

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 27, 2017
Decided August 21, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

No. 16-4176

JERMEL POPE,
Petitioner-Appellant,

Appeal from the United States District
Court for the Central District of Illinois.

v.

No. 1:16-cv-1456-JBM

JANET PERDUE,
Respondent-Appellee.

Joe Billy McDade,
Judge.

ORDER

In 2009, Pope pleaded guilty to transporting a woman across state lines intending that she engage in prostitution, and the district court imposed a term of 100 months in prison. This court affirmed. 370 F. App'x 735 (2010). Pope's first collateral attack—a motion under 28 U.S.C. § 2255—was denied by the district court and Pope did not file a notice of appeal. No. 11 C 7227 (N.D. Ill. Nov. 1, 2012). In 2016 he asked this court's permission to file a second § 2255 motion but his request was denied because he just wanted to relitigate the claim he had brought in his first § 2255 motion. No. 16-3695 (Oct. 25, 2016).

At issue here is Pope's federal petition for a writ of habeas corpus, 28 U.S.C. § 2241, in which he claims the government relied on perjured testimony to obtain the indictment and that counsel either should have discovered that problem or knew about

the government's misconduct and did not act to remedy it. The district court denied Pope's petition because (1) Pope produced no evidence that a grand jury witness committed perjury, (2) the alleged perjury involved whether Pope knew the age of his victim, a fact that is irrelevant to the charge,¹ and (3) § 2255 is not inadequate to remedy this type of claim and, thus, Pope may not resort to § 2241 for relief. We agree with the district court's reasoning and would add that when a defendant pleads guilty he waives his complaints about errors in an indictment. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."); *United States v. Lockett*, 859 F.3d 425, 427 (7th Cir. 2017) ("In general, an unconditional plea of guilty operates as a waiver of all formal defects in the proceedings."); *United States v. Adigun*, 703 F.3d 1014, 1022 (7th Cir. 2012) ("An unconditional guilty plea is not ordinarily considered a forfeiture. It is a knowing, voluntary relinquishment of the defendant's right to go to trial and contest the factual basis of an indictment.").

The district court decision is **AFFIRMED**. Pope's motion to proceed in forma pauperis is **DENIED**.

¹ The age of Pope's victim—she was a minor—was not an element of the crime charged; it influenced his sentencing range. See 370 F. App'x at 736.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 20, 2017

WILLIAM J. BAUER, *Circuit Judge*

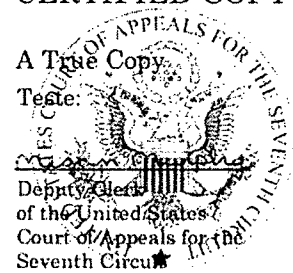
RICHARD A. POSNER, *Circuit Judge**

JOEL M. FLAUM, *Circuit Judge*

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A True Copy

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Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

No. 16-4176

JERMEL POPE,
Petitioner-Appellant,

Appeal from the United States District
Court for the Central District of Illinois.

v.

No. 1:16-cv-01456

JANET PERDUE, Residential Reentry
Manager,
Respondent-Appellee.

Joe Billy McDade,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the petitioner-appellant in the above case on September 5, 2017, no judge in active service has requested a vote thereon, and both judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

*Circuit Judge Posner retired on September 2, 2017, and did not participate in the decision of this case, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION**

JERMEL POPE,

Petitioner,

v.

JEFFREY E. KRUEGER, Warden of FCI)
PEKIN,)

Respondent.)

Case No. 16-cv-1456

ORDER

This matter is before the Court upon the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 (Doc. 1) filed by Jermel Pope (the “Petitioner”). Also before the Court is a Motion For Leave to Proceed In Forma Pauperis (Doc. 2) and a Motion for Discovery (Doc. 3). For the reasons stated below, the motions are DENIED and the petition is DISMISSED.

LEGAL STANDARDS

This Court, in its discretion, applies Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to cases such as these purporting to arise under 28 U.S.C. § 2241. *See* Rules Governing Section 2254 Cases in the United States District Courts, Rule 1(b).¹ Rule 4 requires the Court to “promptly examine” the Petition, and dismiss it if it “plainly appears . . . that the petitioner is not entitled

¹ *See also Poe v. United States*, 468 F.3d 473, 477 n.6 (7th Cir. 2006); *Hudson v. Helman*, 948 F. Supp. 810, 811 (C.D. Ill. 1996) (ruling Rule 4 takes precedence over 28 U.S.C. § 2243’s deadlines and gives court discretion to set deadlines).

to relief.” Pursuant to Rule 4 then, the Court will examine the Petition and determine whether it plainly appears the Petitioner is entitled to relief.

Federal prisoners like Petitioner who wish to collaterally attack their convictions or sentences ordinarily must generally do so under 28 U.S.C. § 2255. *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012). They may petition under 28 U.S.C. § 2241 only in the rare circumstance in which the remedy provided under § 2255 “is inadequate or ineffective to test the legality of his detention.” See 28 U.S.C. § 2255(e) (which is often referred to as “the Savings Clause”). The mere fact that Petitioner’s claim would be a second or successive § 2255 motion does not render § 2255 inadequate or ineffective. See *In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998).

BACKGROUND

In 2009, Petitioner pled guilty to the offense of knowingly transporting an individual in interstate commerce with the intent that such individual engage in prostitution, in violation of Title 18 U.S.C. § 2421. (Doc. 68 at 1, No. 1:08-cr-00334 (N.D. Ill.)). At his sentencing hearing, Petitioner was sentenced to a term of 100 months’ imprisonment, followed by three years’ supervised release. *Pope v. United States*, No. 11 C 7227, 2012 WL 5389807, at *1 (N.D. Ill. Nov. 1, 2012). Petitioner unsuccessfully directly appealed his sentence on grounds separate and distinct from the grounds presented in this case. *United States v. Pope*, 370 F. App’x. 735 (7th Cir. 2010). After his unsuccessful appeal, Petitioner unsuccessfully petitioned the United States Supreme Court for a Writ of Certiorari. See *Pope v. United States*, 562 U.S. 988 (2010). After being rejected for certiorari by the United States Supreme Court, Petitioner sought collateral relief before his sentencing court by filing a motion under

28 U.S.C. § 2255 on grounds that (1) that he was denied effective assistance of counsel; (2) that the sentencing court applied the wrong sentencing guidelines; (3) that his sentence was unreasonable and unsupported by 18 U.S.C. § 3553(a); and (4) the court improperly enhanced the sentence based on a miscalculation of criminal history points. *Pope v. United States*, No. 11 C 7227, 2012 WL 5389807, at *1 (N.D. Ill. Nov. 1, 2012). That § 2255 motion was also unsuccessful. Petitioner later filed a § 2241 petition in this judicial district in 2014 complaining that the Bureau of Prisons (“BOP”) was violating federal law by refusing to credit against his federal sentence time served in state custody prior to his current period of incarceration, or, alternatively, is failing to credit him time he actually spent in exclusive federal custody. *Pope v. Krueger*, No. 1:14-CV-01393-SLD, 2016 WL 3647834, at *1 (C.D. Ill. July 1, 2016). Petitioner was successful in securing a partial credit of thirty days against his sentence.

Now Petitioner has filed another § 2241 petition. This time he argues that his indictment for the offense of knowingly transporting an individual in interstate commerce with the intent that such individual engage in prostitution, in violation of Title 18 U.S.C. § 2421 was invalid because it was gained through the use of false testimony by the Government’s witness. He has not presented this claim to any court before. He claims his counsel before the sentencing court was constitutionally ineffective for failing to inform him that his indictment was obtained through false testimony presented to the Grand Jury. He claims the prosecution knew the witness perjured herself before the Grand Jury. Petitioner requests that this Court find in his favor; overturn his plea of guilty; find his indictment was obtained through the false

testimony that the Government knew was false at the time of its presentation; and vacate his conviction.

DISCUSSION

Petitioner is delusional. First, this § 2241 petition cannot be heard because it is a thinly-veiled § 2255 motion that clearly attacks Petitioner's conviction. Second, even if a witness lied to the grand jury and told the jurors Petitioner knew of his victim's age, such a lie would be immaterial because he pled guilty to an offense for which the age of the victim does not matter.

I. This Court Is Without Jurisdiction To Hear This Petition Because It Is An Unauthorized Successive Section 2255 Motion.

A "federal prisoner may [not] use a petition under § 2241 to call into question the validity of a conviction or sentence that has already been subject to collateral review." *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). Section 2255(e) of Title 28 of the United States Code provides in relevant part that a habeas petition shall not be entertained if it appears the court that sentenced the petitioner has already denied him the requested relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Thus, the initial question before the Court is whether a § 2255 motion would be "inadequate or ineffective to test the legality of [Petitioner's] detention." 28 U.S.C. § 2255(e). The mere fact that Petitioner's claim would be a second or successive § 2255 motion does not render § 2255 inadequate or ineffective. *See In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998). In his petition, Petitioner does not address why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge his conviction. Instead, he merely discusses 1) how the perjured testimony affected him

and that he never possessed a tape of his interview in which the Government's witness testified he acknowledged his victim's age and 2) that he did not know his due process rights were being violated. (Doc. 1 at 5 and 8). This explanation is woefully inadequate. Petitioner claims this "new" evidence shows he is actually innocent of the crime he pled guilty to and has prompted this petition, but § 2255(h) lays out procedures for a petitioner who claims new evidence shows he is actually innocent. Petitioner does not explain why he cannot utilize § 2255(h) and this Court cannot fathom any such explanation. Thus, Petitioner has failed put forth a colorable argument that 28 U.S.C. § 2255 is inadequate or ineffective to test the validity of his indictment and conviction and he cannot utilize a § 2241 petition to challenge his conviction and indictment.

Collateral relief attempts styled as § 2241 petitions but found to be unauthorized successive § 2255 motions are to be dismissed. *See Garza v. Lappin*, 253 F.3d 918, 922–23 (7th Cir. 2001). Therefore, Petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 (Doc. 1) is DISMISSED for lack of jurisdiction because it is an unauthorized successive claim that seeks to attack Petitioner's sentence. 28 U.S.C. § 2244(b)(1).

II. Petitioner's Ground For Challenging His Indictment is Without Merit.

Even if this Court has mistakenly construed the instant petition as an unauthorized successive § 2255 motion, it would still deny Petitioner's claim because it is based on a faulty premise. Petitioner claims an FBI agent falsely told the grand jury that indicted him that Petitioner admitted in an interview that he knew the person he was transporting to engage in prostitution was a minor. Even if that were

true, such a lie would have no effect on his indictment because he was indicted for knowingly transporting an individual in interstate commerce with the intent that such individual engage in prostitution, in violation of Title 18 U.S.C. § 2421. (Doc. 68 at 1, No. 1:08-cr-00334 (N.D. Ill.)). The age of the victim for that offense is not an element of the offense, which means it is not something that has to be presented or proven to the petit jury to secure a conviction or the grand jury to secure an indictment. See 18 U.S.C. § 2421.² “If other, sufficient evidence is present so that the grand jury may have indicted without giving any weight to the perjured testimony, the indictment cannot be challenged on the basis of the perjury.” *United States v. Udziela*, 671 F.2d 995, 1001 (7th Cir. 1982); see also *United States v. Vincent*, 416 F.3d 593, 602 (7th Cir. 2005) (citing *Bank of Nova Scotia*, 487 U.S. at 250, 254 (1988) for its holding that a district court may not invoke its supervisory power to dismiss an indictment because of non-constitutional errors in grand jury proceedings unless the errors prejudiced the defendants). Thus, this argument is absolutely baseless.

² See also Seventh Circuit Pattern Criminal Jury Instruction 18 U.S.C. § 2421 (2012 ed.)

(In order for you to find the defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt: 1. The defendant knowingly [transported] [attempted to transport] [the person identified in the indictment] in interstate commerce; and 2. At the time of [transportation] [the attempted transportation], the defendant intended that [the person identified in the indictment] would engage in [prostitution] [sexual activity for which [the defendant] [any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment]].)

III. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires the district court to “issue or deny a certificate or appealability when it enters a final order adverse to the applicant.” The Seventh Circuit has held that “dismissal of a claim on the ground that it is an unauthorized collateral attack constitutes a final order within the scope of 28 U.S.C. § 2253(c).” *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir. 2005). Therefore, this Court must determine whether a certificate of appealability should issue.

A petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *Sandoval v. United States*, 574 F.3d 847, 852 (7th Cir. 2009) (citing 28 U.S.C. § 2253(c)). Under this standard, a petitioner must demonstrate that “reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For cases in which a district court denies a habeas claim on procedural grounds, the habeas court should issue a certificate of appealability only if the petitioner shows that (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.* Consistent with the discussion above, the Court finds that no reasonable jurists would differ on the Court’s treatment of Petitioner’s instant petition. The Court’s dismissal of Petitioner’s unauthorized collateral attack is proper because it

lacks subject-matter jurisdiction to rule on it. Therefore, this Court declines to certify any issues for appeal pursuant to 28 U.S.C. § 2253(c)(2).

CONCLUSION

IT IS THEREFORE ORDERED that claims in Petitioner's Motion For Leave to Proceed In Forma Pauperis (Doc. 2) and a Motion for Discovery (Doc. 3) are DENIED. Petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 (Doc. 1) is DISMISSED WITH PREJUDICE for the reasons given above. The Court DECLINES to issue a certificate of appealability.

Entered this 5th day of December, 2016.

s/ Joe B. McDade

JOE BILLY McDADE
United States Senior District Judge