

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH POPHAL,

Defendant.

OPINION AND ORDER

12-cv-653-bbc
04-cr-140-bbc

Defendant Keith Pophal entered a guilty plea to charges of unlawful possession of firearms as a felon. He had at least three qualifying convictions for either a serious drug offense or a crime of violence, so his sentence was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e). He was sentenced to a prison term of 180 months.

Defendant has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied his constitutional right to effective assistance of counsel at his sentencing in 2005. Among other things, defendant argues that he was not eligible for an increased sentence under the Armed Career Criminal Act, but that his defense attorney failed to object to one of the predicate convictions that was used to enhance his sentence.

The first question is whether defendant's motion is timely. Defendant was sentenced on January 31, 2005. He challenged the validity of his sentence on direct appeal. The Court of Appeals for the Seventh Circuit affirmed the sentence on February 13, 2006. He petitioned for a writ of certiorari, which the Supreme Court denied on June 19, 2006. Defendant filed this motion for post conviction review on September 9, 2012.

Generally, a defendant has one year from "the date on which his judgment of conviction became final" to bring a post conviction motion. 28 U.S.C. § 2255(f)(1). A direct appeal is "final" when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." Gildon v. Bowen, 384 F.3d 883, 885 (7th Cir. 2004) (citing Clay v. United States, 537 U.S. 522, 527 (2003)). Thus, defendant had one year from June 19, 2006 in which to file a § 2255 motion. His pending motion, dated September 5, 2012, is well outside the time limit found in § 2255(f)(1).

Defendant argues that his motion is timely because he did not learn until November of 2011 that the defense attorney in one of the state cases used to enhance his sentence had failed to take an appeal on defendant's behalf. Thus, he says, his motion is timely under 28 U.S.C. § 2255(f)(4) because he filed it within one year of learning the facts in support of his claim.

The one-year statute of limitations found in § 2255(f)(4) runs from "the date on

which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” The record shows that defendant served one year in jail as the result of his 2000 conviction for substantial battery in Case No. 99CF213. Defendant had ample opportunity to inquire about the status of his appeal after that conviction was entered and could have learned the facts underlying his claim well before he was sentenced in 2005. Under these circumstances, § 2255(f)(4) will not save his untimely motion. Johnson v. United States, 544 U.S. 295, 310-11 (2005) (explaining that, for § 2255(f)(4) to apply, defendants are obliged to act diligently to obtain a state court order vacating a predicate conviction); Purvis v. United States, 662 F.3d 939, 942-43 (7th Cir. 2011) (addressing the timeliness of career offender claims under § 2255).

Defendant does not allege facts showing that any other exception to the one year filing rule applies. Defendant does not allege that government action prevented him from filing his motion in a timely manner, 28 U.S.C. § 2255(f)(2), or that his claim is based on a right that was newly recognized by the court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f)(3). Accordingly, I will dismiss defendant’s motion as untimely filed.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. Such a certificate shall issue “only if the applicant has made a substantial showing of the

denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A defendant makes a “substantial showing where reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Arredondo v. Huibregtse, 542 F.3d 1155, 1165 (7th Cir. 2008). Where denial of relief is based on procedural grounds, the defendant also must show that jurists of reason “would find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Defendant has not made a substantial showing of a denial of a constitutional right and so, because jurists of reason would not debate whether any procedural ruling was correct in this case, no certificate will issue.

ORDER

IT IS ORDERED that defendant Keith Pophal’s motion for post-conviction relief

under 28 U.S.C. § 2255 is DISMISSED as untimely. A certificate of appealability will not issue.

Entered this 3d day of October, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge