

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER TURNER,

Defendant.

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OPINION AND
ORDER

00-C-0478-C
94-CR-0090-C-01

Defendant Roger Turner has filed a motion for vacation or modification of his sentence pursuant to 28 U.S.C. § 2255, contending that he was sentenced unconstitutionally because the court used his possession of an unloaded handgun to enhance his sentence by two levels and because the court erred in determining the amount of methamphetamine to be used for sentencing purposes.

Unfortunately for defendant, neither of his contentions can be considered because his motion is untimely. Defendant was sentenced on July 18, 1995; he appealed his sentence and conviction; and his appeal was denied in June 1996. A one-year limitations period applies to § 2255 motions. See 28 U.S.C. § 2255. The period runs from the latest of the following dates:

the date on which the judgment of conviction became final; the date of removal of any impediment in making a motion created by unconstitutional or illegal government action; the date on which the right asserted was recognized initially by the Supreme Court, if the right has been made retroactively applicable to cases on collateral review; or the date on which the facts supporting the claims could have been discovered through the exercise of due diligence. Defendant's judgment of conviction became final with the issuance of the mandate denying his appeal in September 1996. (He did not petition for a writ of certiorari.) Therefore, his time for filing a motion for post-conviction relief expired in September 1997 unless he fits within one of the special circumstances in which the time for filing is extended. However, defendant has not alleged that the government has taken any action to impede his right to move for collateral relief or that the facts supporting his claim could not have been discovered before now. Defendant seems to be resting his claims on the recent decision by the United States Supreme Court in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), but even if it could be determined from that case that the Court recognized a right not to have a sentence enhanced by matters that have not been the subject of a jury determination, such as defendant's possession of a handgun or the amount of methamphetamine attributable to him, it would not help defendant because the Court did not make the ruling retroactive to cases seeking collateral relief. Therefore, I conclude that defendant had only until September 1997 in which to file a § 2255

motion.

ORDER

IT IS ORDERED that defendant Roger Turner's motion for post-conviction relief, brought pursuant to 28 U.S.C. § 2255, is DENIED for defendant's failure to file the motion within the one-year limitations period set by the statute.

Entered this 10th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge

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