

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
v. ) Crim. No. 00-39-P-C  
)  
SHAWN WEST, )  
)  
Defendant )

**RECOMMENDED DECISION OF 28 U.S.C. § 2255 MOTION**

Shawn West is a prisoner at a federal penitentiary in Ray Brook, New York, serving a 120-month sentence. He has filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. (Docket No. 30.) He has also filed a motion to defer adjudication of his claim that his sentence was wrongly enhanced by an unconstitutional prior conviction. (Docket No. 31.) When he submitted that motion West represented that he would be filing a memorandum in support of that requested relief by March 15, 2002. However, the court has received no further filings from West. Having given preliminary consideration to his 28 U.S.C. § 2255 motion pursuant to the Rules Governing § 2255 Proceedings 4(b), I recommend that the court **DENY** his motion to defer adjudication and **DISMISS** Ground One as premature and summarily **DISMISS** the remainder of his § 2255 petition as it plainly appears the movant is not entitled to relief.

**Discussion**

West's pro se § 2255 motion lists three grounds. One, his sentence was enhanced by unconstitutional prior convictions. With respect to this ground West offers no supporting facts. Two, he was prejudiced by ineffective assistance of counsel. West's factual allegations for this ground are that his lawyer failed to properly challenge a two-level

enhancement for obstruction of justice and failed to challenge the use of a prior conviction with respect to which his rights had been restored. Three, there was an unlawful use of his prior conviction in light of the fact that his firearm rights had been restored. The factual allegation West provides to support this claim is that under North Carolina law his firearm rights were restored after five years making this conviction unusable for felon in possession purposes.

In his motion to defer adjudication of his prior conviction related claim, West offers some detail as to this challenge. West was convicted of a violation of 18 U.S.C. § 922(a)(6) for making a false statement to acquire a firearm and a violation of § 922(g) for being a felon in possession of a firearm. He explains that his prior convictions used to set his penalty range were in New York, North Carolina, and other states. He observes that these prior convictions are not yet vacated and thus, under Daniels v. United States, 532 U.S. 374 (2001), he cannot at this time assert his Ground One claim in a 28 U.S.C. § 2255 motion. He states that in his view his two other claims, his ineffective assistance of counsel and the unlawful use of a prior North Carolina conviction, could go ahead at this time.

Though I appreciate West's concern about the § 2255 one-year statute of limitations, I recommend that the court deny West's motion to defer adjudication of his first ground without requiring the United States to respond. West cites an unpublished First Circuit case, McCarthy v. United States, 1999 WL 1085766 (1<sup>st</sup> Cir. 1998) in support of his suggested treatment of this ground. Aside from being subject to the First Circuit Rule 36 caution, the McCarthy treatment would teach that the court not hold this ground in abeyance. I could locate no authority by which this court at this juncture can formally hold this claim in abeyance or "preserve his right to raise such a challenge later." The cases cited by the First

Circuit in the McCarthy disposition, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) and United States v. Pettiford, 101 F.3d 199 (1<sup>st</sup> Cir. 1996) counsel that this claim be dismissed as premature, leaving West free to attempt to revive this challenge to his sentencing enhancement if he succeeds in getting these convictions vacated. This is not a promise that this court will have the authority to review this claim down the road.

With respect to West's two other grounds I recommend summary dismissal. Rule 4(b) of the Rules Governing Section 2255 Proceedings states in part:

**Initial consideration by the judge.** The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for summary dismissal and cause the movant to be notified.

Rules Governing Sec. 2255 Proceedings 4(b).

In a case discussing a § 2255 movant's entitlement to an evidentiary hearing, the First Circuit referenced the Rule 4(b) standard when stating that the court can forgo an evidentiary hearing when faced only with allegations that "state conclusions instead of facts, contradict the record, or are 'inherently incredible.'" David v. United States, 134 F.3d 470, 477 -78 (1<sup>st</sup> Cir. 1998) (quoting United States v. McGill, 11 F.3d 223, 225-26 (1<sup>st</sup> Cir. 1993)). It went on to remark, "a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings." Id. at 478.

With respect to his ineffective assistance of counsel claim in Ground Two, the Memorandum of Sentencing Judgment iterates the court's finding on the obstruction of justice enhancement as being that West "willfully mislead[] federal agents, a United States

Pretrial Services Officer, and a United States Magistrate Judge about his true identity.”

(Docket No.27.) In his § 2255 motion West has provided no factual allegations as to how this finding was incorrect and the result of ineffective assistance of counsel. Transcripts of the initial appearance and detention hearing before Magistrate Judge Cohen provide factual support for the finding made in the Memorandum of Sentencing.

It appears West’s second conclusory assertion, that his attorney failed to challenge the use of a prior conviction with respect to which his rights had been restored, refers to his attorney’s failure to challenge the use of the North Carolina conviction as alleged in Counts Three, Five, Seven, and Nine of the indictment, charging Felon in Possession of a Firearm. The unlawful use to which he refers in Ground Three is apparently the use of this North Carolina conviction as a second conviction enhancing his sentence under the felon in possession charges. Each of those counts alleges not only the North Carolina conviction, but also a New York conviction. Thus, counsel’s allegedly ineffective assistance in failing to challenge the use of the North Carolina conviction does not result in a determination that he is not guilty of the criminal offense. Rather, if the North Carolina charge had not been included in the sentencing calculations his base offense level would have been lower pursuant to U.S.S.G. § 2K2.1, the court having determined that the Base Offense Level was “24” pursuant to § 2K2.1(a)(2).

Regarding West’s third ground, he again alleges that his rights have been restored as to a North Carolina conviction and that this conviction should not have been used in the determination of whether West was a felon in possession of a firearm. He describes this treatment as unlawful. This is not a challenge to whether or not West should have been convicted of the underlying offense, 18 U.S.C. § 922(g)(1), of being a felon in possession of

a firearm. The United States satisfied the elements of that offense with the New York conviction. Thus, the only possible use to which the defendant could be referring is the use of the North Carolina conviction for the purposes of determining his Base Offense Level pursuant to the Sentencing Guidelines. The relevance of the restoration of civil rights of a felon pertains to 18 U.S.C. § 921(a)(20) which provides, among other things that:

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

§ 921(a)(20)(emphasis added). The “unless clause” under § 921(a)(20) comes into play when a defendant challenges the use of a prior felony conviction as a predicate offense for either a conviction under § 922(g) or as the basis of a mandatory sentence of at least fifteen years (three prior convictions) under § 924(e). It has no apparent relevance to West’s motion. See Caron v. United States, 524 U.S. 308 (1998).<sup>1</sup>

The only possible relevant use made of the North Carolina conviction in this case was to elevate the Base Offense Level to “24” under Sentencing Guideline § 4B1.1 as it pertained to West’s criminal history category. The guideline application notes under § 4A1.2 provide the following:

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<sup>1</sup> It is worth noting that if West had a Caron issue to raise it is unlikely that he would prevail. He was convicted of the North Carolina offense on November 14, 1994, and sentenced to four years in custody according to the presentence investigation. Neither the presentence investigation nor West’s motion reveals when he was discharged from that sentence. On December 1, 1995, N.C. Gen. Stat. § 14-415.1 (1995) became effective making it unlawful for any person convicted of a felony to purchase a handgun (the conduct and type of guns involved in this offense). Thus, under the North Carolina statutory scheme most probably in effect at the time that West was discharged from his sentence his right to purchase a handgun had not been restored under North Carolina’s own Felony Firearms Act. North Carolina applies the law in effect not on the date of conviction but on the date of discharge. United States v. O’Neal, 180 F.3d 115, 121 (4<sup>th</sup> Cir. 1999). Therefore while it is true that generally a felon’s civil rights are restored upon discharge from his sentence, see N.C. Gen. Stat. § 13 –1, et seq., purchase of a handgun by a felon in North Carolina remains a prohibited act.

Conviction Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted.

U.S. Sentencing Guidelines §4A1.2 cmt. n.10.

Thus, whatever arguments West thinks he could make about applicable North Carolina law, those arguments would have no impact on the guidelines computation. And even if his Caron-based challenge to his conviction under § 922(g) had some legal merit, the United States charged him with the presently valid New York conviction as well.

West took no direct appeal. “Habeas review is an extraordinary remedy” and cannot be used as a substitute for direct review. Id. Accord David, 134 F.3d at 474; Knight v. United States, 37 F.3d 769, 772 (1<sup>st</sup> Cir. 1994). This belated attempt to challenge sentencing enhancements through the conclusory allegations of this motion does not warrant relief pursuant to 28 U.S.C. § 2255. Therefore, Ground Three is subject to summary dismissal.

In order for Ground Two, the ineffective assistance ground, to have any viability in the context of his guilty plea, West would have to meet the by now well worn two-prong standard of the Strickland/Hill test. Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985). As the First Circuit articulated in Knight, Strickland requires the complaining defendant to “first demonstrate that counsel’s performance fell below an objective standard of reasonableness. This means that the defendant must show that counsel’s advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” Knight, 37 F.3d at 774 (quoting Hill, 474 U.S. at 369.) The defendant must also demonstrate “that he or she was prejudiced by the errors.” Id. “That is,”

Knight explains, “the defendant must prove that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” Id. In the context of a guilty plea, Hill provides that this second prong of Strickland requires that the defendant demonstrate that there is a “reasonable probability” that if counsel had not erred the defendant would not have pleaded guilty but would have proceeded to trial. Hill, 474 U.S. at 59; see also Knight, 37 F.3d at 774.

West’s conclusory allegation of ineffective assistance does not come anywhere near meeting that standard on either of the facts he alleges, failing to properly challenge the obstruction of justice enhancement and failing to challenge the use of the North Carolina conviction for sentencing purposes. Ground Two is likewise subject to summary dismissal.

### **Conclusion**

For these reasons I recommend that the Court **DENY** West’s motion for deferral of adjudication, dismiss his Ground One claim because it is not ripe, and **SUMMARILY DISMISS** his claims in Grounds Two and Three because they have no merit.

### NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

Dated March 25, 2002.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

MAG CLOSED

U.S. District Court

District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 00-CR-39-ALL

USA v. WEST Filed: 04/26/00

Other Dkt # 2:00-m -00016

Case Assigned to: JUDGE GENE CARTER

Case Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

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JOHN DOE

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BOO

aka

SEAN R WEST

aka

SHAWN A WEST

defendant

[term 03/22/01]

Pending Counts: Disposition

21:841A=CD.F CONTROLLED SUBSTANCE - SELL, DISTRIBUTE, OR DISPENSE; Distribute and possess with intent to distribute, 21 841(a)(1) and (b)(1)(A)  
(1s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6), 942(a)(2), presented false, fictitious, or misrepresented identification with acquisition of a firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2- 10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable  
(2s) (2s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC., 18:922(g)(1) and 924(a)(2); Felon in possession and affecting commerce of firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is not applicable  
(3s) (3s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6) and 924(a)(2); presented false, factitious, or misrepresented identification w/acquisition of a firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable  
(4s) (4s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC., 18:922(g)(1) and 924(a)(2), Felon in possession and affecting commerce of firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2- 10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable  
(5s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS 922(a)(6) and 924(a)(2); presented false, fictitious, or misrepresented identification w/acquisition of firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; special Assessment of \$900; fine is waived; and Restitution is non applicable  
(6s) (6s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC., 18:922(g)(1) and 924(a)(2); Felon in possession and affecting commerce of firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

(7s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6) and 942(a)(2); presented false, factitious, or misrepresented identification w/acquisition of a firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

(8s)

(8s)

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC., 18:922(g)(1) and 924(a)(2); Felon in possession and affecting commerce of firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; and Restitution is non applicable

(9s)

18:922A.F IMPORTING/MANUFACTURING FIREARMS; 18:922(a)(6) and 924(a)(2); presented false, factitious, or misrepresented identification w/acquisition of a firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

(10s)

(10s)

Offense Level (opening): 4

Terminated Counts:                      Disposition

18:922A.F IMPORTING/MANUFACTURING FIREARMS 18:922(a)(6) and 924(a)(2) Presenting false/fictitious identification w/acquisition of a firearm

(1 - 4)

18:922A.F IMPORTING/MANUFACTURING FIREARMS 18:922(a)(6) and 924(a)(2) presenting false identification in the attempted acquisition of a firearm. Imprisoned for a term of 120 months; Supervised release for a term of 3 years on counts 2-10 to be served concurrently; Special Assessment of \$900; fine is waived; and Restitution is non applicable

(5)

(5)

Offense Level (disposition): 4

Complaints

Disposition

false statement in connection with the acquisition of firearms from the Lewiston Pawn Shop,  
Lewiston, ME, 18:922(a)(6), 924(a)(2)

[ 2:00-m -16 ]

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