

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.  
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ORDER

04-C-0855-C

02-CR-0101-C-01

Defendant Patrick W. Barrett has filed a motion for post-conviction relief, pursuant to 28 U.S.C. § 2255, contending that his court-appointed counsel failed to file an appeal of his sentence although defendant had asked him to do so following his sentencing on February 7, 2003. Defendant's motion is untimely unless he can show that he could not have discovered his counsel's failure earlier than November 12, 2003, one year before he filed this motion. On this point defendant says only that counsel had indicated he was filing an appeal, "but my contact with the District Court after almost a year in waiting and no contacts by Counsel, exposed that my Court Appointed Counsel did [n]ot file Notice for Appeal, and it was never waved at Plea." Plt.'s § 2255 Mot., dkt. #25, at 3.

It is defendant's job to show that he could not have filed his motion any sooner, even with the exercise of due diligence. Monetnegro v. United States, 248 F.3d 585, 590-93 (7th Cir. 2001). I cannot tell from defendant's statement what steps he took to find out the status of his appeal, such as inquiring of the court whether an appeal had been filed, or whether he was impeded from finding out the status of the appeal. Defendant will have to provide more information on this point.

Defendant seems to suggest that the claim he would have raised on appeal is the court's sentencing him on facts not found by a jury beyond a reasonable doubt. If defendant was denied the right to take an appeal and he can show that he could not have discovered the denial of this right any sooner than he did, he will have the right to take an appeal of any errors he thinks were made in connection with his sentencing. He should know, however, that he cannot succeed on the claim that he was sentenced on facts not found by the jury. This is because defendant was sentenced as a career offender and not on the basis of any facts about his offense that had not been determined by a jury. The Court of Appeals for the Seventh Circuit has held that the sentencing court does not violate Blakely v. Washington, 124 S. Ct. 2531 (2004), Apprendi v. New Jersey, 530 U.S. 466 (2000), or United States v. Booker, 375 F.3d 508 (7th Cir. 2004), when it determines that a defendant is a career offender under the Sentencing Guidelines. United States v. Pittman, 2004 WL 2567901 (7th Cir. Nov. 12, 2004). The facts that a court uses to determine career offender

status are not the sort of facts that a jury must determine but facts that have been determined in previous judicial proceedings.

ORDER

IT IS ORDERED that defendant Patrick W. Barrett may have until December 10, 2004, in which to submit an affidavit setting forth the specific facts about what he said to his trial lawyer about appealing his conviction and the efforts he made to learn the status of his appeal from his conviction and to explain in detail why he could not have learned earlier than November 12, 2003 that his trial lawyer never filed an appeal on his behalf. If he does not file the affidavit by that date, his motion for post-conviction relief under § 2255 will be denied.

Entered this 29th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge