

No. 21-5027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 22, 2022

DEBORAH S. HUNT, Clerk

NORMAN ALAN KERR,

Petitioner-Appellant,

v.

CHRISTOPHER GOMEZ, Warden,

Respondent-Appellee.

ORDER

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

Norman Alan Kerr, a federal prisoner, has filed a petition for rehearing of this court's order of January 27, 2022, affirming the judgment of the district court dismissing with prejudice his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix A

NOT RECOMMENDED FOR PUBLICATION

No. 21-5027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 27, 2022
DEBORAH S. HUNT, Clerk

NORMAN ALAN KERR,

Petitioner-Appellant,

v.

CHRISTOPHER GOMEZ, Warden,

Respondent-Appellee.

)
)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) KENTUCKY
)
)

ORDER

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

Norman Alan Kerr, a federal prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Kerr is currently confined at the United States Penitentiary, McCreary, Kentucky. 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). We affirm.

In 2009, a federal jury in the Middle District of North Carolina found Kerr guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). During Kerr's trial, the government read to the jury a stipulation agreed to by both Kerr and the government that, "at the time of this offense" Kerr had been convicted by a North Carolina court in 2008 of a crime punishable by a term of imprisonment exceeding one year and that Kerr knew of this conviction. The stipulation also noted that the conviction had not been expunged and that Kerr's rights to possess a firearm had not been restored at the time of his alleged possession of a firearm. Indeed, Kerr had been convicted of three such crimes by the North Carolina court. At sentencing, Kerr objected to his designation as an armed career criminal under § 924(e), which was based on these

Appendix A

three “violent felonies.” But the district court overruled the objection and sentenced Kerr as an armed career criminal to 268 months of imprisonment. On appeal, the Fourth Circuit Court of Appeals vacated the sentence and remanded the case for resentencing in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). On resentencing, the district court again designated Kerr as an armed career criminal and imposed the same 268-month custodial sentence. The court of appeals affirmed. *United States v. Kerr*, 737 F.3d 33, 34 (4th Cir. 2013).

Kerr subsequently filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The district court denied the motion on the recommendation of a magistrate judge. Kerr filed an appeal, but the Fourth Circuit Court of Appeals denied a certificate of appealability. *United States v. Kerr*, No. 18-6018 (4th Cir. Mar. 27, 2018). Kerr also filed multiple unsuccessful motions for authorization to file second or successive § 2255 motions. *See, e.g., In re Kerr*, No. 19-139 (4th Cir. Mar. 4, 2019).

In 2019, Kerr filed a § 2241 petition for a writ of habeas corpus in the district court for the Eastern District of Kentucky, which has jurisdiction over the Warden of USP McCreary. Kerr argued that his 2009 conviction for the § 922(g) firearm-possession offense should be vacated in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The district court entered judgment dismissing the petition with prejudice. It determined that Kerr’s claim, which challenged the legality of his detention, did not meet the requirements for the savings clause of 28 U.S.C. § 2255(e) that would permit habeas relief under § 2241. The court also denied relief on an “Emergency Motion under ‘Extraordinary and Compelling’ circumstances” filed in July 2020. Kerr filed a motion for reconsideration, which the Warden opposed, construing it as filed under Federal Rule of Civil Procedure 59(e). Kerr filed a request to file a traverse, then a notice of appeal and a motion to proceed in forma pauperis on the appeal. The district court denied the motion for reconsideration.

We review de novo the dismissal of a § 2241 petition for a writ of habeas corpus. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). Although a challenge to the legality of a conviction or sentence must normally proceed under 28 U.S.C. § 2255, recourse to the writ of habeas corpus through § 2241 is nevertheless possible through the so-called savings clause if “the

Appendix A

remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e). Such a situation can arise if a prisoner presents a claim of actual innocence that could not reasonably be presented sooner. *Wright v. Spaulding*, 939 F.3d 695, 699 (6th Cir. 2019). The prisoner would be able to demonstrate not having an earlier opportunity to present this claim if settled case law made it unavailable when the prisoner was convicted and during the course of direct appeal or when the § 2255 motion was filed. *See id.* at 703. Moreover, a prisoner can demonstrate actual innocence based on a change in statutory law by showing that (1) a new interpretation of statutory law exists, (2) the interpretation was issued after the prisoner had a meaningful time to raise it on direct appeal or in subsequent motions, (3) the interpretation is retroactive, and (4) the interpretation applies to the merits of the § 2241 petition, such that it is more likely than not that no reasonable juror would have convicted the prisoner. *Wooten v. Cauley*, 677 F.3d 303, 307-08 (6th Cir. 2012). A Supreme Court decision affecting the prisoner's sentence or conviction that was rendered after the disposition of the initial § 2255 motion required to establish the requisite change in statutory interpretation. *Hueso v. Barnart*, 948 F.3d 324, 333 (6th Cir. 2020).

Even if Kerr can meet the other requirements for pursuit of § 2241 habeas relief through the savings clause, he cannot demonstrate that *Rehaif* applies to the merits of his petition such that it is more likely than not that no reasonable juror would have found him guilty of the firearm-possession offense. A defendant is a felon in possession of a firearm, in violation of § 922(g)(1), if (1) he knowingly possessed a firearm; (2) he had previously been convicted of a crime punishable by more than one year in prison and had known of that conviction; and (3) the firearm traveled in interstate commerce. *United States v. Brooks*, 987 F.3d 593, 601 (6th Cir. 2021). In *Rehaif*, 139 S. Ct. at 2200, the Supreme Court required the government to prove that the defendant had knowledge of belonging "to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200.

A stipulation at trial that the defendant had knowledge of being convicted of a crime punishable by a term of imprisonment exceeding one year can be used by the jury to infer that the defendant had knowledge of being a felon at the time that the defendant was in possession of a

Appendix A

firearm. *United States v. Raymore*, 965 F.3d 475, 486 (6th Cir. 2020) (citing *United States v. Conley*, 802 F. App'x 919, 923 (6th Cir. 2020)), *cert. denied*, 141 S. Ct. 2814 (2021). The stipulation that the government entered into evidence at Kerr's trial acknowledged that he knew at the time of his offense that he had been convicted a crime punishable by a term of imprisonment exceeding one year. In the absence of any evidence undermining the stipulation, all reasonable jurors would likely have found Kerr guilty of the § 922(g) firearm-possession offense.

Kerr raises other arguments challenging the admissibility of the stipulation as evidence in the trial. But as the district court pointed out, he did not raise these arguments in his direct appeal or in his § 2255 motion, even as he, for example, challenged the underlying conviction itself as a predicate offense for his designation as an armed career criminal. *See, e.g., Kerr*, 737 F.3d at 39. Kerr could have pursued his arguments against the stipulation prior to his § 2241 petition. Moreover, he does not point to a new interpretation of statutory law substantiating his arguments against the stipulation. Consequently, Kerr cannot use the savings clause to raise these arguments for habeas relief in a § 2241 petition, and the district court appropriately dismissed the petition. *Taylor v. Owens*, 990 F.3d 493, 499 (6th Cir. 2021).

We therefore **AFFIRM** the judgment of the district court and **DENY** as moot all pending motions and petitions.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix A

crime punishable by a term of imprisonment exceeding one year **and that he knew of this conviction.** *See id.* at E.C.F. No. 51-2 at 40. The prosecutor read that stipulation to the jury:

[T]he Defendant, Norman Alan Kerr, and the United States of America by and through their respective attorneys do hereby stipulate and agree to the following: One, the parties stipulate that at the time of this offense, the Defendant, Norman Alan Kerr, is the same person who was convicted on October the 31st of 2008 in the District Court, Forsyth County, Winston-Salem, North Carolina of a crime punishable by imprisonment for a term exceeding one year and that he knew that he had such conviction.

Id. The jury found Kerr guilty of being a felon in possession of a firearm, *see* E.C.F. No. 23, and the district court sentenced him to 268 months in prison, *see* E.C.F. No. 41.

Kerr appealed, and the Fourth Circuit vacated his sentence and remanded for resentencing in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011). *See Kerr*, No. 1:09-cr-290-NCT, at E.C.F. No. 75. At resentencing, the district court again imposed a 268-month sentence. *See id.* at E.C.F. No. 108. Kerr appealed once more, but the Fourth Circuit affirmed the district court's judgment. *See United States v. Kerr*, 737 F.3d 33 (4th Cir. 2013). The Court concluded that Kerr in fact had a prior qualifying felony. *See id.* at 39 ("Because the maximum possible prison sentence that Kerr *faced* for his prior state convictions exceeded one year, and because that potential punishment was far from hypothetical, we hold that Kerr's prior state convictions qualify as predicate felonies for sentencing under the ACCA."); *id.* ("As we have already explained, Kerr faced a presumptive maximum sentence of 14 months' imprisonment for his state convictions. Therefore, Kerr has the requisite predicate felony for his § 922(g)(1) conviction."). Though Kerr continues to gripe over the merits of that ruling, and to cling to points in the dissent, whether he in fact had an actual prior felony is a decided issue and not subject to review here under § 2241.

Kerr, following direct appeals, subsequently filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. *See Kerr*, No. 1:09-cr-290-NCT, at E.C.F. No. 150. The assigned United States Magistrate Judge recommended that the district court dismiss Kerr's motion, and, in her

opinion, recognized that Kerr had stipulated at trial that he was previously convicted of a crime punishable by a term of imprisonment exceeding one year and that he knew of this conviction. *See id.* at E.C.F. No. 171 at 5. The district court then adopted the Magistrate Judge's recommendation and denied Kerr's motion. *See id.* at E.C.F. Nos. 188, 189. Kerr appealed, and the Fourth Circuit dismissed that appeal. *See id.* at E.C.F. No. 198. His § 2255 effort included a broad panoply of claims—from verdict irregularity, to proof, to conduct by his counsel, the prosecutor, and the judge. E.C.F. No. 171, at 7–8. Nowhere did the claim roster challenge his consent to or entry into the stipulation (nominally Exhibit 37, as read to the jury) referencing Ward's prior felony conviction and knowledge of same.

Kerr now pursues relief via § 2241. DE 1. Kerr claims that his 2009 conviction for being a felon in possession of a firearm is no longer valid because of the United States Supreme Court's intervening decision in *Rehaif*. *See id.* Thus, Kerr asks this Court to “reverse [his] conviction.” *Id.* at 1.

Rehaif affected the § 922 elements. In essence, the decision construed the statute to require knowledge by a defendant both that he possessed a firearm **and** that he fell within a prohibited status. *See Rehaif*, 139 S. Ct. at 2200 (“[T]he Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.”). Kerr attempts to claim innocence by virtue of *Rehaif*'s clarification of the crime.

Kerr's petition fails in this context. Although a federal prisoner may challenge the legality of his conviction on direct appeal and through a timely § 2255 motion, he generally may not do so in a § 2241 petition. *See United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001) (explaining the distinction between a § 2255 motion and a § 2241 petition). A § 2241 petition is typically a vehicle for challenges to actions taken by prison officials that affect the way the prisoner's sentence

is being carried out, such as computing sentence credits or determining parole eligibility. *See Terrell v. United States*, 564 F.3d 442, 447 (6th Cir. 2009).

The saving clause of § 2255(e) does create a narrow relief portal, with particular requirements. *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012) (outlining remedial requirements). And § 2255 surely would offer Kerr no relief here, because of time-bar and/or successiveness prohibitions. In a scenario such as this, the Sixth Circuit has explained that a prisoner can proceed via the saving clause only if he can establish his actual innocence by demonstrating:

(1) the existence of a new interpretation of statutory law, (2) which was issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions, (3) is retroactive, and (4) applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him.

Wooten, 677 F.3d at 307–08. The Government concedes all but the fourth element.²

Kerr falters at step four. He is unable to show that, in light of the Supreme Court's decision in *Rehaif*, it is more likely than not that no reasonable juror would have convicted him of being a felon in possession of a firearm. After all, in *Rehaif*, the Supreme Court held that the Government must prove that a defendant possessed a firearm while being aware of his "relevant status," meaning that he knew that he was "a felon, an alien unlawfully in this country, or the like." *Rehaif*, 139 S. Ct. at 2194; *see also United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019) (interpreting the Supreme Court's holding in this manner); *Walker v. Quintana*, No. 5:19-cv-321-

² Uncontested, so the Court accepts. DE 13 at 5. *Rehaif* did involve statutory interpretation that was arguably new. The Supreme Court issued it in 2019, six years after the end of Kerr's direct appeal. Retroactivity perhaps is an open issue, though the Sixth Circuit has counselled that substantive changes narrowing elemental definition of a crime typically would qualify for retroactive treatment. *See Harrington v. Ormond*, 900 F.3d 246, 249 (6th Cir. 2018) ("Substantive decisions that 'narrow the scope of a criminal statute by interpreting its terms' apply retroactively to cases on collateral review. *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 620–621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998))."). The Court treats *Rehaif* as retroactive based on the Government's concession.

DCR, 2019 WL 6310722, at *3 (Nov. 25, 2019) (discussing and applying the holding in *Rehaif* to a § 2241 petition). Here, Kerr stipulated at trial that he was previously convicted of a crime punishable by a term of imprisonment exceeding one year **and** that he knew of this conviction. *See Kerr*, No. 1:09-cr-290-NCT, at E.C.F. No. 51-2 at 40. This factual stipulation was a formal concession that had the effect of withdrawing the fact from issue and thus was conclusive in Kerr's case. *See Christian Legal Society v. Martinez*, 561 U.S. 661, 677–78 (2010). In light of Kerr's clear stipulation, he has not demonstrated that it is more likely than not that no reasonable juror would have convicted him of being a felon in possession of a firearm. The established felony alone would support a knowledge inference. *United States v. Conley*, 802 F. App'x 919, 923 (6th Cir. 2020) (in plain error context) ("That's because he stipulated at trial that he had a prior felony conviction. Although the stipulation of a prior felony does not automatically establish knowledge of felony status, it is strongly suggestive of it."). Here, Kerr conceded both the felony and his awareness of such conviction, particularly a conviction for "a crime punishable by imprisonment for a term exceeding one year." *Kerr*, No. 1:09-cr-290-NCT, at E.C.F. No. 51-2 at 40. This was uncontested proof of status knowledge and forecloses the claim of actual innocence. Kerr even stipulated, "[N]or had the Defendant, Norman Alan Kerr, been pardoned or had his right to possess firearms restored." *Id.* at 41. A reasonable juror surely would here have convicted on such proof.

To be sure, Kerr tries several side arguments—now challenging the stipulation, challenging the felony qualification, and advancing other vagueness claims. None of those theories fits into the saving clause portal. Kerr made and lost many ineffective assistance claims before. None of those included an assault on his consent to stipulate, and that theory is not proper now under § 2241.³

³ Certainly, stipulation validity could involve an assessment of client consent, authorization, and awareness. A stipulation of this type falls under the venerable *Old Chief* model. The Court does not analyze where on the continuum (between *Gonzalez v. United States*, 128 S.Ct. 1765 (2008) and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)) this type of lawyer act falls. Suffice it to say that Kerr registered no complaint about the stipulation at trial, and he did not contest the stipulation in his direct appeal or § 2255 undertakings where

Further, as noted, the Fourth Circuit fully adjudicated the felony qualification—*Rehaif* does not touch what conviction qualifies, so *Rehaif* does not reopen that matter here. Finally, the inscrutable suggestions about statutory vagueness does not track *Rehaif*; again, that case addressed only the scienter requirement of § 922. Kerr's time for generalized challenges or constitutional theories has long since passed. Section 2241 allows assessment of whether the proof would satisfy *Rehaif*. It does not revivify lapsed potential claims targeting Kerr's lawyer, the prosecution, or the validity of the adjudicated parts of the underlying case.

Finally, Kerr filed an interim "emergency" petition alleging "extraordinary and compelling" circumstances and Eighth Amendment claims. DE 20. The parties briefed this intervening matter. DE 21, 22. Construing this broadly,⁴ Kerr seeks to hasten the Court's handling of his § 2241 and perhaps also to ensure adequate medical treatment by the BOP. The "extraordinary and compelling" language echoes § 3582, but Kerr does not pursue such relief. To the extent he seeks to challenge the conditions of his confinement, § 2241 is not the vehicle. *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) ("The BOP is correct that conditions of confinement claims seeking relief in the form of improvement of prison conditions or transfer to another facility are not properly brought under § 2241."); *Kumar v. U.S. Dep't of Homeland Sec.*, No. 19-2404, 2020 WL 2904685, at *1 (6th Cir. June 1, 2020) ("His claims regarding the conditions of his confinement were properly dismissed because they are not cognizable under § 2241.").

The Court thus denies any request sought, via this process, in DE 20.

Accordingly, the Court hereby **ORDERS**:

he specifically litigated the felony qualification. This surely would have been a place to challenge whether the validly agreed to the stipulation.

⁴ The Court evaluates *pro se* filings under a relatively lenient standard. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) ("Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings.").

1. The Court **DENIES** DE 1. A corresponding Judgment follows; and
2. The Court **DENIES** DE 20, to the extent that it requests relief, immediate or otherwise.

This 30th day of November, 2020.



Signed By:

Robert E. Wier *REW*

United States District Judge

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