Nos. 17-3835/4088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 06, 2018
DEBORAH S. HUNT, Clerk

ISRAEL C. ISBELL,

Petitioner-Appellant,

v.

STEVEN MERLAK, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: GUY, COOK, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 17-3835/17-4088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISRAEL C. ISBELL, Petitioner-Appellant, v. STEVEN MERLAK, Warden, Respondent-Appellee.	)	**FILED** May 01, 2018 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: GUY, COOK, and DONALD, Circuit Judges.

Israel C. Isbell, a pro se federal prisoner, appeals the district court's denial of his motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Isbell was sentenced to ten years of imprisonment by the Tenth Judicial Circuit Court of Illinois after pleading guilty to unlawful delivery of a controlled substance, in violation of section 401(c)(2) of the Illinois Controlled Substances Act. After Isbell's state sentence was imposed but before it took effect, the United States District Court for the Central District of Illinois sentenced Isbell to 180 months of imprisonment for receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). *United States v. Isbell*, No. 1:09-cr-10122 (C.D. Ill. July 2, 2010). Isbell was then returned to state custody, and a federal detainer was filed. However, because Isbell had been released from state custody on his previously posted

bond, Isbell was transferred back to federal custody. Later, Isbell filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Northern District of Ohio, arguing that his judgment of conviction was satisfied when he was released to the exclusive custody of Illinois. The district court denied the § 2241 petition and denied Isbell's motions for relief from judgment. Isbell now argues that the federal government relinquished primary custodial jurisdiction when he was released to state custody.

When reviewing the denial of a Rule 60(b) motion, we do not review the underlying judgment; instead, our "review is limited to whether the district court abused its discretion in denying the Rule 60(b) motion." *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). Rule 60(b)(1) provides for relief from a final judgment only in limited circumstances, including "mistake, inadvertence, surprise, or excusable neglect."

The district court did not abuse its discretion in denying Isbell's motions for relief from judgment. "Normally, the sovereign which first arrests an individual acquires priority of jurisdiction for purposes of trial, sentencing and incarceration." *United States v. Collier*, 31 F. App'x 161, 162 (6th Cir. 2002) (quoting *United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980)); *see Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922). While Illinois was the first sovereign to take physical custody of Isbell, Illinois effectively relinquished primary custody when Isbell's motion to reduce his bond to a previously posted amount was granted. *See United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005). Despite the federal government's mistakenly releasing Isbell to the Illinois Department of Corrections, the federal government did not relinquish custody because Isbell was not released on bail, his charges were not dismissed, he was not granted parole, and his sentence had not expired. *See id.* Additionally, when Isbell was released into the custody of the Illinois Department of Corrections, a federal detainer was filed ensuring that he would eventually be returned to federal custody. *See Shaughnessy v. United States*, 150 F. App'x 800, 802 (10th Cir. 2005). In any event, this court has previously held that when a prisoner is mistakenly transferred to another jurisdiction, the original jurisdiction does not waive the right to imprison the prisoner for his conviction. *Stroble v. Egeler*, 547 F.2d 339, 340 (6th

Cir. 1977) (per curiam). Accordingly, the district court did not abuse its discretion in denying the motions for relief from judgment.

Based on the foregoing, we **AFFIRM** the district court's judgments, **GRANT** the motion to proceed in forma pauperis for the limited purpose of these appeals, and **DENY** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Israel Isbell, Petitioner v. Steve Merlak, Warden, Respondent
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
2017 U.S. Dist. LEXIS 93414
Case No. 4:16CV1883
June 15, 2017, Filed

Editorial Information: Subsequent History

Habeas corpus proceeding at, Appeal dismissed by **Isbell v. Merlak**, 2017 U.S. App. LEXIS 23287 (6th Cir., Nov. 17, 2017)Affirmed by, Motion granted by, Motion denied by, As moot **Isbell v. Merlak**, 2018 U.S. App. LEXIS 11262 (6th Cir. Ohio, May 1, 2018)

Counsel Israel C. Isbell, Petitioner, Pro se, Lisbon, OH.
Steven Merlak, Respondent, Pro se, Lisbon, OH.

Judges: James G. Carr, Senior United States District Judge.

Opinion

Opinion by: James G. Carr

Opinion

ORDER

This federal prisoner's habeas case under 28 U.S.C. § 2241 is back before me on the petitioner's motion for relief from judgment under Fed. R. Civ. P. 60(b). (Doc. 5). For the reasons that follow, I deny the motion.

Background

On June 25, 2010, the United States District Court for the Central District of Illinois sentenced petitioner Israel Isbell to 180 months' imprisonment for receiving child pornography. (Doc. 43 at 1-2, *U.S. v. Isbell*, Case No. 1:09-cr-10122 (C.D. Ill.)).

At sentencing, the district court refrained from ordering that Isbell's sentence run either concurrently with, or consecutively to, a sentence that Isbell had received in a narcotics case in the Circuit Court of Tazewell County, Illinois. (Doc. 50 at 80-81, *U.S. v. Isbell*, Case No. 1:09-cr-10122 (C.D. Ill.)). The court stayed its hand in that regard on account of what it called the "very bizarre circumstances" that had attended Isbell's sentencing in state court. (*Id.* at 81).

In brief, the parties in the state-court case devised a plea agreement in May, 2010, under which the court sentenced Isbell to ten years' imprisonment, but stayed execution of the sentence until June 26 - a Saturday, and the day after the federal sentencing hearing. (Doc. 1-4 at 2-5). The upshot of that process, at least in the eyes of the district judge presiding over Isbell's case, was to preclude the federal court from ordering that Isbell's federal sentence run consecutive to his state-court sentence, as the state-court sentence had yet to be imposed:

> And I guess I need to address this, too, about the Tazewell thing. I'm not happy about this, frankly. I don't - I can't imagine ever entering an order is a case here that says, by the way, it

> doesn't - not going to take effect for two weeks or three weeks or something like that. I have no idea what went into that order being entered. I don't like it. But having said that, the state matter could have been resolved next week instead of then. If it had been, I wouldn't be saying this.
>
> The bottom line is he's going to serve his federal sentence first. And since that's the case, and since the state court order says that that sentence in state court, although it occurred on - in May does not become effective until tomorrow, I'm not going to say anything about consecutive or concurrent because as far as I'm concerned, under these very bizarre circumstances, this ends up being the first sentence and then the state court can do whatever they want.(Doc. 50 at 80-81, *U.S. v. Isbell*, Case No. 1:09-cr-10122 (C.D. Ill.); (*see also* Doc. 1-4 at 16).

Isbell began serving his federal sentence on June 25, 2010.

Sometime in July, 2010, the U.S. Marshals Service removed Isbell from federal custody and transferred him to the Illinois Department of Corrections so that he could serve his ten-year sentence in the narcotics case. (Doc. 1-1 at 11). To guarantee Isbell's later return to federal custody, the Marshals Service lodged a detainer with the Illinois authorities. (*Id.*).

But the Marshals Service was apparently unaware of the procedural niceties related to the imposition of Isbell's state and federal sentences. (*Id.* at 4) (federal prison officials stating, in response to Isbell's administrative grievance alleging that his federal sentence had expired, that the Marshals did not know "you posted bond on February 8, 2010, on your state charges, and became exclusive federal custody").

When the Marshals learned, in July, 2011, that Isbell's sentences were, in fact, running concurrently, they retrieved Isbell from Illinois and returned him to federal custody. (Doc. 1-1 at 4).

According to the Bureau of Prisons, Isbell will complete his child-pornography sentence on November 24, 2022. (*Id.*).

Isbell filed his § 2241 petition in July, 2016. (Doc. 1).

He alleged that his federal sentence expired, or that federal authorities effectively waived their right to imprison him any longer, when the Marshals Service transferred him to the custody of Illinois officials to serve his sentence in the narcotics case.

I denied the petition, holding that the cases interpreting the Interstate Agreement on Detainers like *Thompson v. Bannan*, 298 F.2d 611 (6th Cir. 1962), on which Isbell relied provided no support for his claim. (Doc. 3).

In so ruling, I recounted that, after the federal court sentenced Isbell, the "U.S. Marshal subsequently transported him to the Tazewell County, Illinois Sheriff's Department *for a pending state case*, and he then began serving a concurrent state sentence in an Illinois Department of Corrections Institution." (*Id.* at 1) (emphasis supplied).

Isbell now takes issue with the italicized portion of my statement, calling it "clearly erroneous" and grounds for vacating the judgment. (Doc. 5 at 1-2). According to Isbell, his state-court case "had been fully disposed of over a month prior" to the imposition of the federal sentence. (*Id.*).

Standard of Review

Fed. R. Civ. P. 60(b) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding" for six reasons. Isbell's motion, which asserts that I clearly erred when I referred to his state case as "pending," appears to arise under Rule 60(b)(1), which authorizes relief in the case of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

The Sixth Circuit "has stated that a Rule 60(b)(1) motion is intended to provide relief in only two situation: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *U.S. v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002).

Discussion

At bottom, Isbell's claim that is his valid federal sentence1 somehow expired, or that federal authorities waived their right to detain him under his judgment of conviction, when the Marshals Service relinquished him, on a temporary basis, to Illinois authorities so that he could serve his sentence in the narcotics case.

I adhere to my original decision that this claim provides no basis for habeas relief. I also conclude that Isbell has not shown that I made any mistake that warrants vacating the judgment.

As Isbell notes, and as federal prison officials recognized when processing Isbell's grievances, the Marshals Service erred in transferring him to state custody. But that mistake, amounting to little more than a clerical error, provides no grounds for ordering Isbell's immediate release from federal prison.

First, the United States did not, as a matter of law, surrender its jurisdiction over Isbell or its ability to regain custody of him by temporarily releasing him to Illinois authorities. *See generally Ponzi v. Fessenden*, 258 U.S. 254, 262, 42 S. Ct. 309, 66 L. Ed. 607 (1922); *see also Weekes v. Fleming*, 301 F.3d 1175, 1177-81 (10th Cir. 2002).

Second, *Bannan, supra*, 298 F.2d at 615, recognized that, at least in some cases, surrendering a prisoner who is serving a sentence in one state so that he can serve a sentence in another state can amount to an "implied pardon or commutation of sentence."

But to find such an implied pardon in this case would be at odds with the steps that the Marshals Services actually took to ensure that Isbell would ultimately return to federal custody: lodging a detainer with the Illinois authorities. *Cf. Shaughnessy v. U.S.*, 150 F. App'x 800, 802 (10th Cir. 2005) ("In this case it is clear that when the BOP turned Mr. Shaughnessy over to Colorado for prosecution on state charges, the federal government did not intend to waive jurisdiction to require him to complete his federal sentence. On the contrary, a detainer was filed with state authorities promptly after Mr. Shaughnessy was released from federal custody.").

Third, and putting all of the foregoing to one side, granting habeas relief on these facts would be inconsistent with the habeas statute itself, which directs that courts "dispose of habeas corpus matters as law and justice require." *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

The fact remains that Isbell is serving a sentence that he does not contend is unlawful in any way; he claims only - but incorrectly - that the sentence has lapsed. He does not allege any impropriety or misconduct on the part of the Marshals, nor does he allege his treatment has been arbitrary or unfair. Likewise, he does not allege a violation of his constitutional rights.

Moreover, I share the concerns of Judge Mihm, who sentenced Isbell in the Central District of Illinois case, about how the parties in the state-court case frustrated his ability to impose consecutive sentence - an order that, it seems to me, would have been entirely appropriate.2

On these facts, law and justice require that I uphold Isbell's sentence, not release him from it prematurely.

Finally, whether I correctly characterized the state-court narcotics case as "pending" had no effect

upon my decision. Indeed, Isbell himself does not explain how the characterization of that case as pending or resolved affects his claim. (*See* Doc. 5 at 1-3). What mattered to my original decision was the lack of any foundation in law or equity for the relief that Isbell seeks.

It is, therefore

ORDERED THAT Isbell's motion for relief for judgment (Doc. 5) be, and the same hereby is, denied.

So ordered.

/s/ James G. Carr

Sr. U.S. District Judge

Footnotes

1

Nowhere does Isbell challenge the lawfulness of the sentence that the U.S. District Court for the Central District of Illinois handed down. His only challenge is to the ongoing execution of that sentence, and thus his claim arises under § 2241. *E.g., Strawder v. Merlak*, 2017 U.S. Dist. LEXIS 49414, 2017 WL 1199139, *2 (N.D. Ohio) (Oliver, J.).

2

Isbell was on bond in the state narcotics case when authorities arrested him for receiving child pornography. Those circumstances made him a prime contender for consecutive sentences. (Doc. 50 at 50, *U.S. v. Isbell*, Case No. 1:09-cr-10122 (C.D. Ill.) (Judge Mihm stating that, had the state court sentenced Isbell before the federal sentencing hearing, "I definitely would have made this sentence consecutive. There's no doubt.").).