 U.S. 55 (1980), to conclude that a defendant may remove his legal disability by securing reversal of his state-court conviction, but until that conviction is reversed, he is required to register as a sex offender, and he may face charges if he does not. 752 F.3d at 520-25.

Defendant’s sole legal authority is Justice Brennan’s dissent in *Lewis*. *Lewis* addressed the application of the federal law prohibiting convicted felons from possessing firearms, 18 U.S.C. § 1202, to a defendant who alleged that his underlying felony conviction was invalid because he had been deprived of his right to counsel. That situation is closely analogous to this one. Justice Brennan, joined by Justices Marshall and Powell, reasoned that to apply the felon-in-possession law to a defendant whose predicate felony conviction was invalid simply amplified the violation of the defendant’s right to counsel. *Lewis*, 445 U.S. at 70 (Brennan, J., dissenting).

The question may yet be an open one in this circuit, but I will not embrace the interpretation of 18 U.S.C. § 2250 and 42 U.S.C. § 16911(1), proposed by defendant. I am constrained to respect the plain language of the statutes, and I will follow the reasoning of the majority in *Lewis*. Congress provided a clear-cut rule concerning sex offender registration. Defendant's proposal would confuse and complicate its application by opening an avenue of collateral attack on charges of SORNA violations.

In light of defendant's waiver of his right to a jury trial, I will cancel the final pretrial conference. I will set a telephonic status conference for 9:00 a.m., April 8, 2015, to schedule whatever work remains before trial. The parties should also be prepared to inform the court about what issues need to be resolved and what evidence will be presented at trial.

ORDER

IT IS ORDERED that:

1. Defendant's motion to dismiss the indictment or stay the case, Dkt. 12, is DENIED.
2. The final pretrial conference is cancelled.
3. A telephonic status conference will be held at 9:00 a.m. on April 8, 2015.
4. Trial to the bench remains scheduled for 9:00 a.m. on April 27, 2015.

Entered April 3, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge