IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICK W. BARRETT,

Defendant.

ORDER

04-C-0855-C
02-CR-0101-C-01

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Defendant Patrick W. Barrett is seeking postconviction relief pursuant to 28 U.S.C. § 2255 for what he alleges is his counsel's failure to file an appeal on his behalf. The government opposes the motion on the ground that it is untimely under the statute. I agree.

When defendant first filed his motion for relief on November 12, 2004, I advised him that it was untimely unless he could show that he could not have discovered his counsel's failure to file the appeal earlier than November 12, 2003. Defendant's sentence was imposed on February 7, 2003; his time for filing under § 2255 would have expired on approximately February 18, 2004, unless he could not have discovered through the exercise of due diligence the facts supporting his claim in time for him to file his motion by

November 12, 2003. § 2255. Defendant believes that he could not have discovered his trial counsel's failure to file an appeal any earlier than July or August 2004 and that he could not have filed his motion any earlier than November 12, 2004.

In an affidavit filed with the court, defendant averred that his court-appointed counsel assured defendant that he would file an appeal on his behalf; shortly thereafter, defendant was transferred to the United States Penitentiary in Leavenworth, Kansas; in March or April 2003, he spoke with counsel, who left him "under the impression that [he] had an appeal pending in the court, and that [counsel] would send [him] documentation but he never received such documentation; between April and October 2003, he made four other attempts to contact his trial counsel but was unsuccessful, although another person in the office "acted confident regarding [defendant's] belief that [counsel] had filed an appeal" on his behalf; in October, he reached his trial counsel, who concluded the conversation leaving defendant "under the impression" that he had an appeal pending and that documentation would be forthcoming; defendant's mother told him in October 2003 that she had called counsel's office and someone in the office "had assured her that everything had been taken care of with respect to [the] appeal"; defendant wrote trial counsel in January 2004, asking for the records of the case and never received any response; and it was not until "around July or August, 2004" that he learned for the first time from his mother than no appeal had been taken. Defendant avers that his mother learned this by checking with the clerk of court.

It is not always easy for laypeople to learn the status of their court proceedings, but this does not mean that they are excused from doing so. Section 2255 makes it explicit that in instances of newly discovered evidence, the one-year limitations starts to run whenever the movant could have discovered the facts relevant to his claim "through the exercise of due diligence." "Due diligence" does not mean whenever the movant happened to find out; rather, it requires a showing that the movant has been in active pursuit of the information he needs. This is not a situation in which a defendant needs DNA testing or the discovery of the real perpetrator of the crime in order to press his claim. The lack of any appeal from his conviction was evident on this court's docket, which is a public record. Montenegro v. United States, 248 F.3d 585, 593 (7th Cir. 2001) ("'reasonable diligence would have unearthed'" public record) (quoting Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2000)).

Defendant's four unsuccessful efforts to reach his counsel between April and October 2003 do not show due diligence. According to his own averments, counsel had "left [him] under the impression" in March or April 2003 that documentation of the appeal would be sent to defendant. When that documentation did not arrive, defendant should have been alerted to the possibility of a problem. At that point, he should have started checking with the court to see whether he was correct about his "impression" that an appeal had been filed. Certainly, when defendant did not receive the allegedly promised documentation shortly after he finally reached counsel by telephone in October 2003, he should have realized that

he needed to take additional steps to investigate the status of his appeal.

Defendant does not argue that his counsel told him in so many words that the appeal had been filed. As the government has pointed out, nowhere in his affidavit does defendant say that his counsel told him explicitly that he had filed an appeal on defendant's behalf. Instead, he uses other terms, such as "left me under the impression" or "sounded confident" that the matter had been taken care of.

In additional support of his claim that he could not have learned earlier that his appeal had never been filed, the defendant has submitted another affidavit in which he sets out the chronology of his transfer to Leavenworth and avers that he was subject to a one-month lock down from May 18, 2003 to June 18, 2003, placed in administrative segregation for protective custody in November 18, 2003, and limited in his ability to do legal research or make telephone calls while in segregation and that he failed to realize the importance of the issue until June 2004, when he became aware of the decision in Blakely v. Washington. Defendant avers also that during the entire time that he was awaiting trial and during the trial, he was under the influence of multiple psychotropic drugs that influenced his memory and ability to file case documents, and that he has been declared mentally disabled by an administrative law judge.

I cannot find from the averments of either of defendant's affidavits that he exercised due diligence in determining whether his trial counsel had filed an appeal on his behalf. His

averments about the difficulty of making telephone calls from administrative segregation do not account for the five months from June 18, 2003 to November 18, 2003, when he was neither in transit nor in lockdown status and could have taken more steps to learn the status of his appeal. His statements about his mental problems do not suggest any reason why he could not have been pursuing the question of his appeal with more vigor than he did. From his admission that he made *some* calls during this time, I can infer that he remembered the issue, despite the medications that allegedly affected his memory. His preparation of the documents he has submitted in support of his motion shows that he understands the nature of his claim.

Therefore, I conclude that defendant's motion for postconviction relief must be denied without an evidentiary hearing for his failure to file it within the one-year time period allowed under § 2255.

ORDER

IT IS ORDERED that defendant Patrick W. Barrett's motion for postconviction relief

is DENIED as untimely.

Entered this 26th day of April, 2005.

BY THE COURT:
/s/
Barbara B. Crabb
District Judge