

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 11, 2019
Decided August 5, 2019

Before

DIANE P. WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 19-2314

CURTIS SMITH,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Motion for an Order Authorizing the
District Court to Entertain a Second or
Successive Motion for Collateral Review.

*Received on August 21st 2019,
from K. Houston, Unit B1, Counselor
Curtis Lee Smith*

ORDER

A jury found Curtis Smith guilty of possessing a gun as a felon, 18 U.S.C. § 922(g), and possessing drugs with intent to distribute them, 21 U.S.C. § 841(a)(1). He was sentenced to 262 months' imprisonment. On direct appeal we affirmed the conviction and sentence but issued a limited remand to cure some clerical errors in the judgment. *United States v. Smith*, 341 F. App'x 206 (7th Cir. 2009).

Smith then moved to vacate the sentence under 28 U.S.C. § 2255, to no avail. No. 11-3135 (7th Cir. July 10, 2012). Next, he sent us two lengthy applications for leave to file a new collateral attack under §§ 2244(b) and 2255(h). These efforts garnered Smith a \$500 sanction. No. 12-3519 (7th Cir. Nov. 8, 2012) (returning first application unread); No. 13-2317 (7th Cir. July 9, 2013) (denying second application and imposing fine). But

in 2018 Smith paid his fine and submitted a new application that we dismissed for failure to identify his claims. No. 18-3612 (7th Cir. Jan. 3, 2019). Next came a more complete (but meritless) application, which we denied. No. 19-1092 (7th Cir. Feb. 8, 2019). Then came another unsuccessful application—and this time we warned Smith about the prospect of renewed sanctions. No. 19-1858 (7th Cir. May 15, 2019).

That takes us to today's application and supporting memo. The governing statute is clear: we cannot authorize a second collateral attack unless the proposed claims rest either on previously unavailable evidence establishing Smith's innocence, 28 U.S.C. § 2255(h)(1), or on a new constitutional rule that the Supreme Court has made retroactive, *id.* § 2255(h)(2). Smith's application does not meet that standard.

First, citing *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Smith argues that his jurors were not instructed that they needed to find that he *knew* he was a felon at the time he possessed the gun. But *Rehaif* announces no new constitutional rule. Instead, it clarifies the statutory elements that must be proved under §§ 922(g) and 924(a)(2)—particularly the *mens rea* requirement. Because *Rehaif* interprets a statute and not the Constitution, it furnishes no grounds for authorization under § 2255(h).

Second, Smith asserts that the government and its allies have defrauded the courts throughout his prior litigation, and that his previous lawyers abandoned him or were otherwise ineffective. To the best of our understanding, he also contends that the district court erred in denying his first § 2255 motion without an evidentiary hearing in 2011. None of these theories rests on a new rule, or on evidence that was unavailable when Smith filed the application that we denied in May 2019.

We therefore **DENY** authorization and **DISMISS** Smith's application. Further, we **DENY** his request for counsel, as there are no potentially meritorious issues to argue. And because Smith has persisted in filing claims that plainly do not satisfy § 2255(h)—despite ample warnings and a previous filing bar—we impose the following **SANCTION**:

Smith is fined \$500. Until he pays that sum in full to the clerk of this court, any collateral attack on his federal convictions or sentences from 2008 that he files in any court of this circuit will be returned unfiled. Any applications for leave to file successive collateral attacks on these convictions or sentences will be deemed denied 30 days after filing unless the court orders otherwise. See *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 1, 2019
Decided May 15, 2019

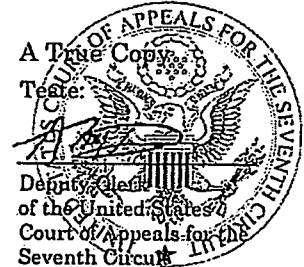
Before

DIANE P. WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CERTIFIED COPY



No. 19-1858

CURTIS SMITH,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Motion for an Order Authorizing the
District Court to Entertain a Second or
Successive Motion for Collateral Review.

ORDER

A jury found Curtis Smith guilty of possessing a gun as a felon, 18 U.S.C. § 922(g), and possessing drugs with intent to distribute them, 21 U.S.C. § 841(a)(1). And the district court sentenced him to 262 months' imprisonment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). On direct appeal we affirmed the conviction and sentence but issued a limited remand to cure some clerical errors in the judgment. *United States v. Smith*, 341 F. App'x 206 (7th Cir. 2009).

Smith then moved to vacate the sentence under 28 U.S.C. § 2255, to no avail. No. 11-3135 (7th Cir. July 10, 2012) (denying certificate of appealability). Next, Smith sent us two lengthy applications for our leave to file a new collateral attack under §§ 2244(b) and 2255(h). These efforts not only failed, but garnered Smith a \$500

APPENDIX B #5

No. 19-1858

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sanction. No. 12-3519 (7th Cir. Nov. 8, 2012) (returning first application unread); No. 13-2317 (7th Cir. July 9, 2013) (denying second application and imposing fine for abusive litigation). But in 2018 Smith paid his fine and submitted a new application that we dismissed for failure to identify his claims. No. 18-3612 (7th Cir. Jan. 3, 2019). Next came a more complete—but meritless—application, which we denied. No. 19-1092 (7th Cir. Feb. 8, 2019).

That takes us to today's application. The governing statute is clear: we cannot authorize a second collateral attack unless the proposed claims rest either on previously unavailable evidence establishing Smith's innocence, 28 U.S.C. § 2255(h)(1), or on a new constitutional rule that the Supreme Court has made retroactive, *id.* § 2255(h)(2).

Smith's application does not meet that standard. It contains three challenges to Smith's sentence: (1) on direct appeal, counsel wrongly failed to rely on a helpful 2008 opinion of a district court; (2) in December 2018, Congress amended various statutes to "clarif[y]" that some of Smith's prior convictions should no longer qualify him for the recidivist enhancement; and (3) the district court miscalculated his advisory guidelines range by considering charged conduct of which the jury had acquitted him. None of these claims calls Smith's jury's verdict into question. Nor does any of them rely on a new and retroactive rule of constitutional law.

To be sure, Smith supports his guidelines challenge with a citation to *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). *Nelson* outlines the due process safeguards for former defendants who seek the return of previously paid court fees and other sums when a conviction is vacated or reversed. In particular, *Nelson* forbids states from demanding that exonerated defendants bear the burden of proving their actual innocence in a civil action for a refund. But no decision of the Supreme Court (or even of our court) suggests that *Nelson* spells the end of advisory guidelines enhancements for acquitted or uncharged conduct when at least one conviction stands and the government proves the relevant conduct by a preponderance of the evidence. *Cf. United States v. Watts*, 519 U.S. 148 (1997). At all events, *Nelson* is two years old and was reasonably available to Smith when he filed the application that we denied in February 2019.

We therefore DENY authorization and DISMISS Smith's application. And we caution Smith that continuing to submit frivolous arguments to this court will lead to renewed sanctions under *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted January 14, 2019

Decided February 8, 2019

Before

DIANE P. WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 19-1092

CURTIS SMITH,
Applicant,

v.

On Motion for an Order Authorizing the
District Court to Entertain a Second or
Successive Motion for Collateral Review.

UNITED STATES OF AMERICA,
Respondent.

ORDER

A jury found Curtis Smith guilty of possessing a gun as a felon, 18 U.S.C. § 922(g), and possessing drugs with intent to distribute them, 21 U.S.C. § 841(a)(1). The district court sentenced him to 262 months' imprisonment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). On direct appeal we affirmed the conviction and sentence but issued a limited remand to cure some clerical errors in the judgment. *United States v. Smith*, 341 F. App'x 206 (7th Cir. 2009).

Smith then moved to vacate the sentence under 28 U.S.C. § 2255, but the district judge denied relief and we did not certify an appeal. No. 11-3135 (7th Cir. July 10, 2012). Next, Smith asked under §§ 2244(b) and 2255(h) for our leave to file a new motion. But the application was hundreds of pages long, and we dismissed it with leave to file

No. 19-1092

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something less prolix. No. 12-3519 (7th Cir. Nov. 8, 2012). We warned Smith that we would sanction him if his next filing were similarly lengthy. But his next filing was indeed lengthy, so in 2013 we fined him \$500 and barred further applications until he paid. No. 13-2317 (7th Cir. July 9, 2013).

Years passed without activity in our court (although Smith continued with other collateral attacks in the Northern District of Georgia, where he was confined). Then, in early 2018, Smith began paying his fine in installments; the last payment came in August 2018, thus lifting the sanction. About four further months lapsed before Smith sent a new application for leave to file a successive collateral attack. This time, we dismissed it without prejudice because we could not discern the basis for his claims. No. 18-3612 (7th Cir. Jan. 3, 2019).

Smith then filed today's application and supporting memorandum. We can authorize a successive collateral attack only if the proposed claims rest either on previously unavailable evidence establishing Smith's innocence, 28 U.S.C. § 2255(h)(1), or on a new constitutional rule that the Supreme Court has made retroactive, *id.* § 2255(h)(2); *see also id.* § 2255(f)(3) (requiring motion based on new right to be filed within one year of right's recognition by Supreme Court). Smith meets neither standard.

He first contends that the district court, in denying his initial § 2255 motion, failed to address several theories of juror misconduct, prosecutorial overreach, and ineffective counsel. But Smith had a chance to present these arguments when seeking a certificate of appealability in No. 11-3135. And these claims do not rest on new evidence or a new rule. The same goes for Smith's contentions that his arrest violated the Fourth Amendment, that the government did not meet its burden to prove him guilty, and that everyone's refusal to identify a confidential informant violated his confrontation rights. Smith also refers to a new police report that, he says, casts doubt on eyewitness testimony about who was driving what sort of vehicle at the scene of his arrest. But that information would not clearly establish his innocence of the drug and gun charges.

Finally, Smith proposes to challenge his Armed Career Criminal status under *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down part of the ACCA as unconstitutionally vague. Yet that Supreme Court decision was more than three years old when he paid his fine; once he paid, additional months lapsed before he sent us a new application. Under §§ 2255(f) and (h), the application is too late.

We therefore deny authorization and dismiss Smith's application.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CURTIS SMITH, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
341 Fed. Appx. 206; 2009 U.S. App. LEXIS 17969

No. 08-3761

Memorandum

July 8, 2009, Argued
August 12, 2009, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Rehearing denied by, Rehearing, en banc, denied by United States v. Smith, 2009 U.S. App. LEXIS 24191 (7th Cir. Ill., Oct. 23, 2009) Post-conviction relief denied at United States v. Smith, 2011 U.S. Dist. LEXIS 91807 (N.D. Ill., Aug. 15, 2011)

Editorial Information: Prior History

{2009 U.S. App. LEXIS 1}

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 CR 441-1. William J. Hibbler, Judge.

Counsel

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Sheri H. Mecklenburg, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.

For CURTIS SMITH, Defendant - Appellant: Susan Kister, Attorney, St. Louis, MO.

Judges: Before ILANA DIAMOND ROVNER, Circuit Judge, DIANE P. WOOD, Circuit Judge, ANN CLAIRE WILLIAMS, Circuit Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the sentence imposed by the United States District Court for the Northern District of Illinois, Eastern Division, following his conviction for possessing a gun as a felon, a violation of 18 U.S.C.S. § 922(g)(1), and possessing drugs with intent to distribute, a violation of 21 U.S.C.S. § 841(a)(1). Defendant was sentenced as an Armed Career Criminal under 18 U.S.C.S. § 924(e) and U.S. Sentencing Guidelines Manual § 4B1.4. District court did not err in sentencing defendant as Armed Career Criminal under 18 U.S.C.S. § 924(e) and USSG § 4B1.4 because evidence supported that gun in his possession was connected to drugs and district court did not err by failing to credit defendant's post-arrest statements over strong inferences drawn from proximity of gun to drugs.

OVERVIEW: On appeal, the court noted that although defendant contended that the gun was not connected to the drugs because he had the gun only to sell it, the evidence supported the district court's finding that they were connected. The district court relied on the arresting officer's testimony that, right after defendant had possibly sold drugs, the officer saw him reach into his lap and then place a white object behind the seat. The officer later recovered a white towel from behind the seat that contained a gun and heroin packaged to be sold. From that testimony, the district court reasonably inferred that the gun was connected to the drug sale, and it did not err by failing, unprompted, to credit defendant's

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APPENDIX D #1

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post-arrest statements over the strong inferences drawn from the proximity of the gun to the drugs. Even though the district court did not err in computing the sentence, the court held that a limited remand was necessary under Fed. R. Crim. P. 36 to correct some errors in the judgment.

OUTCOME: The court affirmed the district court's judgment but ordered a limited remand for the district court to correct identified errors.

LexisNexis Headnotes

Criminal Law & Procedure > Sentencing > Guidelines

The court of appeals reviews a district court's interpretation of the sentencing guidelines de novo and findings of fact for clear error.

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Penalties

For purposes of U.S. Sentencing Guidelines Manual § 4B1.4, a defendant possesses a gun in connection with a drug offense if the weapon facilitated or served some purpose to the felonious conduct, regardless of any jury findings on whether the gun furthered the drug-trafficking offense. Such a connection is usually warranted when the gun is "found in close proximity to drugs" because the presence of the gun may help the dealer complete sales or provide protection. U.S. Sentencing Guidelines Manual § 2K2.1, cmt., application n. 14(A), (B).

Opinion

{341 Fed. Appx. 207} ORDER

A jury found Curtis Smith guilty of possessing a gun as a felon, 18 U.S.C. § 922(g)(1), and of possessing drugs with intent to distribute, 21 U.S.C. § 841(a)(1), but acquitted him of possessing the gun in furtherance of the drug crime, 18 U.S.C. § 924(c)(1). The district court sentenced him as an Armed Career Criminal, *id.* § 924(e); U.S.S.G. § 4B1.4, and imposed a sentence of 262 months' imprisonment, the bottom of the guidelines range. Smith argues that the sentencing court erroneously found that the gun he possessed was connected to the drug offense and, therefore, improperly elevated his offense level and criminal history category. We affirm the judgment but order a limited remand to correct clerical errors in the written {2009 U.S. App. LEXIS 2} judgment.

At trial one of the arresting officers testified that while on patrol with his partner, an informant flagged him down and told him that someone named Curt was selling drugs from his van by phone order. At the officer's direction, the informant called Curt to arrange a drug sale, but, as the officer and informant were nearing the van, the officer saw a woman approach it and exchange money for a small object. Suspecting that he had witnessed a drug sale, he sent the informant away, motioned for his partner to approach the van and its occupants, and caught up to the woman, who was carrying a small packet of what the officer suspected was heroin.

The other arresting officer testified that as he approached the van, he saw the driver reach into his lap then stuff a white object behind the seat. When the officer later looked behind the seat, he found a white hand towel wrapped around both a gun and 16 baggies of suspected drugs. He testified that the gun was an unloaded .22 caliber two-shot pistol that was "pretty beat up," but he did not recall

whether the gun was rusty. The officer arrested the driver and identified him as Smith, but released the van's passengers after a search {2009 U.S. App. LEXIS 3} and a warrant check revealed nothing.

The officer further testified that at the police station, Smith told him that he had {341 Fed. Appx. 208} found the gun while tearing down walls of a house that was being rehabbed and that he was carrying the gun to have it appraised. Smith also told him that he sold drugs to support his heroin habit.

The government did not produce the gun for trial. The Chicago police officer who oversees gun evidence testified that he inventoried the gun recovered from Smith, but after the state chose not to prosecute the gun-possession crime, he destroyed the gun without first checking to see whether there were any federal charges pending. The government also called a gun expert who testified that he determined from the gun's serial number that it had been produced in Connecticut in 1975.

Smith was the only defense witness. He denied selling drugs, denied that he possessed the gun, and denied using heroin. He testified that his passenger, Steve Sanford, found and kept the gun while he helped Smith tear down the wall. Smith described the gun as being "rusty all over"; the trigger was rusty and the trigger guard was rusty. Smith also explained that he did not sell any drugs to {2009 U.S. App. LEXIS 4} the woman whom the police arrested; rather he had given her a ride. When the police saw her get out of his van, Smith asserted they recognized her as a known prostitute and ran Smith's plates, thereby learning he was a registered sex offender. Then they stopped the van and searched the occupants. According to Smith, the officers found drugs on Sanford, who started crying because he had already been to jail three times for drugs and did not want to go to prison. Smith also testified that the officers searched the passenger compartment of the van, but found nothing. At that point, he said, Sanford (in exchange for being released) directed the officers to his own tool bag containing the gun and the drugs and said that they belonged to Smith. Smith testified that Sanford, who died before trial, had signed a written confession, which Smith locked in a safe, but that he had lost the combination since being in jail and did not know where the safe was.

The jury found Smith guilty of the drug offense and gun possession but acquitted him of possessing the gun in furtherance of drug trafficking. Smith filed a motion for a new trial, which the court denied.

The probation officer determined in the {2009 U.S. App. LEXIS 5} Presentence Investigation Report ("PSR") that Smith qualified as an Armed Career Criminal, see 18 U.S.C. § 924(e); U.S.S.G. § 4B1.4, and, because she concluded that for purposes of sentencing Smith possessed the gun in connection with a drug offense, she recommended an increased offense level of 34 and criminal history category VI, see U.S.S.G. § 4B1.4. The night before the sentencing hearing, Smith filed an objection to the finding that he possessed the gun in connection with the drug offense because the jury acquitted him of possessing the gun in furtherance of a drug-trafficking offense, 18 U.S.C. § 924(c). The district court rejected Smith's objection, noting that the jury's verdict was not inconsistent with a finding that Smith possessed the gun in connection with the drug sale because the relevant considerations for each were different. The court adopted the PSR's recommended imprisonment range of 262-327 months, and sentenced Smith to 262 months.

On appeal Smith presents a slightly different challenge to the guidelines calculation: he argues that there was insufficient evidence for the district court to conclude that he possessed the gun in connection with the drug offense, and {2009 U.S. App. LEXIS 6} therefore the court erred by increasing his offense level and criminal history category on that basis. He asserts that the record does not reflect whether the gun was in his lap {341 Fed. Appx. 209} while he was conducting his sales or whether the gun was already in the towel behind the seat, waiting to be appraised. He contends that if he was transporting the gun to sell it, his possession was unrelated to his drug sales,

and so the district court clearly erred in applying the greater offense level and criminal history category.

We review the district court's interpretation of the guidelines de novo and findings of fact for clear error. *United States v. Hill*, 563 F.3d 572, 577 (7th Cir. 2009). In his brief, Smith cites *United States v. Grimm*, 170 F.3d 760 (7th Cir. 1999), for the proposition that in applying the gun-related increase in the Armed Career Criminal guideline, § 4B1.4, after the government proves that a weapon was near the drugs, the burden shifts to the defendant to demonstrate that it was clearly improbable that the two were connected. But *Grimm* applies to gun enhancements under § 2D1.1, not § 4B1.4. See *United States v. Haynes*, 179 F.3d 1045, 1047 (7th Cir. 1999) (holding that phrase "in {2009 U.S. App. LEXIS 7}connection with" in § 4B1.4 should be interpreted the same as in § 2K2.1(b)(5) (now § 2K2.1(b)(6)); *United States v. Wyatt*, 102 F.3d 241, 248 n.10 (acknowledging difference between § 2K2.1 and § 2D1.1); *United States v. Goodman*, 519 F.3d 310, 321 (6th Cir. 2008) (contrasting language in § 4B1.4 with language in § 2D1.1 and concluding that each presents different standards). But see *United States v. Guerrero*, 5 F.3d 868, 872-72 (5th Cir. 1993) (holding that standard in § 2D1.1 applies to § 4B1.4). For purposes of § 4B1.4, a defendant possesses a gun in connection with a drug offense "if the weapon facilitated or served some purpose to the felonious conduct," *Haynes*, 179 F.3d at 1047 (citation omitted), regardless of any jury findings on whether the gun furthered the drug-trafficking offense, see *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997); *United States v. Thomas*, 294 F.3d 899, 905 (7th Cir. 2002). Such a connection is usually warranted when the gun is "found in close proximity to drugs" because the presence of the gun may help the dealer complete sales or provide protection. U.S.S.G. § 2K2.1 Application Note 14(A), (B); *United States v. Markovitch*, 442 F.3d 1029, 1032-33 (7th Cir. 2006); {2009 U.S. App. LEXIS 8}see also *Haynes*, 179 F.3d at 1047 (applying cases interpreting § 2K2.1 to cases applying § 4B1.4).

Although Smith now contends that the gun was not connected to the drugs because he had the gun only to sell it, the evidence supports the district court's finding that they were connected. The only evidence in favor of Smith's new theory was the arresting officer's testimony about Smith's post-arrest statements. But at trial Smith denied making those statements and testified that the gun was not his and that it was so old and rusty that he would not even want it. The district court, though, relied on the arresting officer's testimony that, right after Smith had possibly sold drugs, the officer saw him reach into his lap and then place a white object behind the seat. The officer later recovered a white towel from behind the seat that contained a gun and heroin packaged to be sold. From this testimony, the district court reasonably inferred that the gun was connected to the drug sale, and it did not err by failing, unprompted, to credit Smith's post-arrest statements over the strong inferences drawn from the proximity of the gun to the drugs.

Even though the district court did not err in {2009 U.S. App. LEXIS 9}computing the sentence, a limited remand is necessary under Federal Rule of Criminal Procedure 36 to correct some errors in the judgment. See *United States v. Bonner*, 522 F.3d 804, 808-09 (7th Cir. 2008). First, the judgment should reflect that Smith was convicted pursuant to a jury verdict rather than a guilty plea and that he was acquitted of count three. Second, {341 Fed. Appx. 210} the PSR states (and the government represented at sentencing) that the drug count had a 40-year statutory maximum, but at oral argument the government conceded that it was actually 20 years. See 21 U.S.C. § 841(b)(1)(C). The sentence of 262 months' imprisonment on count two, therefore, exceeds the statutory maximum (but is still permissible on count one, which carries a maximum of life imprisonment, 18 U.S.C. §§ 922(g)(1), 924(e)(1)). See *United States v. Spells*, 537 F.3d 743, 754 (7th Cir. 2008). Finally, the written statement of reasons mistakenly says both that a mandatory minimum sentence was imposed and also that no count carries a mandatory minimum. This should be corrected to reflect that count

one has a mandatory minimum (which was imposed). See 18 U.S.C. §§ 922(g)(1), 924(e)(1).

Accordingly, the judgment of the district {2009 U.S. App. LEXIS 10}court is AFFIRMED, except to the extent mentioned above, and we order a limited REMAND for the district court to correct the errors we have identified.

UNITED STATES OF AMERICA, Plaintiff-Respondent, v. CURTIS SMITH, Defendant-Movant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION

2011 U.S. Dist. LEXIS 91807

No. 10 C-348

August 15, 2011, Decided

August 15, 2011, Filed

Memorandum

Editorial Information: Prior History

United States v. Smith, 341 Fed. Appx. 206, 2009 U.S. App. LEXIS 17969 (7th Cir. Ill., 2009)

Counsel

For United States of America, Plaintiff: AUSA, United States Attorney's
Office (NDIL), Chicago, IL; Sheri H. Mecklenburg, Assistant United States Attorney, Chicago,
IL.

Curtis Smith, Defendant, Pro se, White Deer, PA.

Judges: Hon. William J. Hibbler, United States District Judge.

Opinion

Opinion by: William J. Hibbler

Opinion

MEMORANDUM OPINION AND ORDER

On April 11, 2008, a jury convicted Movant Curtis Smith of unlawful possession of a firearm and possession with intent to distribute a controlled substance, namely cocaine and heroin. On October 8, 2008, the Court sentenced Smith to 262 months imprisonment, in accordance with the Armed Career Criminal provisions of the United States Sentencing Guidelines. U.S.S.G. § 4B1.4. On August 12, 2009, the Seventh Circuit affirmed Smith's conviction and sentence. *United States v. Smith*, 341 Fed. Appx. 206, 207 (7th Cir. 2009).

Smith now moves, pursuant to 28 U.S.C. § 2255, for various forms of relief from his conviction and sentence. He sets forth a variety of claims, including: (1) that he was denied the right to a fair trial because there was insufficient evidence to convict him; (2) that the Court erred by allowing the Government to cross-examine Smith regarding his prior convictions; (3) that the Court improperly instructed the jury on evidence introduced regarding prior bad acts; (4) that the Government engaged in prosecutorial misconduct; (5) that the Court erred in failing to force the Government to produce the confidential informant as a witness; (6) that the Court erred in considering him an Armed Career Criminal for sentencing purposes; and (7) that he received ineffective assistance of counsel. For the following reasons, the Court DENIES Smith's motion.

I. Insufficient evidence

Smith's arguments regarding the credibility of witnesses and the weight of testimony and evidence are inappropriate at this stage of the proceedings. The arguments amount to an attempt to have the Court reweigh the evidence, which is the province of the jury. *United States v. Hampton*, 585 F.3d

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1033, 1041-42 (7th Cir. 2009). Smith already had the opportunity to cross-examine the witnesses and to present his case to the jury.

II. Evidence of prior convictions

Smith objects to the fact that the Court allowed the Government to introduce evidence of Smith's prior rape convictions and argues that the Court erred in instructing the jury about how to consider that evidence.

Insofar as Smith is challenging the Court's evidentiary ruling, he must show that the ruling resulted in such extreme prejudice that it "compromise[d his] due process right to a fundamentally fair trial." *Howard v. O'Sullivan*, 185 F.3d 721, 723-24 (7th Cir. 1999). Smith clearly cannot succeed on such an argument because he was responsible for introducing the evidence of his prior bad acts. Despite the Court's ruling that the prosecution could not introduce the evidence, Smith decided to take the stand and affirmatively state that the reason he was targeted by the police was not that he was selling drugs, but because they knew that he was a convicted sex offender. Then, he claimed that he had not committed the offense for which he was convicted, and that he had never raped anyone. Consequently, Smith opened the door for the prosecution to cross-examine him on his claims and present evidence regarding his prior convictions. The evidence was not offered in order to show his propensity for committing such acts, but for impeachment and credibility purposes, and the Court instructed the jury as to its proper use. Smith is certainly reasonable to assume that the evidence may have prejudiced him, but he was responsible for its presentation, and the jury was instructed in order to avoid undue prejudice. Thus, Smith was not denied a right to a fair trial.

Because the evidence was properly introduced for the reasons stated above, Smith's claim that its introduction constitutes prosecutorial misconduct also fails.

III Prosecutorial misconduct

Smith makes some additional claims of prosecutorial misconduct. He argues that the prosecution prejudiced him by destroying the gun the police recovered and the van he was in at the time of his arrest. There is no evidence in the record regarding the destruction of the van, and Smith therefore has no basis for making that claim. The evidence regarding the destruction of the gun was presented at trial, and showed that the Chicago Police mistakenly destroyed the gun when they were notified that the State of Illinois would not be charging Smith with a gun possession crime because the police did not check whether the federal government was pursuing charges. There is no evidence that the prosecutors in this case were involved in the gun's destruction, and there is ample evidence that they were not. Smith does not present any previously undisclosed evidence regarding the gun's destruction. There is simply no basis for a finding of prosecutorial misconduct.

Smith also argues that the prosecution engaged in misconduct by failing to produce the confidential informant at trial. The evidence showed that, although the police initially planned on employing a confidential informant for the purposes of conducting a controlled purchase of narcotics from Smith, they abandoned that plan and asked the confidential informant to leave after witnessing Smith engage in a narcotics transaction themselves. Smith apparently believes he was prejudiced by the informant's failure to testify at trial. However, this is the first time Smith has raised this argument, and because he could have raised it at trial or on direct appeal, it is procedurally defaulted. *Sandoval v. United States*, 574 F.3d 847, 850 (7th Cir. 2009). His argument that the Court erred in failing to force production of the confidential informant fails for the same reason.

The Court also denied Smith motion to produce the confidential informant for a pre-trial suppression hearing. To the extent Smith is challenging that decision in his petition, he is unable to show the requisite prejudice. Smith argued that the confidential informant should be made available to testify

as to whether he witnessed Smith engage in the transaction at issue from a nearby car. The Court found, based on the police officers' statements that they witnessed Smith engage in the drug transaction, that an evidentiary hearing was unnecessary to determine whether the officers' search of Smith's van was reasonable. The Court found that Smith had not shown that the informant's testimony was so useful as to overcome the confidential informant privilege because: (1) the confidential informant could not testify as to what the officers saw; (2) the informant was present only because he had already informed the officers that Smith sold drugs from his van and set up a transaction with Smith in the officers' presence; and (3) there was at least one other witness involved in the alleged transaction who could be called to testify about whether a transaction took place. See *United States v. Andrus*, 775 F.2d 825,841-42 (7th Cir. 1985) (holding that defendant bears burden of showing a "genuine need for disclosure" of informant's identity).

IV. Armed career criminal status

Smith argues that it was improper for the Court to consider convictions older than fifteen years in deciding whether he qualified as an armed career criminal under U.S.S.G. § 4B1.4. Smith is correct that U.S.S.G. § 4A1.2(e) excludes convictions older than fifteen years from consideration for purposes of calculating criminal history under § 4A1.1. However, the time limit in § 4A1.2(e) does not apply to the determination of whether a defendant is an armed career criminal. *United States v. Paul*, 156 F.3d 403, 404 (2d Cir. 1998) (citing U.S.S.G. § 4B1.4, application note 1).

Smith also argues that his conviction for aggravated battery does not qualify as a crime of violence, and that he therefore lacks sufficient criminal history to qualify as an armed career criminal. Once again, this is the first time Smith has raised this argument, and because he could have raised it at trial or on direct appeal, it is procedurally defaulted. *Sandoval v. United States*, 574 F.3d 847, 850 (7th Cir. 2009).

V. Ineffective assistance of counsel

In order to succeed on his claim of ineffective assistance of counsel, a § 2255 movant must meet both prongs of a test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, he must show that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. at 2064. Second, he must show that his counsel's deficient performance prejudiced his defense, *Id.* More specifically, he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

Most of Smith's claims of ineffective assistance are based on his belief that his counsel failed to point out many of the errors he raises in this motion. For instance, he argues that his trial counsel should have objected to the prosecution's descriptions of his prior bad acts during closing. However, for all of the reasons set forth above, the purported errors Smith points to were not actually errors. Thus, his counsel was not ineffective by failing to object.

Smith also argues that his appellate counsel was ineffective for failing to produce evidence of his mental and physical conditions, his medications, and the abuse he suffered in prison. However, the role of appellate counsel is not to produce new evidence. Thus, Smith's claim fails.

CONCLUSION

For all of the above reasons, the Court DENIES Movant's motion.

IT IS SO ORDERED.

8/15/11

Dated

/s/ William J. Hibbler

Hon. William J. Hibbler

United States District Court

APPENDIX D # 10

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