UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3116

Alvin Weekly

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana
(4:11-cr-40037-SOH-20)

JUDGMENT

Before LOKEN, GRUENDER, and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

March 21, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

May 01, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

UNITED STATES OF AMERICA RESPONDENT

v. Case No. 1:11-cr-40037-20

ALVIN WEEKLY PETITIONER

ORDER

Before the Court is the Report and Recommendation filed May 15, 2018, by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas. (ECF No. 1868). Judge Bryant recommends that the Court deny Petitioner Alvin Weekly's Petition for Relief of Sentence Pursuant to Rule 60(b). (ECF No. 1820). Petitioner has filed objections. (ECF No. 1873). The Court finds the matter ripe for consideration.

I. BACKGROUND

On September 14, 2011, Petitioner was named in 6 counts of a 190 count Indictment filed in the United States District Court for the Western District of Arkansas. The Indictment charged Petitioner with one count of conspiracy to distribute cocaine base, four counts of distribution of cocaine base, and one count of distribution of cocaine base within 1,000 feet of a public school. On March 2, 2012, pursuant to a written plea agreement, Petitioner entered a plea of guilty to the charge of distribution of cocaine base within 1,000 feet of a public school. On November 1, 2012, the Court sentenced Petitioner to 140 months of imprisonment; 6 years of supervised release; and a $100 special assessment. (ECF No. 967). The Court also dismissed the remaining counts against Petitioner. On November 9, 2012, Petitioner filed a timely notice of appeal. (ECF No. 971). On December 7, 2012, Petitioner filed a motion to dismiss his appeal, and on December 14, 2012, the Eighth Circuit entered a mandate granting the same.

On October 9, 2013, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 1275). While maintaining that he was not contesting his guilty plea, Petitioner's section 2255 motion sought to vacate his sentence on four grounds of ineffective assistance of counsel.[1] On July 11, 2014, Judge Bryant issued a Report and Recommendation, recommending denial of Petitioner's section 2255 motion. On April 30, 2015, the Court adopted Judge Bryant's Report and Recommendation and denied Petitioner's section 2255 motion. (ECF No. 1518). Petitioner appealed, and on October 28, 2015, the Eighth Circuit dismissed Petitioner's appeal. (ECF No. 1646).

On June 7, 2016, Petitioner filed an application seeking the Eighth Circuit's leave to file a second or successive section 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). On March 30, 2017, the Eighth Circuit denied the application.

On November 30, 2017, Petitioner filed a motion to correct sentence under Rule 60(b). Petitioner argues that, pursuant to *Buck v. Davis*, 137 S. Ct. 759 (2017), Rule 60(b) gives the Court jurisdiction to reopen cases in extraordinary circumstances to challenge procedural defects in a prior *habeas* proceeding. Petitioner argues that new information exists in the form of a Google Maps printout, showing that he did not commit the offense of distributing cocaine base within 1,000 feet of a public school. Petitioner contends that procedural defects occurred during his sentencing because the street that the written plea agreement and the presentence report stated Petitioner dealt cocaine base on was not 1,000 feet from a public school, and thus the Court based his sentence on inaccurate information. Petitioner concludes by asking the Court to vacate his sentence and grant him an evidentiary hearing so that he may present evidence that he is actually innocent of the crime of distributing cocaine base within 1,000 feet of a public school.

[1] One of these grounds was that Petitioner's counsel was ineffective for advising him to plead guilty to the count of distributing cocaine base within 1,000 feet of a public school because counsel failed to investigate and determine that Woodlawn Street, the location where Petitioner was charged to have distributed cocaine base, is not within 1,000 feet of a school.

On March 29, 2018, the government filed a response to the Rule 60(b) motion. The government argues that, although the motion is styled as a Rule 60(b) motion, it is actually a second or successive section 2255 motion, and thus should be denied because Petitioner did not seek approval from the Eighth Circuit before filing the motion. The government also argues alternatively that Petitioner's reliance on Rule 60(b) is misplaced because Rule 60(b) cannot be used to attack an underlying criminal sentence.

On May 15, 2018, Judge Bryant issued the instant Report and Recommendation. (ECF No. 1868). Judge Bryant recommends that the Court deny Petitioner's Rule 60(b) motion. Specifically, Judge Bryant finds that the motion is a second or successive section 2255 motion because it seeks to vacate his criminal sentence. Accordingly, Judge Bryant reasons that Petitioner's motion is barred because he did not obtain leave from the Eighth Circuit prior to filing it. Judge Bryant finds alternatively that, even if the motion is construed as a Rule 60(b) motion, it nonetheless fails because: (1) Rule 60(b) does not apply to criminal cases and (2) because the facts of this case do not rise to the level of "extraordinary circumstances" contemplated by *Buck v. Davis* to warrant reopening this case and granting Petitioner relief from judgment. Judge Bryant concludes by recommending that the Court deny Petitioner's motion and that no certificate of appealability should be issued.

On May 29, 2018, Petitioner filed objections to the Report and Recommendation. Pursuant to 28 U.S.C. § 646(b)(1), the Court will conduct a *de novo* review of all issues related to Petitioner's specific objections.

II. DISCUSSION

Petitioner objects to Judge Bryant's finding that Rule 60(b) does not apply to criminal cases and that the facts of this case do not rise to the "extraordinary circumstances" contemplated by *Buck v. Davis* to warrant reopening this case and granting Petitioner relief from judgment.

The Court notes that Petitioner does not object to Judge Bryant's finding that the Rule 60(b) motion is a second or successive section 2255 motion. The Court agrees with Judge Bryant that Petitioner's motion is a second or successive section 2255 motion.

A "second or successive" section 2255 motion may not be filed absent certification by the Eighth Circuit, thereby authorizing the district court to consider the second or successive motion. *See* 28 U.S.C. § 2244(b)(3)(a); 28 U.S.C. § 2255(h). An inmate may not bypass this requirement by purporting to invoke some other procedure, such as a Rule 60(b) motion. *See United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam). A Rule 60(b) motion is not treated as a second or successive section 2255 motion if it does not raise a merits challenge to the resolution of a claim in a prior section 2255 proceeding, but instead attacks "some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Croxby*, 545 U.S. 524, 532-33 (2005).

Petitioner's motion explicitly asks the Court to vacate his sentence on the basis that he did not distribute cocaine base within 1,000 feet of a public school. Petitioner already raised this argument in his section 2255 motion on October 9, 2013, and the Court denied the same on April 30, 2015. In sum, Petitioner invokes Rule 60(b) to present new evidence and revisit his previous attack on the validity of his sentence.[2] This is a collateral attack on his conviction and sentence, something that should be brought in a section 2255 petition. Petitioner did not obtain leave from the Eighth Circuit prior to filing his motion, and thus, the motion is barred. *See Boyd*, 304 F.3d at 814.

Even assuming *arguendo* that Petitioner's motion is not a second or successive section 2255 motion, Rule 60(b) does not provide the relief that Petitioner ultimately seeks, which is for the Court

[2] The Court notes that Petitioner's October 9, 2013, motion to vacate under section 2255 also attached a Google Map printout in support of his argument that the street he was charged with distributing cocaine base on was not within 1,000 feet of a school. That previous exhibit is not identical to the one Petitioner currently offers in support of his Rule 60(b) motion, but the fact remains that Petitioner has already submitted substantially similar evidence with his section 2255 motion, which the Court considered and denied on April 30, 2015, after adopting Judge Bryant's Report and Recommendation.

to vacate his sentence.[3] *See United States v. Shenett*, No. CRIM.A. 05-431 MJD, 2015 WL 3887184, at *2 (D. Minn. June 24, 2015) ("It is well established that a Rule 60(b) motion may not be used to relieve a party from operation of a judgment of conviction or sentence in a criminal case."). For these reasons, it is unnecessary for the Court to address the Report and Recommendation's alternative findings regarding Rule 60(b), or Petitioner's objections thereto.

Judge Bryant also recommends that the Court decline to issue a certificate of appealability in this instance. Petitioner does not object to this recommendation, and the Court agrees with Judge Bryant. Therefore, the Court concludes that no certificate of appealability should be issued.

III. CONCLUSION

For the above-discussed reasons and upon *de novo* review of the Report and Recommendation, the Court finds that Petitioner's objections offer neither law nor fact which would cause the Court to deviate from Judge Bryant's Report and Recommendation. Accordingly, the Court hereby overrules Petitoner's objections and adopts the Report and Recommendation. (ECF No. 1868). Petitioner's Petition for Relief of Sentence Pursuant to Rule 60(b) (ECF No. 1820) is hereby **DENIED**. The Court will not issue a certificate of appealability in this instance.

IT IS SO ORDERED, this 28th day of June, 2018.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge

[3] Moreover, the procedural errors that Petitioner alleged occurred during his sentencing do not implicate Rule 60(b), which allows a court to grant relief from judgment due to procedural errors in a federal *habeas* proceeding. *See Gonzalez*, 545 U.S. at 532-33. Petitioner only seeks to correct alleged procedural errors that occurred during his sentencing, not during a federal court's resolution of his subsequently filed *habeas* petition. Petitioner offers no authority allowing Rule 60(b) relief from a criminal sentence due to alleged procedural defects that occurred during an underlying sentencing hearing.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA RESPONDENT

vs. Criminal No. 4:11-cr-40037-20
Civil No. 4:13-cv-04102

ALVIN WEEKLY MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Movant is Alvin Weekly ("Weekly") who is proceeding *pro se*. On November 30, 2017, Weekly filed a Petition for Relief of Sentence Pursuant to Rule 60(b) to Correct the Procedural Defect and Ineffective Assistance of Counsel and Unlawful Enhancement in Light of Supreme Court Ruling of Buck v. Davis. ECF No. 1820. After being directed to respond, the Government filed a response to this Motion. ECF No. 1858.

The Motion was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case. The Court has reviewed the Motion and the response; and based upon that review, the Court recommends this Motion be **DENIED**.

1. Procedural Background:[1]

On July 11, 2014, this Court entered a Report and Recommendation regarding Weekly's first § 2255 Motion. ECF No. 1336. In that Report and Recommendation, the Court summarized the procedural background of Weekly's case, and the Court will not restate it here. *Id.*

After that Report and Recommendation was entered, Weekly then filed a Motion for a

[1]The procedural background is taken from the Motion and Response filed in this matter as well as the Court's docket in this matter.

Certificate of Appealability. ECF No. 1527. That Motion was denied. *Id.* Despite not obtaining a certificate of appealability, Weekly still filed an appeal. ECF No. 1646. This appeal was denied. ECF No. 1646.

On December 15, 2015, Weekly filed his Petition with the United States Court of Appeals for the Eighth Circuit seeking permission to file a second or successive motion pursuant to § 2255. ECF No. 1676. The Eighth Circuit denied this request on March 23, 2016. ECF No. 1677.

Weekly then filed a second application to file a successive § 2255 Motion with the Eighth Circuit on June 7, 2016. ECF No. 1717. The Eighth Circuit entered a mandate denying that request on March 30, 2017. ECF No. 1782.

Now, Weekly has filed a Petition for Relief of Sentence Pursuant to Rule 60(b). ECF No. 1820. With this Petition, Weekly specifically claims this Motion is "not to be construed" as a § 2255 Motion. *Id.* After Weekly filed this Petition, the Court directed the Government to respond and specifically address whether this Petition should be construed as a successive motion pursuant to § 2255, whether this Petition is timely, and whether *Buck v. Davis*, 137 S.Ct. 759 (2017) has any application to this case. ECF No. 1840. On March 29, 2018, the Government responded to this Motion as directed and argues this Petition should be denied in its entirety. ECF No. 1858. The Court finds this Motion is now ripe for consideration.

2. Applicable Law:

A § 2255 motion is fundamentally different from a direct appeal. The Court will not reconsider an issue, which was decided on direct appeal, in a motion to vacate pursuant to § 2255. *See United States v. Davis*, 406 F.3d 505, 511 (8th Cir. 2005); *Dall v. United States*, 957 F.2d 571, 572 (8th Cir.1992) ("Claims which were raised and decided on direct appeal cannot be re-litigated

on a motion to vacate pursuant to 28 U.S.C. § 2255 .").

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

Furthermore, any second or successive motion pursuant to § 2255 must be certified by the appropriate Court of Appeals, prior to filing in District Court. 28 U.S.C. § 2255(h). A second or successive § 2255 motion must be certified pursuant to 28 U.S.C. § 2244 by a panel of the appropriate court of appeals to contain either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h)

3. Discussion:

As noted, Weekly has previously filed a motion pursuant to § 2255, accordingly, the current Petition before the Court is either a successive § 2255 Motion or a Rule 60(b) Motion. The Court will address both instances.

A. Successive § 2255 Motion

Although Weekly does not style his Petition as a § 2255 Motion, the relief Weekly seeks is "to correct the procedural defect and ineffective assistance of counsel and unlawful enhancement." ECF No. 1820. These claims are clearly an attempt to vacate, set aside or modify his criminal sentence. They fall squarely within the reach of § 2255. Further, at least as far as a claim of

ineffective assistance of counsel is concerned, the remedy sought is for a violation of his "constitutional rights." *See Apfel,* 97 F.3d at 1076. Thus, this Petition should be treated as a § 2255 motion.

As a § 2255 motion, the instant Motion is clearly barred as a successive motion. Pursuant to § 2255 (h) Weekly was required to seek leave of the Eighth Circuit prior to filing this Petition. Here, Weekly did not seek leave. Indeed, his prior attempts at seeking leave to file a successive § 2255 Motion were denied. ECF No. 1677 and 1782. Because Weekly has not obtained permission from the Eighth Circuit to file this successive Motion, it is barred.

B. Rule 60(b) Motion

Weekly styled his Motion a Rule 60(b) motion for relief from judgment. ECF No. 1820. Such a motion is made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. As a civil motion, this rule has no application to a criminal proceeding. *See United States v. Camacho-Bordes,* 94 F.3d 1168, 1171 n.2 (8th Cir. 1996) (recognizing "Rule 60(b) is inapplicable" in criminal proceedings). Thus, if this Petition were construed to be a Rule 60(b) motion attacking the underlying criminal case, it should be denied.

However, Weekly asserts that he is attacking defects in or the integrity of his prior federal §2255 proceeding. ECF No. 1820, p. 3. The defect in the prior § 2255 proceeding, according to Weekly, was misleading information about the location of his underlying criminal conduct and ineffective assistance of counsel at his sentencing. ECF No. 1820, p. 3-4.

The United States Supreme Court has decided that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in *habeas corpus* proceedings only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. *See Gonzalez v. Crosby,* 545 U.S. 524, 531

(2005). The procedural requirements for second or successive *habeas* petitions apply to motions for relief from a judgment filed under Federal Rule of Civil Procedure 60(b). *See id.* at 529. A movant, in the context of a relief from a judgement denying a § 2255 motion must show "extraordinary circumstances" in order obtain relief pursuant to Rule 60(b). *Id.* at 535.

Assuming the instant Rule 60(b) Motion is an attack on the Court's prior ruling regarding Weekly's original § 2255 motion, it is still unavailing. Weekly cites *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759 (2017) to support his assertion that Rule 60(b) gives the Court jurisdiction to reopen his case in extraordinary circumstances to challenge the defects in the prior *habeas* proceeding. A reading of *Buck* reveals it offers no relief to Weekly. The Supreme Court in *Buck* held that the fact the defendant "may have been sentenced to death because of his race" was an "extraordinary circumstance" that warranted relief pursuant to Rule 60(b). *See* 137 S.Ct. at 778. In this case there is no "the risk of injustice to the parties," "the risk of undermining the public's confidence in the judicial process" or other factor which would justify a finding of "extraordinary circumstance" to allow application of Rule 60(b) to the instant Motion.

Accordingly, *Buck* does not make Weekly's Motion here one attacking the judgment entered in the prior § 2255 proceeding in this case. Rather, he again attacks his underlying conviction and sentence. This Motion, ostensibly pursuant to Rule 60(b), should be considered an uncertified successive motion and denied.

4. Conclusion:

As outlined above, Weekly's Petition is barred as either a successive § 2255 Motion or as an improperly-filed Rule 60(b) Motion.

5. Recommendation:

Accordingly, based on the foregoing, the Court recommends the instant Petition (ECF No. 1820) be **DENIED** and dismissed with prejudice. The Court further recommends no Certificate of Appealability be issued in this matter. Likewise, the Court finds no evidentiary hearing is required on this Petition. *See Urquhart v. Lockhart,* 726 F.2d 1316, 1318-19 (8th Cir.1984) ("A federal court may dismiss a claim without an evidentiary hearing where the allegations are frivolous, where the allegations fail to state a constitutional claim, where the relevant facts are not in dispute, or where the dispute can be resolved on the basis of the record").

The Parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The Parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

DATED this **15th day of May 2018.**

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE