

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 31, 2023

Lyle W. Cayce
Clerk

No. 23-20247

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

WALTER FREEMAN JORDAN, III,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:17-CR-516-1

ORDER:

Walter Freeman Jordan, III, federal prisoner # 28991-479, was convicted of aiding and abetting aggravated credit union robbery and aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, and he is serving consecutive sentences of 262 and 84 months. The district court dismissed his 28 U.S.C. 2255 motion, concluding that it was untimely and meritless. Jordan now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his Federal Rule of Civil Procedure 60(b) motion as untimely and moot. His motion for leave file a supplemental COA brief is GRANTED.

To obtain a COA, Jordan must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As he is challenging the district court’s denial of a Rule 60(b) motion, Jordan must show that reasonable jurists could debate whether the district court’s ruling constituted an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

In his COA motion, Jordan challenges the validity of his convictions and sentences in various claims raised for the first time before this court. He thus does not meaningfully challenge the district court’s dismissal of his Rule 60(b) motion. By failing to address the bases for the district court’s dismissal, Jordan has abandoned the only cognizable issues for appeal. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). As Jordan has not made the requisite showing, his motion for a COA is DENIED. His motions for leave to proceed in forma pauperis, for oral argument, and for appointment of counsel are likewise DENIED.

/s/ Carl E. Stewart

CARL E. STEWART

United States Circuit Judge

ENTERED

May 09, 2023

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

WALTER FREEMAN JORDAN, III

§
§
§
§
§

CRIMINAL ACTION NO. H-17-516-1

MEMORANDUM OPINION AND ORDER

A jury found defendant Walter Freeman Jordan, III, guilty of aiding and abetting armed robbery of a credit union in violation of 18 U.S.C. §§ 2113(a) and (d), and carrying and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii). (Docket Entry No. 243.) The Court sentenced defendant in August 2018 to a total term of imprisonment of 346 months. *Id.* The convictions and sentences were affirmed on appeal. *United States v. Jordan*, 945 F.3d 245 (5th Cir. 2019).

Represented by retained counsel, defendant filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 on May 26, 2021. As grounds, defendant challenged the sufficiency of the evidence to support his conviction for brandishing a firearm during the offense and the Court's application of the Sentencing Guidelines based on an adjustment for obstruction of justice. On May 16, 2022, the Court dismissed the motion as barred by the applicable one-year statute of limitations. The Court further found that, even assuming timeliness, defendant's habeas claims had no merit.

B. Rule 60(b) – Mootness

In dismissing defendant's section 2255 motion in May 2022, the Court found that the motion was barred by limitations. The Court further found that, even assuming timeliness, defendant's habeas claims had no merit. Defendant contends here that he is entitled to equitable tolling predicated on counsel's purported ineffective assistance in filing an untimely section 2255 motion. Defendant contends that, if Rule 60(b) relief is granted, this Court can consider the merits of the underlying claims raised in his section 2255 motion.

This Court has already considered and rejected the merits of defendant's underlying habeas claims. In finding that defendant's section 2255 habeas claims lacked merit, the Court determined that his challenge to the sufficiency of the evidence had been raised and rejected on direct appeal by the Fifth Circuit Court of Appeals, and could not be re-urged on habeas review. The Court further found that defendant's challenge to application of the Sentencing Guidelines was not a cognizable claim for relief under section 2255.

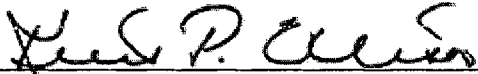
Thus, defendant's ultimate request for the Court to consider the merits of his habeas claims is moot. Any motion filed by defendant seeking reconsideration of the merits of those claims at this point would stand as an unauthorized successive section 2255 motion over which this Court lacks jurisdiction. *See United States v. Fleming*, 734 F. App'x 298, 299 (5th Cir. 2018).

Defendant's Rule 60(b) motion is **DISMISSED AS MOOT**.

C. Conclusion

Petitioner's Rule 60(b) motion (Docket Entry No. 417) is **DISMISSED** as untimely and moot. To any extent necessary, A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on this the 9th day of May, 2023.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

ENTERED

May 16, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIMINAL ACTION NO. H-17-516-1
	§	
WALTER FREEMAN JORDAN, III	§	

MEMORANDUM OPINION AND ORDER

Defendant Walter Freeman Jordan, III, represented by retained counsel, filed a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 (Docket Entry No. 384). The Government filed a motion to dismiss, and served the motion on defendant's counsel of record through ECF on December 21, 2021. (Docket No. 396.) Defendant has not filed a response to the motion to dismiss, and the motion is deemed unopposed under L.R. 7.4, Local Rules of the United States District Court For the Southern District of Texas.

Having considered the motions, the record, and the applicable law, the Court **GRANTS** the motion to dismiss and **DISMISSES** the motion to vacate, as shown below.

I. BACKGROUND AND CLAIMS

A jury found defendant guilty of aiding and abetting armed robbery of a credit union in violation of 18 U.S.C. §§ 2113(a), (d), and 2 (Count 1), and carrying and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Count 2). (Docket Entry No. 243.) The Court sentenced defendant on August 10, 2018, to a term of 262 months as to Count 1, and a term of 84 months as to

Count 2, to run consecutively, for a total term of imprisonment of 346 months. *Id.* Defendant's conviction and sentence were affirmed on appeal. *United States v. Jordan*, 945 F.3d 245 (5th Cir. 2019).

In the instant habeas proceeding, defendant challenges the sufficiency of the evidence to support his conviction for brandishing a firearm during the offense and the Court's application of the Sentencing Guidelines based on an adjustment for obstruction of justice.

The Government argues that defendant's claims are untimely and/or without merit.

II. LEGAL STANDARDS

Generally, there are four grounds upon which a defendant may move to vacate, set aside, or correct his sentence pursuant to section 2255: (1) the imposition of a sentence in violation of the Constitution or the laws of the United States; (2) a lack of jurisdiction of the district court that imposed the sentence; (3) the imposition of a sentence in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Section 2255 is an extraordinary measure, and cannot be used for errors that are not constitutional or jurisdictional if those errors could have been raised on direct appeal. *United States v. Stumpf*, 900 F.2d 842, 845 (5th Cir. 1990). If the error is not of constitutional or jurisdictional magnitude, the movant must show the error could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994).

III. ANALYSIS

A. Limitations

The Government correctly argues that defendant's section 2255 motion is barred by limitations. Time limitations for the filing of a motion under 28 U.S.C. § 2255 are governed by the following provisions:

- (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
 - (1) the date on which the judgment of conviction becomes final;
 - (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
 - (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Limitations in the instant case falls under section 2255(f)(1), as applicability of a different provision is not shown in the record or by defendant. Defendant's judgment of conviction became final for limitations purposes on April 20, 2020, the day the Supreme Court denied certiorari. (Docket Entry No. 368.) *See Clay v. United States*, 537 U.S. 522,

527 (2003); *United States v. Wheaten*, 826 F.3d 843, 846 (5th Cir. 2016). Consequently, defendant's deadline for filing his motion for relief under section 2255 expired one year later, on April 20, 2021.

Defendant filed the instant section 2255 motion through counsel on May 26, 2021. (Docket Entry No. 384:) Although his motion is dated April 20, 2021, his memorandum of law, filed contemporaneously with his section 2255 motion, is dated May 24, 2021. (Docket Entries No. 384, p. 4; No. 384-1, p. 5.) Moreover, defendant's attorney filed the motion through ECF on May 26, 2021. Nothing in the record indicates that defendant's motion was filed with this Court in a timely manner, and defendant presents nothing to the contrary.

Defendant's claims are barred by the applicable one-year statute of limitations and must be dismissed. 28 U.S.C. § 2255(f)(1). Even assuming defendant's claims were timely, the claims lack merit, as shown below.

B. Brandishing a Firearm

Defendant challenges the sufficiency of the evidence to support his firearms offense under 18 U.S.C. § 924(c)(1)(A)(ii). He argues that there is no evidence that he or another person brandished a weapon to commit or further the robbery, and that any use of a weapon occurred after the robbery.

Defendant raised this sufficiency issue on direct appeal, and it was rejected by the Fifth Circuit Court of Appeals. *Jordan*, 945 F.3d at 256–57 (“As for the second count — aiding and abetting the brandishing of a firearm during and in relation to a crime of violence

– the evidence also supports [the] conviction. . . . Witnesses testified that a gun was brandished at a teller and pointed at a customer.”) Issues that are raised and rejected on the merits on direct appeal may not be raised as grounds for relief under section 2255. *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986); *see also United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (holding that “the proscription covers issues [the Court] has decided expressly and by necessary implication, reflecting the sound policy that when an issue is once litigated and decided, that should be the end of the matter.”).

Defendant’s challenge to the sufficiency of the evidence as to Count 2 would not warrant relief under section 2255.

C. Sentencing Guidelines

Defendant also challenges the Court’s technical application of the Sentencing Guidelines, and argues that “the two-point enhancement under U.S.S.G. § 3C1.2 for recklessly creating a substantial risk of death or serious bodily injury to someone else while fleeing from the police” was unsupported in the evidence. Defendant’s attorney raised this objection at sentencing, but this Court overruled the objection. (Docket Entry No. 338, pp. 1–15). Defendant did not raise the issue on direct appeal.

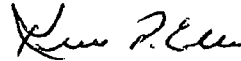
It is well-established that technical applications of the Sentencing Guidelines do not give rise to constitutional issues and are not cognizable in a section 2255 motion. *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir.1992).

Defendant's challenge to the technical application of the Sentencing Guidelines in his case would not warrant relief under section 2255.

IV. CONCLUSION

For the above reasons, the Government's motion to dismiss (Docket Entry No. 396) is **GRANTED**, and defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Docket Entry No. 384) is **DISMISSED**. A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on this the 16th day of May, 2022.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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