

Doward v. USA

CV-01-52-B

04/04/01

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

John R. Doward

v.

Civil No. 01-52-B

Opinion No. 2001DNH071

United States of America

O R D E R

John Doward seeks relief pursuant to 28 U.S.C. § 2255. He argues that the court improperly enhanced his statutory maximum sentence pursuant to 18 U.S.C. § 924(e). His claims depend upon the Supreme Court's decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

I assume without deciding that: (1) Doward's claims are not barred by the statute of limitations that governs § 2255 motions because he filed his motion within one year of "the date on which the right asserted was initially recognized by the Supreme Court . . . and made retroactively applicable to cases on collateral review," 28 U.S.C. § 2255; and (2) Doward can establish "cause and prejudice" that excuses his failure to raise his claims on direct appeal. See Sustache-Rivera v. United States, 221 F.3d 8,

17-18 (1st Cir. 2000), cert. denied, 2001 WL 261805 (Mar. 19, 2001). Nevertheless, I reject Doward's claims because they are defective on their merits.

The Supreme Court held in Apprendi that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63 (emphasis added). The Court did not overrule its prior decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which held that, where provided by statute, a judge may enhance a defendant's sentence based upon prior convictions which have not been presented to a jury and proved to the jury's satisfaction beyond a reasonable doubt. See id. at 239-48; see also Apprendi, 120 S.Ct. at 2362 (declining to revisit the validity of Almendarez-Torres). Therefore, as both the Tenth and the Eleventh Circuit Courts of Appeal have recognized, an enhancement of a statutory maximum sentence based on 18 U.S.C. § 924(e) that results from prior convictions is governed by Almendarez-Torres rather than Apprendi. See United States v. Thomas, No. 99-12367, 2001 WL 178506, *5 (11th Cir. Feb. 23, 2001); United States v. Dorris, 236 F.3d 582, 587-88

(10th Cir. 2000).

I enhanced Doward's sentence pursuant to 18 U.S.C. § 924(e) based upon several prior convictions. Under prevailing Supreme Court precedent, the applicability of this enhancement is a matter for the judge rather than the jury. Petition dismissed.

SO ORDERED.

Paul Barbadoro
Chief Judge

April 4, 2001

cc: John R. Doward, pro se
Peter E. Papps, Esq.