

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ROBERT LOUIS KING,)	
)	
Petitioner,)	
)	
v.)	4:14-cv-8034-LSC
)	(4:11-cr-00020-LSC-RRA-1)
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MEMORANDUM OF OPINION

I. Introduction

On June 16, 2014, Robert Louis King (“ Petitioner”) filed a motion to vacate his sentence under 28 U.S.C. § 2255. (Doc. 1.) Petitioner challenges his 135-month sentence of imprisonment for a 2011 felon in possession of a firearm conviction. Since it appeared that his claim was time barred, this Court issued Petitioner an order to show cause why his petition should not be summarily dismissed for his failure to bring the action within the applicable limitations period. Petitioner responded with additional information on August 27, 2014. (Doc. 3.) Pursuant to § 2255(b) and Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts, this Court has conducted a review of Petitioner’s filings and determines that the § 2255 motion is due to be denied.

II. Background

Petitioner was charged by indictment on February 2, 2011, with one count of unlawfully possessing a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). Pursuant to a written agreement, Petitioner entered a guilty plea on March 22, 2011. As part of the plea agreement, Petitioner waived his rights to appeal his conviction and sentence and to seek post-conviction collateral relief to challenge his sentence. He did, however, reserve the right to contest “ [a]ny sentence imposed in excess of the applicable statutory maximum” and “ [a]ny sentence that constitutes an upward departure from the advisory guideline sentencing range calculated by the court at the time the sentence is imposed.”

Petitioner came before this Court for sentencing on June 15, 2011, at which time he, through his attorney, made several objections to his pre-sentence report and guideline calculation. Specifically, Petitioner objected to the determination that he was an Armed Career Criminal and thus subject to an enhanced sentence. According to the pre-sentence report, Petitioner’s previous convictions required the application of 18 U.S.C. § 924(e) to his sentence. That statute mandates a 180-month minimum sentence for individuals who violate 18 U.S.C. § 922(g) and have three prior convictions for any combination of “ serious drug offenses” or “ violent felonies.”

While Petitioner's guideline range of imprisonment based on a total offense level of 30 and a criminal history category of VI would otherwise have been 168 months to 210 months, because Petitioner's statutorily-required sentence under 18 U.S.C. § 924(e) was greater than the minimum of the applicable guideline range, the guideline sentence in his proceeding became 180 months to 210 months. *See* U.S.S.G. § 5G1.1(c)(2).

Petitioner's argument at sentencing was that his "enhancement qualifying convictions" were insufficient. He asserted that he had pled guilty to a general drug crime which included in its codification possible methods of violating the statute that would not meet the definition of "serious drug offenses." After considering his arguments as well as certified copies of the indictments to which he actually pled (the sale of marijuana), this Court overruled his objections and found him subject to the Armed Career Criminal Enhancement.

This Court nonetheless granted the government's motion for a downward departure from the mandatory minimum 180-month sentence based upon substantial assistance provided by Petitioner to the government and sentenced him to imprisonment for a term of 135 months, with an additional 60 months of supervised release. As such, the sentence ultimately imposed by this Court fell below the advisory

guideline range.

Judgment was entered on June 15, 2011 and Petitioner filed a pro se notice of appeal on June 17, 2011 along with a request for the appointment of new counsel. Ultimately new counsel was appointed for Petitioner but that counsel, after reviewing the matter, moved for the dismissal of the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Eleventh Circuit granted the motion to withdraw the appeal and upheld Petitioner's conviction and sentence in a judgment entered on May 23, 2012. The mandate was issued on June 27, 2012. He did not petition the United States Supreme Court for the issuance of a writ of certiorari.

Petitioner now asserts that he is entitled to post-conviction relief because two of his prior state convictions for distribution of a controlled substance are not "serious drug offenses" within the meaning of 18 U.S.C. § 924(e)(2)(A), which would render § 924(e) inapplicable to his sentence.

III. Discussion

Initially, this Court should consider whether Petitioner's motion is timely as there is a one-year statute of limitations applicable to his claims under 28 U.S.C. § 2255. That statute states, in pertinent part:

A 1-year period of limitation shall apply to a motion under this section. The limitations 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).

Petitioner filed his motion well over one year after the date on which the judgment of his conviction became final. *See* 28 U.S.C. § 2255(f)(1). Because he neither petitioned the Eleventh Circuit for a rehearing nor petitioned the Supreme Court for relief, the one-year statute of limitations period began to run 90 days after the Eleventh Circuit entered its judgment, when the time period to petition the Supreme Court for certiorari expired. *See Clay v. United States*, 537 U.S. 522, 525 (2003). This motion was not filed until June 16, 2014, clearly exceeding the statutory

limitations period of one year.

Nonetheless, Petitioner maintains that his request for relief is timely under 28 U.S.C. § 2255(f)(3) because it was filed within one year of the Supreme Court's ruling in *Descamps v. United States*, 133 S. Ct. 2276 (June 20, 2013). Section 2255(f)(3) alternatively provides that the limitations period begins to run from "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." Petitioner contends that the *Descamps* ruling allows for his predicate convictions under 18 U.S.C. § 924(e) to be analyzed using the "modified categorical approach," which he argues would demonstrate that his two state convictions for distribution of a controlled substance do not qualify as "serious drug offenses" for the purpose of enhancing his federal sentence. This argument also fails.

First, *Descamps* was decided in the context of a direct appeal, and the Supreme Court has not declared its decision in *Descamps* to be retroactively applicable on collateral review, either within the opinion itself or in a later ruling. *See Wilson v. Warden, FCC Coleman*, ___ F. App'x ___, 2014 WL 4345685, at *3 (11th Cir. Sept. 3, 2014). Moreover, the Supreme Court adopted the categorical approach to reviewing prior convictions as far back as 1990, *see Descamps*, 133 S. Ct. at 2283 (citing *Taylor v.*

United States, 495 U.S. 575, 600 (1990)), and the modified categorical approach developed by *Taylor* and related decisions was acknowledged in 2009. *See Descamps*, 133 S. Ct. at 2284-85 (citing *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). The Eleventh Circuit has stated that the *Descamps* ruling merely “clarif[ies] the proper analytical approach for determining whether a defendant’s sentence should be enhanced.” *United States v. Ramirez-Flores*, 743 F.3d 816, 820 (11th Cir. 2014).

Thus, because the *Descamps* ruling neither recognizes a new right nor applies retroactively on collateral review, Petitioner’s motion to vacate his sentence is not timely under 28 U.S.C. § 2255(f)(3).

Even assuming that Petitioner’s motion is timely, his argument necessarily fails on the merits. The appropriate inquiry is whether Petitioner’s convictions each meet the definition of a “serious drug offense” at § 924(e)(2)(A)(ii). *Id.* A “serious drug offense” includes “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 U.S.C. § 802]), for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). Specifically, Petitioner challenges the use of his 1988 drug convictions at sentencing to enhance his sentence. The transcript of his sentencing hearing reflects that Petitioner made

substantially the same argument at his sentencing hearing, to-wit: that his convictions were under an early version of the Uniform Alabama Controlled Substance Act. He maintained that since the early statute included alternative charges, such as simple possession, sale, and distribution, the convictions cannot meet the elemental test required for the enhancement. This is basically the same test described in *Descamps*, albeit dealing with violent felonies in that case. However, as this Court explained when ruling on the objections at the sentencing hearing, Petitioner pled guilty to Counts One and Four of the indictment that was pending in his state case in 1988. Those counts charged that on two separate occasions, Petitioner unlawfully sold, furnished, or gave away marijuana, in violation of Ala. Code § 20-2-70. Obviously, selling, furnishing and giving away are all forms of distributing. Furthermore, marijuana qualifies as a controlled substance under the federal Controlled Substances Act. *See* 21 U.S.C. § 812(c). And finally, the maximum penalty for violation of Ala. Code § 20-2-70 was at that time 15 years. *See* Ala. Code § 20-2-70 (1984). Because Petitioner's convictions satisfy the statutory definition of a "serious drug offense," they were properly considered as such for purposes of enhancing his federal sentence under 18 U.S.C. § 924(e).¹

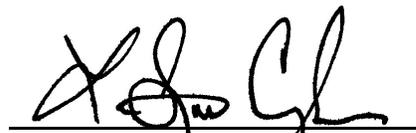
¹ Finally, the Court notes that Petitioner's § 2255 motion is also precluded by his plea agreement, in which he agreed that he would not collaterally attack his sentence except

IV. Conclusion

For the foregoing reasons, Petitioner's § 2255 motion to vacate his sentence is due to be denied and this case dismissed with prejudice. A separate order will be entered consistent with this opinion.

This Court may issue a certificate of appealability " only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a " petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that " the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). This Court finds Petitioner's claims do not satisfy either standard.

Done this 24th day of October 2014.



L. Scott Coogler
United States District Judge
[160704]

based on certain grounds not present in his motion. *See Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (affirming district court's denial of collateral relief on grounds that petitioner's § 2255 claims were precluded by his sentence appeal waiver in his plea agreement).