

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 00-385
v.	:	
	:	CIVIL ACTION
KERRY MARSHALL	:	NO. 19-2124

MEMORANDUM

Padova, J.

April 9, 2020

This action arises out of Petitioner Kerry Marshall's conviction for conspiracy to receive explosives in violation of 18 U.S.C. § 844(n). Presently before the court is Marshall's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Marshall brings this Motion following a state court order vacating a prior state sentence, and he argues that the fact that his state sentence was vacated allows us to vacate his federal sentence for conspiracy and grant him a resentencing hearing. We held argument on the Motion on February 10, 2020. For the reasons that follow, we now deny the Motion.

I. BACKGROUND

A. Marshall's State Homicide Conviction

On November 2, 1988, Marshall, 17 years old at the time, and his 14-year-old accomplice, climbed aboard Susan Richardson's fish truck and attempted an armed robbery. Also on board was Ms. Richardson's 4-year-old son and a 17-year-old employee. Ms. Richardson drew her gun in defense and the two exchanged shots. Marshall was struck in the hand and Ms. Richardson was shot in the chest. Ms. Richardson eventually died of her wound. On March 6, 1990, Marshall was found guilty of first-degree murder, recklessly endangering another person (two counts), robbery,

possession of an instrument of crime, and criminal conspiracy. He was sentenced to life without the possibility of parole (“LWOP”).

B. Marshall’s Federal Conviction

In June 1999, while Marshall was serving his LWOP sentence at State Correctional Institute at Graterford, correctional officers found 250 feet of rope under Marshall’s mattress and found that one of the metal bars on his window had been cut away in what officials determined was an attempted escape. (6/7/01 Hr’g Tr. at 15:10-15.) As a result, Marshall was placed in a restrictive housing unit, and all of his ingoing and outgoing mail was intercepted, copied, and read, leading authorities to discover a series of incriminating letters. (Id. at 15:16-18.)

On July 22, 1999, prison officials intercepted a letter from Marshall to his mother, asking her to buy dynamite for him, using the code name “exotic candlesticks.” (Id. at 15:19-24.) One week later, on July 29, 1999, prison officials intercepted a letter from Marshall to an individual in the Philadelphia area, in which Marshall referred to his thwarted escape plan and again asked for dynamite. (Id. at 15:25-16:5.) Marshall subsequently received a letter from an individual stating that he did not have the “sticks,” but he did have “hammers and the vest”—street terms for guns and a bullet proof vest. (Id. at 16:15-18.) On July 30, 1999, Marshall’s mother responded that she could not get the dynamite for him, but maybe someone else could. (Id. at 16:6-10.) Marshall wrote back to his mother on August 1, 1999, asking her to check the internet for dynamite and to ask his brothers for help. (Id. at 16:11-14.) Thereafter, Marshall’s mother wrote to him that she needed to speak to him about the candlesticks and that she would visit the prison on August 27, 1999. (Id. at 17:8-13.) On September 28, 1999, Marshall wrote to his mother, instructing her not to not allow the police into her house. (Id. at 17:14-16.)

Marshall also wrote to other inmates. He stated in one letter that “he was ready to die with guns blasting in a pitch [sic] battle for my freedom, justice, and equality” and that if he went down, he wanted “to take as many devils with him.” (Id. at 16:23-17:2.) In another letter, he stated the dates he would be on a bus to attend court in November 1999, indicating that he intended to attempt escape while being transported to or from the courthouse. (Id. at 17:3-7.)

On October 1, 1999, undercover agents contacted Marshall’s mother, and she agreed to meet with them that same day. (Id. at 17:17-25.) She took possession of five sticks of sham dynamite and a handgun from the undercover agents and acknowledged that she knew the items were to be used to free her son. (Id. at 18:1-8.) The next day, prison officials intercepted a letter from Marshall telling another individual to ““pass off them hammers, vest and weed”” and “to contact his mother . . . to take possession of the dynamite.” (Id. at 18:9-17.)

On June 29, 2000, Marshall and his mother were charged with conspiracy to receive explosives, in violation of 18 U.S.C. § 844(n). (Docket No. 1.) On June 7, 2001, Marshall pled guilty to this crime. (6/7/01 Hr’g Tr. at 23:9.)¹

C. Marshall’s Federal Sentence

We sentenced Marshall on September 12, 2001. In determining Marshall’s sentence, we considered the sentencing recommendations of both the Probation Officer and the Government, the pre-sentence investigation report, the statutory maximum provided by 18 U.S.C. § 844(d), and the Sentencing Guidelines Range calculated pursuant to the 2000 edition of the United States Sentencing Guidelines. We calculated Marshall’s Sentencing Guidelines Range using, as one of the factors, Marshall’s criminal history. Marshall had three prior state criminal convictions: (1)

¹ Marshall’s mother pled not guilty and was acquitted by a jury on August 9, 2001. (Docket No. 61.)

the March 13, 1990 murder conviction underlying his LWOP sentence; (2) an April 4, 1990 drug conviction for manufacture and delivery of crack cocaine; and (3) an October 27, 1995 conviction for hindering prosecution or apprehension arising from Marshall's manufacturing a knife used by another prisoner to stab an inmate. These three convictions produced nine criminal history points and, after adding an additional three points because Marshall was imprisoned at the time he committed the explosives conspiracy, we assigned him a criminal history category of V. This criminal history category, in combination with Marshall's calculated offense level of 25, resulted in a Sentencing Guidelines Range of 100-120 months.² We ultimately sentenced Marshall to a term of 110 months in prison, to be served consecutively to his state LWOP sentence.³

D. Marshall's State Court Order Vacating his State Sentence

In 2012, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller v. Alabama, 567 U.S. 460, 479 (2012) (citation omitted). In 2016, the Supreme Court further held that Miller "announced a substantive rule that is retroactive in cases on collateral review." Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016). In light of these decisions, Marshall filed a Post-Conviction Relief Act ("PCRA") petition in Pennsylvania state court. On

² At the time of Marshall's sentencing in 2001, the Sentencing Guidelines were mandatory and binding on all judges. See United States v. Booker, 543 U.S. 220, 233 (2005) ("The Guidelines as written . . . are not advisory; they are mandatory and binding on all judges."). It was not until 2005 that the United States Supreme Court held that the Guidelines' mandatory nature conflicted with the Sixth Amendment and that courts must therefore treat the Guidelines as advisory. See id. at 265 ("We do not doubt that Congress, when it wrote the [Sentencing Reform Act of 1984], intended to create a form of mandatory Guidelines system. But . . . given today's constitutional holding, that is not a choice that remains open." (citation omitted)).

³ The 2000 edition of the Sentencing Guidelines provided that "[i]f the instant offense was committed while the defendant was serving a term of imprisonment . . . , the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." U.S.S.G. § 5G1.3(a) (2001).

May 17, 2018, Judge Jeffrey Minehart of the Court of Common Pleas of Philadelphia County granted that petition, vacated Marshall's LWOP sentence, and resented him to 29 years to life, in part due to his rehabilitation efforts, making him immediately eligible to apply for parole. Thereafter, on May 15, 2019, Marshall filed the instant 28 U.S.C. § 2255 Motion seeking to vacate his 110-month sentence for conspiracy to receive explosives in violation of 18 U.S.C. § 844(n).

II. LEGAL STANDARD

Marshall has moved for relief pursuant to 28 U.S.C. § 2255, which provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). “Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.” United States v. Perkins, Crim. A. No. 03-303, Civ. A. No. 07-3371, 2008 WL 399336, at *1 (E.D. Pa. Feb. 14, 2008) (quoting United States v. Rishell, Crim. A. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001)). In order to prevail on a Section 2255 motion, the movant's claimed errors of law must be constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962); see also United States v. Travillion, 759 F.3d 281, 288 (3d Cir. 2014) (stating that “relief under § 2255 is available only when ‘the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice, and . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ . . . is apparent.’” (alterations in original) (quoting Davis v. United States, 417 U.S. 333, 346 (1974))).

III. DISCUSSION

Marshall seeks to vacate his sentence under § 2255 and argues that (1) his Motion is timely because the state court's order vacating his state sentence is a newly discovered fact, which restarts the one-year limitations period for § 2255 motions; and (2) we should vacate his federal sentence and grant him a resentencing hearing using the reasoning underlying the "sentencing package doctrine" because his state sentence was vacated and his federal sentence is predicated on his state sentence.

A. Timeliness of Marshall's Motion

As a preliminary matter, we must determine whether Marshall's § 2255 Motion is timely. Title 28 U.S.C. § 2255(f) provides that a § 2255 motion must ordinarily be filed within one year of the date on which the judgment of conviction becomes final. However, under circumstances in which newly discovered facts support a movant's § 2255 claim, the statute of limitations starts to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). Marshall argues that the May 17, 2018 state court order vacating his prior state sentence is the newly discovered "fact[]" upon which his [§ 2255] claim is premised." (Pet'r's Mem. at 11.) He therefore maintains that the limitations period for bringing the instant Motion started to run on May 17, 2018, and that the Motion, which was filed on May 15, 2019, is thereby timely. In arguing that the state court order is a new "fact" that triggers a new limitations period, Marshall relies on the Supreme Court's opinion in Johnson v. United States, 544 U.S. 295 (2005), in which the Court determined that a state court order vacating a prior conviction was a "fact," which triggered the one-year limitations period pursuant to 28 U.S.C. § 2255(f)(4). Id. at 302. The Government argues, however, that

Johnson is inapposite because it concerned an order vacating a prior *conviction*, while the instant case involves an order vacating a prior *sentence*.

In Johnson, a federal prisoner filed a § 2255 motion, seeking to vacate his federal sentence after a state court vacated seven state court convictions on constitutional grounds, one of which had been the basis for his designation as a career offender under the United States Sentencing Guidelines. 544 U.S. at 300-01. Johnson argued that his motion was timely even though it was filed more than one year after his judgment of conviction had become final because “the order vacating his prior conviction [was] the factual matter supporting his § 2255 claim, discovery of which trigger[ed] the refreshed 1-year period” pursuant to § 2255(f)(4). Id. at 304. The Johnson Court agreed with Johnson’s basic argument. Id. at 308. It reasoned that “[w]e commonly speak of the ‘fact of a prior conviction,’ and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it.” Id. at 306-07 (quotation omitted). The Court further reasoned that “a claim of such a fact is subject to proof or disproof like any other factual issue.” Id. at 307. Having concluded that the state court order was a “fact” within the meaning of § 2255(f)(4), the Court ultimately held that a federal prisoner may bring a § 2255 petition asserting a claim that his or her federal sentence had been improperly enhanced by a subsequently-vacated state conviction as long as the petitioner had acted with due diligence in challenging the state conviction and had filed his § 2255 petition within one year of his receipt of the order vacating that conviction. Id. at 302.

The Government, in essence, argues that Marshall’s reliance on Johnson is misplaced because Johnson only held that an order vacating a prior *conviction* could serve as a newly discovered fact that restarts the § 2255(f)(4) limitations period for bringing a § 2255 motion claiming that a prisoner’s federal sentence was improperly enhanced by the now-vacated

conviction. However, applying Johnson's logic to the case at hand, we conclude that a state court order vacating a prior *sentence* is also a fact within the meaning of § 2255(f)(4), which triggers the running of the limitations period on Marshall's § 2255 claim that his federal sentence was improperly influenced by the now-vacated state sentence. We determine that, as with an order vacating a predicate conviction, an order vacating a predicate sentence "is spoken of as a fact just as sensibly as the order entering it," and "a claim of such a fact is subject to proof or disproof like any other factual issue." Id. at 307. Moreover, as the Johnson Court stated:

Our job here is to find a sensible way to apply [§ 2255(f)(4)] when . . . [the statute's] drafters probably never thought about the situation we face here. . . . [I]t is peculiar to speak of "discovering" the fact of the very eventuality the petitioner himself has brought about [by challenging his sentence], but when that fact is necessary to the § 2255 claim, and treating notice of it as the trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be. And here the fit is painless, if short on style.

Id. at 308. In the end, then, it is apparent that "receiving notice of success [of a challenge to a state sentence] can surely qualify as a kind of discovery falling within the statutory language." Id. We therefore conclude that, under 28 U.S.C. § 2255(f)(4), the limitations period for Marshall's Motion began to run on May 17, 2018, the date of the order vacating Marshall's LWOP sentence. Accordingly, we further conclude that Marshall's May 15, 2019 Motion was timely filed.

B. Application of the Sentencing Package Doctrine

We must now decide whether Marshall's claim is meritorious, that is, whether he presents a sufficient basis on which to ground an order vacating his September 12, 2001 federal sentence and granting him a resentencing hearing. Marshall's argument in favor of relief rests on the sentencing package doctrine. The sentencing package doctrine "allows resentencing on all counts when a multicount conviction produces an aggregate sentence or 'sentencing package,'" and "'a conviction on one or more of the component counts is vacated.'" United States v. Davis, 112 F.3d

118, 122 (3d Cir. 1997) (quoting, first Merritt v. United States, 930 F. Supp. 1109, 1113-14 (E.D.N.C. 1996); then United States v. Pimienta-Redondo, 874 F.2d 9, 14 (1st Cir. 1989)). As the United States Court of Appeals for the Third Circuit has explained:

“[W]hen a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan. When a conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand . . . if that appears necessary in order to ensure that the punishment still fits both crime and criminal.”

United States v. Miller, 594 F.3d 172, 180 (3d Cir. 2010) (alteration in original) (quoting Davis, 112 F.3d at 122) (citations omitted). Marshall contends that, like sentences on a multicount indictment, his state and federal sentences can be viewed together as a sentencing package because his federal sentence was imposed to run consecutively to his state sentence. Specifically, he explains that the consecutive nature of his state and federal sentences renders his state sentence “a necessary prerequisite for the imposition of a consecutive federal sentence,” which makes his state sentence “an indispensable component of . . . his federal sentence.” (Pet’r’s Mem. at 13-14.) Using this reasoning, Marshall argues that we should vacate his federal sentence because one component of this sentencing package, the state sentence, was vacated.⁴

We are not convinced, however, that the principles underlying the sentencing package doctrine properly apply to the circumstances presented here. As noted above, the purpose of the sentencing package doctrine is to permit the sentencing court to review a previously-imposed

⁴ Notably, Marshall acknowledges that the sentencing package doctrine normally “deal[s] with resentencing proceedings resulting from the vacatur of one conviction in a multicount indictment resulting in multiple, interdependent convictions” and concedes that those are not the circumstances presented in this case. (Pet’r’s Mem. at 12.) Consequently, he does not argue that the sentencing package doctrine itself should be applied here; rather, he argues that we should use its reasoning as “guidance” in adjudicating the issue that he raises. (Id.)

sentence when that sentence is comprised of “sentences on . . . various counts [that] form part of an overall plan” and a “conviction on one or more of the component counts is vacated.” Miller, 594 F.3d at 180 (quotation omitted). In Marshall’s case, we did not consider his state LWOP sentence to be part of an overall sentencing plan. Indeed, although the Guidelines at the time required us to impose his federal sentence consecutive to his state LWOP sentence, see supra n.3, this fact did not influence our determination as to the length of his federal sentence. Rather, we merely calculated the appropriate range for Marshall’s sentence for his federal crime pursuant to Guidelines provisions and then considered the sentencing recommendations of both the Probation Officer and the Government, the pre-sentence investigation report, and the statutory maximum provided by 18 U.S.C. § 844(d) to determine an appropriate sentence for Marshall. As a result, we simply cannot conclude that Marshall’s state and federal sentences were dependent on one another as part of a sentencing package under the logic of the sentencing package doctrine. We therefore decline to apply the logic of the sentencing package doctrine to vacate Marshall’s federal sentence. Accordingly, we deny Marshall’s request to vacate his federal sentence for conspiracy to receive explosives, as well as his related request that we hold a resentencing hearing.

IV. CONCLUSION

For the foregoing reasons, we deny Marshall’s Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
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KERRY MARSHALL	:	NO. 19-2124

ORDER

AND NOW, this 9th day of April, 2020, upon consideration of Kerry Marshall’s “Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody” (Crim. Docket No. 66), all documents filed in connection therewith, and the Oral Argument held on February 10, 2020, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that the Motion is **DENIED**. The Clerk is directed to **CLOSE** Civil Action No. 19-2124. Furthermore, because Marshall has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.