

NOT RECOMMENDED FOR PUBLICATION

No. 21-3258

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW COX,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

FILED
Oct 13, 2021
DEBORAH S. HUNT, Clerk

) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE NORTHERN DISTRICT OF
) OHIO

O R D E R

Before: GUY, BUSH, and LARSEN, Circuit Judges.

Andrew Cox, a pro se federal prisoner, appeals the district court's denial of his motion for relief from judgment in his habeas proceedings under 28 U.S.C. § 2241. He also moves for summary reversal and to proceed in forma pauperis. 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).*

In 2011, Cox pleaded guilty in the United States District Court for the District of New Jersey to six counts of knowingly distributing child pornography. The district court sentenced him to 262 months of imprisonment, and his convictions and sentence were affirmed on appeal. *United States v. Cox*, 553 F. App'x 123 (3d Cir. 2014). In 2016, Cox filed a motion to vacate under 28 U.S.C. § 2255 in the District of New Jersey, and it is still pending before that district court.

Also in 2016, Cox filed this § 2241 petition for a writ of habeas corpus in the Northern District of Ohio, the district where he was incarcerated. *See Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004). It was his fourth such petition. *See Cox v. United States*, No. 4:17-CV-0248, 2018

WL 9393063, at *1 (N.D. Ohio Sept. 27, 2018). He asked the district court to vacate his convictions and sentence, contending that: the District of New Jersey was refusing to exercise jurisdiction over his § 2255 motion in violation of the Suspension Clause; he is actually innocent; his arrest warrant was invalid; his Speedy Trial rights were violated; he was the subject of a malicious prosecution; the government and district judge engaged in fraud on the court; his attorney was ineffective; his attorney-client privilege was violated; he was denied due process in his plea agreement; his sentence was beyond the statutory maximum; and his guilty plea was involuntary. The district court denied the petition as barred by the doctrine of claim preclusion, holding that he had already litigated those identical claims in a previous § 2241 petition; that his § 2255 motion had not been pending long and thus his right to habeas relief had not been suspended; and that he had adequate remedies at law if his motion were not resolved expeditiously. We affirmed that decision, noting that § 2255, not § 2241, was the appropriate vehicle to challenge one's conviction and sentence. *Cox v. United States*, No. 16-4074 (6th Cir. Mar. 1, 2017) (order).

In 2021, Cox moved for relief from judgment in that § 2241 case, citing Federal Rule of Civil Procedure 60(b)(6). He asserted that the District of New Jersey has continued not to resolve his § 2255 motion, reiterating that it is a violation of the Suspension Clause. He also alleged that the judge and the government's attorney have engaged in various improprieties. Cox argued that the court's refusal to adjudicate his § 2255 motion makes § 2241 the appropriate remedy.

The district court denied Cox's motion for relief as untimely while also holding that it would fail on the merits. *United States v. Cox*, No. 4:16 CR 1981, 2021 WL 781595, at *1 (N.D. Ohio Mar. 1, 2021). The district court recounted the case history of his § 2255 motion, noting Cox's failure to follow administrative requirements and his frequent filings as well as the Third Circuit's statement that the district court was moving forward with the case. *Id.* at *1.

Cox appeals, reiterating the arguments in his motion, asserting that there is no time limit for Rule 60(b)(6) motions, and alleging that the district court's recitation of the procedural history of his § 2255 proceeding was incorrect. He also moves for summary reversal.

We review the district court's denial of a Rule 60(b) motion for an abuse of discretion. *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). "Abuse of discretion is defined as a definite

and firm conviction that the trial court committed a clear error of judgment.” *Burrell v. Henderson*, 434 F.3d 826, 831 (6th Cir. 2006) (quoting *Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991)).

Rule 60(b) provides relief from a final judgment for several specific reasons—mistake, newly discovered evidence, fraud by the opposing party, or when the judgment is void or has been satisfied or reversed—but it also includes the catch-all provision in subsection (6), which permits courts to grant a motion for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b). Rule 60(b)(6) “applies ‘only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.’” *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007) (quoting *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001)).

The district court first denied Cox’s motion as untimely. Cox argues that Rule “60(b)(6) does not have a time limit,” but he is incorrect. Under Rule 60(c)(1), the motion “must be made within a reasonable time.” The district court noted that the underlying judgment was entered in September 2016, and this court affirmed it in April 2017, yet Cox did not file this motion for relief until February 2021. Given Cox’s mistaken belief that his Rule 60(b)(6) motion could not be untimely, he does not argue that his motion was filed within a reasonable time. Therefore, the district court’s denial of his motion on timeliness grounds was not an abuse of discretion.

In any event, the district court also denied Cox’s motion on the merits, holding that he did “not bring to light any information that would justify a reversal of this Court’s prior order” and noting that “there is no indication that the New Jersey District Court has suspended proceedings related to Mr. Cox’s 2255 petition.” *Cox*, 2021 WL 781595, at *2. Cox argues that the district court misunderstood the procedural history of his § 2255 motion and that it was clear that the New Jersey District Court had suspended the proceedings and was not planning to act on the motion. He argues that he was correct to file his motion under § 2241 because, although challenges to the legality of a prisoner’s detention generally must be filed under § 2255, the district court’s supposed refusal to rule on his § 2255 motion renders that statute “inadequate or ineffective to test the

legality of his detention.” 28 U.S.C. § 2255(e); *see also Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam).

Cox claims that his situation meets this exception, citing *Stirone v. Markley*, 345 F.2d 473 (7th Cir. 1965), and *Workman v. Tate*, 957 F.2d 1339 (6th Cir. 1992). Yet “[t]he circumstances in which § 2255 is inadequate and ineffective are narrow.” *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001); *see also Wright v. Spaulding*, 939 F.3d 695, 705 (6th Cir. 2019). And neither of the cases Cox relies on helps him. In *Stirone*, the Seventh Circuit stated only that it was “not prepared to say that a refusal to entertain a section 2255 motion or an inordinate delay in its disposition would not invoke the exception to the section’s remedial exclusiveness.” 345 F.2d at 475. And *Workman* concerned the requirement that a state prisoner must exhaust his state-court remedies before seeking federal habeas relief, 957 F.2d at 1344; it does not speak to § 2241 or whether § 2255 is inadequate or ineffective when the district court has delayed ruling on the motion. Therefore, Cox has not shown that he meets the exception that permits him to seek relief under § 2241. It follows, then, that Cox has not shown the extraordinary circumstances required for relief under Rule 60(b)(6), and so the district court did not abuse its discretion in denying his motion.

“in delay”

Accordingly, we **GRANT** Cox’s motion to proceed in forma pauperis for the limited purpose of this appeal, **DENY** his motion for summary reversal, and **AFFIRM** the district court’s order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA)	JUDGE DONALD C. NUGENT
)	
Plaintiff,)	CASE NO. 4:16 CR 1981
)	
vs.)	<u>MEMORANDUM OPINION</u>
)	<u>AND ORDER</u>
ANDREW COX,)	
)	
Defendant.)	

This matter is before the Court on Defendant Andrew Cox's Expedited Motion For Relief from Judgment Under Federal Rule of Civil Procedure 60(b)(6). (ECF #11). For the reasons set forth below, the Defendant's Motion is hereby DENIED.

Mr. Cox pled guilty in 2011 in the United States District Court for the District of New Jersey to six counts of knowingly distributing child pornography in violation of 18 U.S.C. §2252A(a)(2)(A). He was sentenced to 262 months of imprisonment. His conviction and sentence were affirmed on appeal. *United States v. Cox*, 553 F. App'x 123, 125 (3d Cir. 2014), cert. denied, 135 S. Ct. 1463 (2015). On January 20, 2016, Cox filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 in the New Jersey district court. Within a month of filing his 2255 petition, Mr. Cox, who was housed at Elkon in Lisbon, Ohio,

filed his first petition for habeas relief pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of Ohio. The district court denied the petition, and Cox voluntarily dismissed his appeal. In February 2016, Cox filed a second § 2241 petition claiming that the New Jersey district court refused to exercise jurisdiction over his § 2255 motion, which this court also denied. The Sixth Circuit affirmed the district court's denial. On August 8, 2016, Cox filed yet another § 2241 habeas corpus petition, renewing his argument that the New Jersey district court has refused to exercise jurisdiction over his § 2255 motion in violation of the Suspension Clause. The district court denied this petition, and, again the Sixth Circuit affirmed. Mr. Cox now seeks relief from the denial under Fed. R. Civ. P. 60(b)(6).

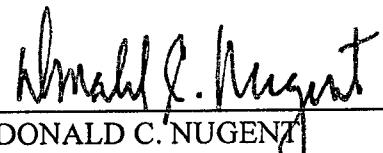
A Rule 60(b)(6) motion must be made within a reasonable time. Fed.R.Civ.Pro. 60(c)(1). The Sixth Circuit has held that a "district court does not have the discretion to extend the period of limitations set forth in Rule 60(b)." *Smith v. Secretary of Health and Human Services*, 776 F.2d 1330, 1332 (6th Cir. 1985). The ruling from which Mr. Cox seeks relief was entered on September 12, 2016. It was affirmed by the Sixth Circuit Court of Appeals on April 24, 2017. Mr. Cox's motion under 60(b) is, therefore, clearly time barred.

Even if it had been timely filed, the motion would also be denied on the merits. The decision from which Mr. Cox seeks relief has already been appealed and affirmed. Further, his 2255 petition has since been terminated and, at least partially, re-instated. His petition was terminated on January 12, 2017 for failure to follow proper administrative requirements. (New Jersey District Court, Case No.: 2:16 CV 345). Mr. Cox appealed the termination but withdrew the appeal. He later sought to reinstate the petition in the District Court. Despite not having fully complied with the administrative requirements, the New Jersey District Court ordered the

Government to respond. Mr. Cox's complaint relating to the length of time the New Jersey Court has taken to address his §2255 motion is being addressed by the New Jersey Court and the Third Circuit. Mr. Cox himself alleges that he sought mandamus relief from the Third Circuit, which denied such relief because "contrary to Cox's contention, the District Court is moving forward with the case, and we are confident that it will adjudicate his pending 2255 motion in a timely manner." (ECF #11 PageID 36). [There is no reason to believe that the New Jersey District Court is not proceeding towards resolution of Mr. Cox's petition.] There have been no less than 20 docket entries over the last year, and much of the delay in resolving the petition has stemmed from Mr. Cox's continued extraneous filings and appeals which require briefing and resolution by the Court.

The information alleged by the Petitioner does not bring to light any information that would justify a reversal of this Court's prior order. Further, when considering the New Jersey docket, there is no indication that the New Jersey District Court has suspended proceedings related to Mr. Cox's 2255 petition. [Therefore, the Expedited Motion for Relief from Judgment Under Fed. R. Civ. P. 60(b)(6) is DENIED. This Court hereby certifies, pursuant to 28 U.S.C. § 2253(c) that an appeal from this Order could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability.

IT IS SO ORDERED.


DONALD C. NUGENT
United States District Judge

DATED: March 1, 2021