

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARRIUS ABDULLAH : CIVIL ACTION

v. :

UNITED STATES OF AMERICA : No. 01-862

UNITED STATES OF AMERICA : CRIMINAL ACTION

v. :

DARRIUS ABDULLAH : No. 95-317

MEMORANDUM

Dalzell, J.

March 20, 2001

Petitioner Darrius Abdullah, who was convicted of conspiracy to interfere with interstate commerce by robbery, has filed a pro se petition pursuant to 28 U.S.C. § 2241 seeking to challenge his sentence. We here consider whether a § 2241 petition is a means by which Abdullah can raise such a claim.

I. Factual and Procedural Background

Abdullah pleaded guilty before us on August 10, 1995 to the sole count of an information charging him with violation of 18 U.S.C. § 1951 for conspiracy to interfere with interstate commerce by robbery, a charge which stemmed from the gun-point robbery of a jewelry store in Haddon Heights, New Jersey on November 3, 1994. On April 2, 1996, we denied Abdullah's subsequently-filed motion to vacate his guilty plea, and sentenced him to 188 months imprisonment, to be followed by three years supervised release, pursuant to the Sentencing Guidelines career offender provisions.

Abdullah took a direct appeal from this sentence, which challenged, inter alia, our denial of his motion to withdraw his guilty plea, our finding that Abdullah was a career offender for Guidelines purposes, the fact that the sentence imposed was at the top of the applicable Guidelines range, and our finding that the career offender Guideline does not violate due process. On February 7, 1994, our Court of Appeals affirmed the judgment in all respects.

Abdullah subsequently filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In that motion, Abdullah raised three claims: (1) his counsel was ineffective in that she recommended that he plead guilty; (2) his trial counsel was ineffective in that she failed to argue that the Government had not shown a sufficient nexus between the robbery and interstate commerce; and (3) that counsel was ineffective in that she failed to raise the other two arguments before the Court of Appeals on direct appeal.

By an Order dated August 5, 1998, we denied the § 2255 motion. We rejected Abdullah's first argument on the ground that it was a relitigation of his prior motion to withdraw his guilty plea. We found the second argument frivolous, since case law interpreting the Hobbs Act requires the showing only of a minimal nexus between the robbery and interstate commerce. We noted that the Government proffered evidence at the plea hearing that the jewelry involved in the robbery had been received by the New Jersey victim from a New York jeweler and also that a week before

the robbery -- when Abdullah and his confederate drove from Philadelphia to Haddon Heights, New Jersey to case the store -- and immediately after the crime the robbers, including Abdullah, had driven back from New Jersey to Philadelphia where they sold the jewelry for \$1,700 cash, facts which amply demonstrate the requisite interstate nexus. See August 10, 1995 Notes of Testimony at 31; see also Abdullah's admission, id. at 33. As to the third argument, we rejected it on the basis that the first argument -- a challenge to the denial of the motion to withdraw the guilty plea -- was raised on appeal, and that counsel was not ineffective for failing to raise the frivolous second argument.¹ We declined to issue a certificate of appealability, finding that Abdullah had not made a substantial showing of the denial of a constitutional right. Abdullah subsequently sought a certificate of appealability from the Court of Appeals, which was denied on May 21, 1999.

II. Abdullah's Petition Pursuant to 28 U.S.C. § 2241

Abdullah, who is currently incarcerated in the United States Penitentiary in Florence, Colorado, has now filed the instant pro se petition, pursuant to 28 U.S.C. § 2241(c)(3), in which he seeks to have the sentence imposed upon him vacated, and his case "remanded" to us for a hearing and a resentencing. He argues that his sentencing was improper because the Sentencing

¹ We observed that even if the second argument were not frivolous, counsel does not have a constitutional duty to raise on appeal every nonfrivolous issue a defendant requests.

Guidelines, enacted in 1987, were not in effect when he committed many of the prior crimes which were considered in his sentence calculation². Abdullah maintains that this consideration of pre-Guidelines crimes in his sentence calculation was a violation of his rights under the Ex Post Facto Clause. Abdullah further contends that he is "actually innocent of the sentence imposed" and of the career offender designation and that his claims raise issues of a "miscarriage of justice".

III. Analysis

Prisoners convicted in federal court typically seek redress of their convictions and sentences first through direct appeal and then through a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Here, however, Abdullah specifically eschews reliance on 28 U.S.C. § 2255, as he maintains that he cannot raise his claims under that statute since he has defaulted on these claims by failing to raise them

² Abdullah seems to focus on the fact that he was sentenced as a career offender, which resulted in the application of a higher offense level than would otherwise have obtained. However, as he does argue in his petition, since his pre-Guidelines crimes were considered in calculating his criminal history category, as well as in applying the career offender provisions, his arguments also extend to any Guidelines sentence for him where the criminal history calculation included the pre-November 1987 crimes.

In this vein, we do note that Abdullah's prior crimes resulted in an assignment of 20 criminal history points, placing him comfortably in criminal history Category VI. Only three of those points arose from crimes committed after November 1, 1987, the date upon which the Guidelines took effect. Similarly, Abdullah's classification as a career offender arose in part from a crime committed before November 1, 1987.

either in his direct appeal or in his earlier motion under 28 U.S.C. § 2255, Pet'r's Mem. of Law at 7. Instead, Abdullah argues that in his case 28 U.S.C. § 2255 does not provide adequate or effective relief, and that therefore recourse to a § 2241 petition is warranted. A threshold issue before us, then, is whether Abdullah's claims are properly raised in a petition under 28 U.S.C. § 2241.³

28 U.S.C. § 2241 provides:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) he is in custody for an act done or omitted in the pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

³ As noted above, while Abdullah was convicted before us, he is now incarcerated in Florence, Colorado. For the purposes of our analysis here, we will act as if this Court is a proper venue for Abdullah's § 2241 petition. The proper resolution of this venue question, however, is far from clear, and we explicitly make no decision about it, see In re Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997)(noting that a motion for habeas corpus pursuant to § 2241 should be filed "in the district of his confinement"), but cf. In re Nwanze, - F.3d --, No. 00-1459, 2001 WL 245120 at *6-7 (3d Cir. Mar. 13, 2001) (addressing the appeal of an inmate from a district court's order transferring his § 2241 petition from the Western District of Pennsylvania (the district of confinement) to the Eastern District of Virginia (the district of conviction), and denying that appeal based upon a finding that the Eastern District of Virginia court would reach the merits of the petition and that transfer pursuant to 28 U.S.C. § 1404(a) was appropriate).

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

As noted above, Abdullah claims he is entitled to relief under § 2241(c)(3), since his sentence violated the Ex Post Facto Clause of the Constitution.

While, as we have mentioned, 28 U.S.C. § 2255 generally serves as the federal prisoners' equivalent to a habeas corpus petition, the language of that statute provides a "safety valve" allowing prisoners to seek a writ of habeas corpus by other means:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255.

In In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), our Court of Appeals considered the meaning of this provision. Since it is upon Dorsainvil that Abdullah primarily relies in arguing that his petition under § 2241 is proper, the circumstances of that case are worth brief discussion.

In Dorsainvil, the petitioner argued that the Supreme Court's decision in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed.2d 472 (1995), which was decided after Dorsainvil's first § 2255 petition was denied on the merits, rendered his weapons

conviction under 18 U.S.C. § 924(c)(1) invalid. He wished to collaterally attack that conviction in the District Court and asked [the Third Circuit] to certify his second habeas petition under § 2255's gatekeeping provisions limiting a prisoner's ability to file a successive habeas petition. The Court first held that the petition had failed to satisfy those gatekeeping provisions because his Bailey claim was a statutory claim. As a result, petitioner was unable to bring his new claim in a § 2255 proceeding in the District Court.

The Court did not stop there, however. Dorsainvil argued that if his Bailey claim could not be heard in the District Court, then § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), was unconstitutional. The Court avoided reaching the "thorny constitutional issue[s]" by holding that "under narrow circumstances, a petitioner in Dorsainvil's uncommon situation may resort to the writ of habeas corpus as codified under 28 U.S.C. § 2241. Dorsainvil, 119 F.3d at 248.

United States v. Brooks, 230 F.3d 643, 647 (3d Cir. 2000).

The Dorsainvil panel went on to state that

[t]hus, Dorsainvil does not have and, because of the circumstance that he was convicted for a violation of § 924(c)(1) before the Bailey decision, never had an opportunity to challenge his conviction as inconsistent with the Supreme Court's interpretation of § 924(c)(1). If, as the Supreme Court stated in [Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298 (1974)] it is a "complete miscarriage of justice" to punish a defendant for an act that the law does not make criminal, thereby warranting resort to the collateral remedy afforded by § 2255, it must follow that it is the same "complete miscarriage of justice" when the AEDPA amendment to § 2255 makes that collateral remedy unavailable. In that unusual circumstance, the remedy afforded by § 2255 is "inadequate or ineffective to test the legality of [Dorsainvil's] detention."

Dorsainvil, 119 F.3d 251.

Having thus confirmed the propriety of federal prisoners' use of § 2241 under certain circumstances, however, the Dorsainvil panel was quick to add that:

[w]e do not suggest that § 2255 would be "inadequate or ineffective" so as to enable a second petitioner to invoke § 2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255. Such a holding would effectively eviscerate Congress's intent in amending § 2255.

Dorsainvil, 119 F.3d at 251.

Our threshold question therefore becomes whether Abdullah's claims here fit within the set of circumstances Dorsainvil delineated as suitable for a § 2241 petition. In order to conduct this examination, we first must flesh out, to a slightly greater extent than we did above, the nature of Abdullah's claims.

Abdullah argues that the Ex Post Facto Clause of the Constitution barred us from considering, in conjunction with calculating Abdullah's sentence under the Sentencing Guidelines, any of his prior crimes that occurred before the Sentencing Guidelines took effect, which is to say November 1, 1987.⁴ In

⁴ As suggested above, Abdullah's Presentence Investigation Report catalogued an impressive record of prior crimes. Prior to November 1, 1987, Abdullah had been convicted of 16 offenses, including at least three occasions of shoplifting, one occasion of theft, one occasion of receiving stolen property, one instance each of possessing and distributing controlled substances, one simple assault, two aggravated assaults, one occasion of conspiracy to distribute a controlled
(continued...)

support of this argument, he cites, inter alia, to Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446 (1987) (holding that revisions to Florida's sentencing guidelines law were void as applied to sentencing for crimes that occurred before the revisions were enacted); Madonna v. United States Parole Comm'n, 900 F.2d 24 (3d Cir. 1990) (declining to decide whether provisions of the Sentencing Reform Act of 1987 applied to a parole hearing conducted after the Act had become law but which dealt with a crime committed before the Act had become law); and United States v. Story, 891 F.2d 988 (2d Cir. 1989) (addressing question of whether a conspiracy that began before and continued after the Sentencing Guidelines took effect on November 1, 1987 is properly sentenced under the Guidelines).⁵ It would appear that Abdullah seeks to have us extend the reasoning of cases like Miller to hold that just as the Guidelines cannot be used to calculate the sentence for crimes that were completed before they

⁴ (...continued)

substance, and one instance of robbery. All of these crimes were committed before Abdullah's twenty-fourth birthday.

⁵ In association with his ex post facto argument, Abdullah also cites to Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594 (1972) (reversing district court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of an inmate's § 1983 claims against various state and prison officials on the ground that the plaintiff should be given an opportunity to bring forward evidence) and Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975) (holding that a state may not constitutionally require a criminal defendant to be represented by counsel after the literate, competent and understanding defendant had unequivocally stated that he wanted to represent himself). These cases appear to relate to the procedural posture of Abdullah's claim, and not to the question of the constitutionality of his sentence.

took effect, similarly the Guidelines system cannot take into consideration as sentencing factors past crimes that were completed before the Guidelines took effect.

As Abdullah himself contends, Pet'r's Mem. of Law at 13, this contention is neither a new rule of constitutional law nor newly discovered evidence, and therefore does not serve to permit him to file a second motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. For this reason, Abdullah contends there is no relief available to him under § 2255 that would permit him to raise this argument, and he therefore falls into that class of federal prisoners permitted to raise claims through § 2241 petitions.

Notwithstanding this contention, however, it is clear that Abdullah's claims are not properly raised pursuant to 28 U.S.C. § 2241, and we will therefore deny his petition.

The Dorsainvil panel made clear that the § 2241 option was only available in certain "rare cases", Dorsainvil, 119 F.3d at 250, and the "rare" circumstances that distinguished Dorsainvil's case from others was that he was in an "unusual position -- that of a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate, even when the Government concedes that such a change should be applied retroactively," Dorsainvil, 119 F.3d at 251. Moreover, as set forth above, the Dorsainvil panel made equally clear that the § 2241 option was not available "merely because [a] petitioner is unable to meet the stringent

gatekeeping requirements of the amended § 2255," Dorsainvil, 119 F.3d at 251.

The procedural history of Abdullah's claim demonstrates not only that he does not fall into the category of petitioners that Dorsainvil embraced, but that he does fall into the category of petitioners that Dorsainvil rejected. All of the case law to which Abdullah cites in support of his ex post facto argument, and particularly the Supreme Court's Miller decision, predated his guilty plea, his sentencing, his pursuit of a direct appeal, and his prosecution of his motion under § 2255. Therefore, in clear distinction from defendants like Dorsainvil, Abdullah had every opportunity to raise the ex post facto claims previously during the pendency of his case and in his § 2255 motion. Indeed, it is clear that Abdullah has only filed his § 2241 petition in an effort to circumvent the admittedly harsh gatekeeping provisions that the AEDPA imposed⁶, and which have left Abdullah without a means by which to raise the claims he presents in his petition. As Dorsainvil makes clear, though, the mere fact that § 2255 review is not available to Abdullah cannot be sufficient to permit him to defy those gatekeeping provisions. We consequently have no difficulty in concluding that Abdullah

⁶ Abdullah does not make any claim, nor could he, that the arguments he presents here could not have been made earlier. Instead, his resort to a § 2241 petition is predicated on the fact that his contention falls into neither of the two categories that would permit him to pursue a second § 2255 motion. Therefore, the petition itself shows that the only reason Abdullah has filed pursuant to § 2241 is that the gatekeeping provisions deny him a second bite at the § 2255 apple.

cannot contest his sentence through a § 2241 petition on the reasoning set forth in Dorsainvil.

Apart from the Dorsainvil argument, Abdullah also maintains that we should consider his § 2241 petition because his petition raises the question of his actual innocence or the existence of a complete miscarriage of justice.

In Bousley v United States, 523 U.S. 614, 118 S. Ct. 1604 (1998), the Supreme Court held that where a defendant has procedurally defaulted on a claim by failing to raise it on direct review, the claim may be raised in a habeas context if the defendant can demonstrate that he is "actually innocent", Bousley, 523 U.S. at 622, 118 S. Ct. at 1611 (citing Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986)). Such "actual innocence" must be factual innocence, as opposed to procedural insufficiency, Bousley, 523 U.S. at 624, 118 S. Ct. at 1611, and to establish factual innocence, a petitioner must "demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," Bousley, 523 U.S. at 623, 118 S. Ct. at 1611 (citing Schlup v. Delo, 513 U.S. 298, 327-28, 115 S. Ct. 851, 867-68 (1995)) (internal quotation marks omitted).

By the very terms of his own argument, however, Abdullah cannot raise here any claim of "actual innocence". As Bousley made clear, what we are taking about here is innocence of the crime of which the defendant was convicted. Abdullah, however, makes no contention whatever that he did not conspire to

interfere with interstate commerce by robbery. Instead, he contends that he is "innocent" of the sentence imposed upon him, since that sentence was based partly on his extensive pre-Guidelines criminal history. The "innocence" that Abdullah brings to our attention, therefore, is not the sort of actual, factual innocence of crime that serves, pursuant to Bousley and similar cases, to permit a Court to address on habeas corpus review claims that had otherwise been procedurally defaulted.⁷ As this entire line of reasoning is inapplicable to Abdullah's situation, we can find no justification therein for considering Abdullah's § 2241 petition.

As we stated at the outset, the threshold question Abdullah presents is whether he may pursue his claim that his sentence violated the Ex Post Facto Clause through a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Neither the reasoning of In re Dorsainvil nor the "actual innocence" exception for the review of defaulted claims apply to the instant petition, and we therefore conclude that Abdullah's only opportunities to raise this issue -- either on direct appeal or

⁷ Moreover, as another member of this Court has observed, the "actual innocence" exception does not apply to one whose guilt is conceded or plain, and a guilty plea serves exactly as such a concession, Hendel v. Vaughn, No. 00-783, 2000 WL 1456906 at *2 (E.D. Pa. Aug. 25, 2000) (citing Schlup, 513 U.S. at 321, 115 S. Ct. at 864).

in his § 2255 motion -- are past.⁸ We will deny his petition for a writ of habeas corpus⁹.

⁸ Our holding here obviates any need to examine the merits of Abdullah's claim. In this connection, however, we observe that the cases that Abdullah cites in support of his argument fail to demonstrate that his ex post facto claims have any validity. Although Miller, and other cases, have established that it is unconstitutional use at sentencing guidelines that were not in effect when the crime for which the defendant is being sentenced was committed, no case Abdullah cites contains anything to suggest that such reasoning might be extended to suggest that a sentencing court is constitutionally barred from considering past crimes occurring before the guidelines went into effect. Consequently, Abdullah's argument that "the district judge clearly violated established law when he applied the U.S.S.G. to [these] prior [crimes] that occurred before the U.S.S.G. went into effect," Pet'r's Mem. of Law at 21, borders on the frivolous.

⁹ Abdullah has also filed a motion to proceed in forma pauperis. Given our the disposition outlined above, we will deny this motion as moot.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARRIUS ABDULLAH	:	CIVIL ACTION
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v.	:	
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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DARRIUS ABDULLAH	:	No. 95-317

ORDER

AND NOW, this 20th day of March, 2001, upon consideration of the pro se petition for a writ of habeas corpus (docket number 81 in 95-cr-317) and petitioner's pro se motion to proceed in forma pauperis (docket number 82 in 95-cr-317), and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The petition for a writ of habeas corpus is DENIED;
2. We decline to issue a certificate of appealability;
3. The motion to proceed in forma pauperis is DENIED AS MOOT; and
4. The Clerk shall CLOSE C.A. No. 01-862 statistically.

BY THE COURT:

Stewart Dalzell, J.

