NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 26, 2023*
Decided May 30, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-2900

RANDALL COPE,
Petitioner-Appellant,

v.

ERIC WILLIAMS,
Respondent-Appellee.

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

No. 19-cv-403-SMY

Staci M. Yandle,
Judge.

O R D E R

Randall Cope, a federal prisoner, filed a petition for habeas corpus under 28 U.S.C. § 2241 to challenge the constitutionality of his incarceration for aiding and abetting the knowing use of a firearm during and in relation to a crime of violence. *See* 18 U.S.C. §§ 924(c)(1)(A)(iii), 2. The district court dismissed Cope's petition,

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

concluding that he could have raised his argument on direct appeal or in a motion under 28 U.S.C. § 2255, and therefore § 2241 was not available to him. We affirm.

While living in Kentucky, Cope conspired to kill his ex-fiancée to prevent her from testifying against him in a trial unrelated to the underlying criminal case here. Cope was incarcerated at the time, so he enlisted his brother to murder the ex-fiancée by shooting at her while she was in her car; the attempt failed. Both brothers faced federal charges for the conspiracy, and Cope was convicted of numerous offenses, including aiding and abetting his brother in knowingly using a firearm during and in relation to a crime of violence. *See* 18 U.S.C. §§ 924(c)(1)(A), 2, 1512(a)(1). Cope appealed the conviction and sentence, filed a motion to vacate his conviction under § 2255, and moved for leave to file a successive § 2255 motion; he was unsuccessful at all points. *See generally United States v. Cope*, 312 F.3d 757 (6th Cir. 2002) (direct appeal); *Cope v. United States*, 272 F. App'x 445 (6th Cir. 2008) (motion under § 2255); *In re Cope*, No. 16-5889 (6th Cir. Oct. 13, 2016) (successive motion under § 2255).

Cope next filed a § 2241 petition, the subject of this appeal, invoking the savings clause of § 2255(e) as authorization. Cope asserted that his § 924(c) conviction was unconstitutional under the Supreme Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014), which held that, to aid and abet a firearm offense in relation to a crime of violence, the defendant must "actively participate" in the crime of violence with advance knowledge that an accomplice will carry a firearm.[1] *See id.* at 67. Cope argued that, because he was not physically present at the scene of the crime, he was not an active participant nor could he have had knowledge that his brother would use a gun. The government moved to dismiss the petition. The district court granted the motion, concluding that, first, Cope did not meet the procedural requirements to bring a § 2241 petition, and second, Cope's claim failed on the merits because *Rosemond* did not require a defendant's physical presence for a conviction under § 924(c). Cope moved to reconsider the dismissal, but the district court denied his motion because Cope did not present anything new. Cope appeals.

We review the denial of relief under § 2241 de novo. *Camacho v. English*, 872 F.3d 811, 813 (7th Cir. 2017). Generally, a federal prisoner must use § 2255 to collaterally

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[1] Cope also asserted a claim under *United States v. Davis*, 139 S. Ct. 2319 (2019) (residual clause in § 924(c)(3)'s definition of "crime of violence" unconstitutional), but later conceded that *Davis* is a case of constitutional interpretation and so he could not bring the claim under § 2241 pursuant to the savings clause. *See Worman v. Entzel*, 953 F.3d 1004, 1008 (7th Cir. 2020). He does not discuss *Davis* on appeal.

attack his conviction and sentence, but he can seek relief under § 2241 if § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In this circuit, a prisoner can show that § 2255 is inadequate by satisfying a three-part test known by its namesake decision, *In re Davenport*, 147 F.3d 605 (7th Cir. 1998): (1) he must seek relief based on a decision of statutory interpretation; (2) the statutory rule must apply retroactively and have been unavailable to invoke in a prior § 2255 motion; and (3) a miscarriage of justice would result from a failure to grant habeas relief. *Id.* at 611–12; *Worman v. Entzel*, 953 F.3d 1004, 1008 (7th Cir. 2020). Cope gets halfway there because *Rosemond* is a decision of statutory interpretation and applies retroactively to cases on collateral review. *See Montana v. Cross*, 829 F.3d 775, 783 (7th Cir. 2016).

Cope falters, however, on the second part of step two, because he could have brought his *Rosemond* claim in a prior § 2255 motion. Although Cope contends that he had to wait until the Supreme Court decided *Rosemond*, the question is not whether he could have previously cited *Rosemond* to support his argument, but rather whether circuit law at the time of his petitions foreclosed the substance of his argument. *See id.* at 784–85 (*Rosemond* claim failed step two because law prior to *Rosemond* did not foreclose petitioner's argument). Nothing in Sixth Circuit law foreclosed an argument in Cope's previous petitions that he could not be liable for aiding and abetting the use of a firearm during a crime of violence because he was not physically present for the crime. Indeed, Cope made the physical-presence argument in his direct appeal, § 2255 motion, and motion for leave to file a successive § 2255 motion. That his argument was unsuccessful does not mean § 2255 was inadequate to address it. *See Davenport*, 147 F.3d at 609–10. And *Rosemond* does not compel a different conclusion than the Sixth Circuit reached.

To the extent that Cope also argues that his conviction is improper because he did not have advance knowledge that his brother would use a firearm, this contention was also available to him before *Rosemond* was decided. At the time of his appeal and his § 2255 submissions, the Sixth Circuit required for a conviction under § 924(c) the defendant's advance knowledge that his accomplice would have a firearm. *See United States v. Morrow*, 977 F.2d 222, 231 (6th Cir. 1992). The court in *Morrow* stated that "mere presence and knowledge" of the gun would be insufficient to find a defendant guilty of aiding and abetting a § 924(c) violation. *Id.* But the court determined that criminal liability was appropriate because the evidence showed the defendant knew of the gun before committing the crime and took steps suggesting he intended its use. *Id.* Drawing on *Morrow*, Cope could have argued in his direct appeal and his first § 2255 motion that he was not guilty because he lacked prior knowledge that his brother would use a gun in the attempted murder; he had a reasonable opportunity to obtain earlier judicial correction of this asserted defect.

And even if Cope could show that § 2255 was inadequate, his argument would fail at the last step of the *Davenport* test, which requires him to demonstrate that there would be a miscarriage of justice if his § 2241 petition were disallowed. He could not make that showing because his arguments about the effect of *Rosemond* lack merit. *Rosemond* focused on the requisite mens rea for a person convicted of aiding and abetting the use of a firearm during a crime of violence. The Court concluded that a defendant must know in advance—when he could still "walk away" from the crime—that a confederate would carry a gun. *Rosemond*, 572 U.S. at 78. Cope equates this with a requirement that the aider-abettor be physically present and states that he lacked a chance to "walk away" because he was not present. But *Rosemond* does not say that physical presence is needed to establish either prior knowledge or the ability to withdraw from the crime. Cope provides no other support that he did not have advance knowledge about the firearm. (Regardless, the evidence showed that Cope knew his brother would use a firearm based on his conversations before and after the shooting. *See Cope*, 312 F.3d at 767.)

We finally turn to Cope's alternative argument that the predicate crime for his § 924(c) conviction—aiding and abetting the attempted murder of a witness—is not a "crime of violence" under the statute. Cope bases his argument on *United States v. Taylor*, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery is not a crime of violence under § 924(c) because "no *element* of attempted Hobbs Act robbery requires the government to prove beyond a reasonable doubt that the defendant used, attempted to use, or even threatened to use force." *See id.* at 2022. Cope argues that, likewise, his aiding and abetting offense does not have the requisite element of violence. He brings this argument for the first time on appeal because *Taylor* was not decided until after the district court's ruling. Although it is a legal question, we are not inclined to address it without full briefing and outside the normal channels, whether that be an amended or new petition. We make clear, however, that we are not addressing whether (as the government briefly argued) the claim is waived or defaulted because of a failure to raise it earlier in this proceeding. Furthermore, in seeking affirmance, the government represents that it does not view the filing of the current petition as an obstacle to raising a *Taylor* claim in a later petition, whatever other obstacles might exist. We accept that representation and trust that other courts will, too.

AFFIRMED