United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 13, 2019*
Decided March 13, 2019

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 18-2427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FAIRLY EARLS,
Defendant-Appellant.

Appeal from the United States District Court for Northern District of Indiana, Hammond Division.

No. 2:10-CR-222 JVB

Joseph S. Van Bokkelen, *Judge.*

ORDER

Fairly Earls was convicted in the Northern District of Indiana of lying in a passport application, aggravated identity fraud, and identity theft, 18 U.S.C. § 1542, § 1028A(a)(1), § 1028(a)(2), and sentenced to 60 months' imprisonment. While serving his sentence, Earls was transferred from federal prison to Wisconsin state custody and tried for first-degree sexual assault of a child and bail jumping. He was convicted and sentenced to a total of 90 years' imprisonment, and he is currently incarcerated in

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

APPENDIX D

Wisconsin state prison. Seeking a declaration that he has now completed his federal sentence, he filed a "Motion Pursuant to Federal Rule 60(b)(5)" in his criminal case in the Northern District of Indiana. The district court properly denied Earls any relief, but we conclude that it should have construed the request as a petition under 28 U.S.C. § 2241 and dismissed it.

After five years total in federal and state prison, Earls requested a letter from the Federal Bureau of Prisons declaring that he had completed his federal sentence. In response, the Bureau contacted the district court to ask if it had intended Earls's federal sentence to run "concurrently" with the state sentence that was imposed years later. The court answered the Bureau by issuing an order stating that, because it "did not order the sentence to be served concurrently with anticipated state court sentence, the default provision of [18 U.S.C.] § 3584 applies and the federal court sentences runs consecutively to the state court sentences." Earls appealed the order to this court.

We dismissed that appeal for lack of jurisdiction because the district court's order was not an appealable decision; it was just a response to the Bureau of Prisons. *United States v. Earls*, No. 15-3651 (7th Cir. Apr. 6, 2016). We stated that Earls's proper course was to exhaust his administrative remedies, and if unsuccessful, petition the federal court for review under 28 U.S.C. § 2241. *Id.* (citing *Romandine v. United States*, 206 F.3d 731, 736 (7th Cir. 2000); *Barden v. Keohane*, 921 F.2d 476, 479 (3d Cir. 1990)).

Instead, Earls filed a "Motion Pursuant to Civil Rule 60(b)(5)," asking the district court for an order that he had "satisfied" the judgment—a declaration that he had completed his federal sentence. The court denied the motion because, it reasoned, it had no authority under the Federal Rules of Civil Procedure to grant the relief sought. This appeal followed.

The district court was undoubtedly correct that Federal Rule of Civil Procedure 60, like all the civil rules, does not apply in criminal cases. *See* FED. R. CIV. P. 1. But, in situations like this, when there is no civil proceeding underway, a court should examine the substance, not just the label, of the pro se filing, and if it calls out for post-conviction relief, construe it as a collateral attack under the appropriate statute—28 U.S.C. § 2255 or § 2241. *See Castro v. United States*, 540 U.S. 375, 381–83 (2003); *Melton v. United States*, 359 F.3d 855, 857–58 (7th Cir. 2004).

Here, it would be inappropriate to construe Earls's filing as a § 2255 motion because it is not challenging the validity of his sentence or seeking to have it vacated.

Romandine, 206 F.3d at 736. Rather, Earls wants time he served in state custody credited against his federal sentence, and such "[r]equests for sentence credit, or for recalculation of time yet to serve ... must be presented to the Attorney General (or [his] delegate, the Bureau of Prisons), and adverse decisions may be reviewed by an action under 28 U.S.C. § 2241." *Id.* As we stated in Earls's last appeal, a § 2241 petition (after he has exhausted his administrative remedies) is the only avenue for the type of relief Earls wants. Thus, the district court should have reclassified Earls's motion. *See Setser v. United States*, 566 U.S. 231, 244 (2012); *Romandine*, 206 F.3d at 736.

But the district court could not have granted relief, or even evaluated the merits of Earls's petition, because he filed it in the wrong court. A § 2241 petition must be filed in the judicial district that contains the prisoner's place of confinement. 28 U.S.C. § 2241(a); *e.g.*, *al-Marri v. Rumsfeld*, 360 F.3d 707, 709–10, 712 (7th Cir. 2004). Earls is incarcerated in Portage, Wisconsin, located in the Eastern District of Wisconsin. The federal district court there is the proper venue for Earls's petition.

Accordingly, we VACATE and REMAND to the district court with instructions to dismiss the petition without prejudice.

CF 205

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 4, 2019

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 18-2427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FAIRLY W. EARLS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:10-cr-222

Joseph S. Van Bokkelen,
Judge.

ORDER

On consideration of the motion for panel rehearing filed by defendant-appellant on March 29, 2019, and construed as a petition for rehearing, all members of the original panel have voted to deny the petition.

Accordingly, the petition for rehearing is hereby DENIED.

APPENDIX C

4-4-19

United States District Court
Northern District of Indiana
Hammond Division

UNITED STATES OF AMERICA	
v.	Case No. 2:10-CR-222 JVB
FAIRLY EARLS	

ORDER

This matter is before the Court on the motion of Defendant Fairly Earls for relief in his criminal case pursuant to Federal Rule of Civil Procedure 60(b)(5) (DE 126). He has also filed a motion to proceed in forma pauperis (DE 127-1) and a motion for judgment on the pleadings (DE 131). For the following reasons, all of his motions are **DENIED**.

A. Background

A federal jury found Defendant guilty of making a false statement in a passport application, aggravated identity fraud, and identity theft. On October 5, 2011, this Court sentenced him to a sixty-month term of imprisonment. Defendant was later sentenced by the state of Wisconsin and is serving consecutive thirty- and sixty-year terms of imprisonment in that state's prison system for felony bail jumping and sexual assault of a child. The Wisconsin court made his state sentences consecutive to any other sentence (DE 109). The gist of his 60(b)(5) motion that he has completed his federal sentence and is entitled to some sort of acknowledgment of this fact, or what he terms "an order of satisfaction of judgment or an order directing the Bureau of Prisons to issue the satisfaction letter."

APPENDIX E

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B. Discussion

According to the Bureau of Prisons, at the time Defendant's federal sentence was imposed, he was under the primary jurisdiction of state authorities in Wisconsin and in federal custody pursuant to a writ. After his sentencing he was returned to Wisconsin authorities (DE 109). He believes that because his federal sentence was issued first and the Bureau of Prisons sent him back to the Wisconsin authorities, his time in Wisconsin facilities counts toward his federal sentence and that he has already served his sixty months.

In his motion, Defendant has not directed the Court to any legal source suggesting that the Court has the authority, pursuant to a Rule 60(b)(5)[1] motion filed in a terminated criminal case, to declare that a sentence has been fully served. Nor has he convinced the Court that there is any legal reason why his time in Wisconsin state custody should count toward his consecutive federal sentence. Accordingly, his Rule 60(b)(5) motion is denied.

Defendant's motion for judgment on the pleadings is also denied. Once again, Defendant is attempting to apply a rule of civil procedure to a criminal matter. Even if the Court considered his Rule 60(b)(5) motion a pleading, he has not shown the Court has the authority to grant him the relief he seeks.

Because there are no fees or costs associated with Defendant's filings in this case, the Court denies his motion to proceed in forma pauperis as moot.

SO ORDERED on June 22, 2018.

s/ Joseph S. Van Bokkelen
Joseph S. Van Bokkelen
United States District Judge

[1]The Federal Rules of Civil Procedure do not apply to criminal cases. The Rules of Civil Procedure apply only to civil actions. *See* Federal Rule of Civil Procedure 1.

Additional material from this filing is available in the Clerk's Office.