

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

JOHN L. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

11-cr-81-bbc

15-cv-408-bbc

Petitioner John L. Davis has filed a motion to reconsider this court's ruling that his § 2255 motion was untimely. A review of that ruling reveals several errors and leads to a different conclusion.

Petitioner was found guilty of distributing heroin and was sentenced on December 21, 2011 to a term of 168 months. No provision was made for running his sentence concurrently with or consecutively to any term of imprisonment imposed in a pending criminal case in the Circuit Court for Dane County, Wisconsin. Petitioner appealed the judgment of conviction to the Court of Appeals for the Seventh Circuit. While the appeal was pending, the United States Supreme Court decided in Setser v. United States, 132 S. Ct. 1463 (2012), that a federal court could order a sentence to run concurrently with sentence that was yet to be imposed. Two months later, the Bureau of Prisons asked the court whether it would approve a retroactive concurrent sentence for petitioner, running his

federal sentence concurrently with the sentence imposed on him in the Dane County case. I advised the bureau that I would approve concurrent sentences and it adjusted petitioner's sentence accordingly.

On April 1, 2013, the court of appeals issued an order, vacating petitioner's sentence and directing the court to resentence petitioner in light of Setser. Included with the order was the court's mandate. On April 4, 2013, I issued a memorandum, saying that I believed that a resentencing hearing was not necessary because I had responded to an inquiry from the Bureau of Prisons that petitioner should serve his federal sentence concurrently with the sentence imposed on him in state court. However, I asked counsel to object if they disagreed. The government said no new sentencing was necessary; petitioner's counsel advised the court that he did not know his client's whereabouts at the time but would consult him once he knew where he was housed.

After no action in the case for a year, petitioner filed a motion for clarification, asking the court to inform him about any action he had to take to have his sentence corrected. After holding a telephone conference with counsel for both parties, I entered an amended judgment and commitment on June 20, 2014, making it explicit that petitioner's federal sentence was to run concurrently with his state sentence.

Almost a year later, on June 6, 2015, petitioner filed a motion for an extension of time to file a motion for post conviction relief under 28 U.S.C. § 2255. That motion was denied as untimely on June 18, 2015, but the explanation for the denial contained three errors. First, I noted that the mandate had issued on April 1, 2014, when it had actually

issued on April 1, 2013. Second, I added to the error by miscalculating the time for filing from the date of the issuance of the mandate, instead of from the date of the issuance of the order. The former calculation would have been correct if the order had issued 21 days before the issuance of the mandate, Clay v. United States, 537 U.S. 522, 532 (2003), but in this case, both documents came out on the same day. Had the order and mandate issued on April 1, 2014, as I originally thought, petitioner's § 2255 June 2015 motion would have been timely. Instead, it seemed to me to be at least a year late.

However, petitioner has argued in a motion to reconsider filed on July 13, 2015, that his § 2255 motion should be considered timely because any motion for post conviction relief that he would have filed before he was resentenced would have been premature. The question is an unusual one because of the unlikelihood of a petitioner wanting to pursue a post conviction motion after a judgment in his favor, but I conclude that petitioner is correct. As he points out, 28 U.S.C. § 2255(f) (1) says that the one-year period of limitation starts to run from "the date on which the judgment of conviction becomes final" and his judgment of conviction did not become final until he was resentenced and a new judgment and commitment order signed on June 20, 2014. Moreover, the issues he now wants to raise are not ones that could have been raised on his direct appeal because they relate to the alleged ineffectiveness of counsel and to matters that would not be of record.

Accordingly, I will direct the government to respond to petitioner's claims that (1) he was denied the effective assistance of counsel because his lawyer did not object to the allegedly overstated drug weights in the presentence report and did not advise petitioner of

the length of the sentence he would receive if he pleaded guilty and (2) the government engaged in prosecutorial misconduct by threatening to give petitioner at least 22 years in prison if he did not plead guilty immediately.

ORDER

IT IS ORDERED that the government may have until October 7, 2015, in which to file a response to petitioner John L. Davis's motion for post conviction relief under 28 U.S.C. § 2255; petitioner may have until October 28, 2015, in which to file a reply.

Entered this 15th day of September, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge