

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT FLEMISTER,

Defendant.

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ORDER

03-C-0349-C

99-CR-0106-C-1

Defendant Robert Flemister has filed a motion for vacation or modification of his sentence pursuant to 28 U.S.C. § 2255. He contends that he was convicted and sentenced unconstitutionally because the trial court failed to grant his motion for severance, the court's jury instructions were defective because they failed to require the jury to identify the quantity of drugs attributable to defendant and his role in the alleged conspiracy and his sentence was enhanced improperly when the court found that he had used a person under the age of eighteen to avoid detection and apprehension. Defendant alleges also that his trial counsel was ineffective.

Defendant's motion fails at the outset because it is untimely. Defendant was sentenced on August 31, 2000; his conviction and sentence were affirmed on October 11,

2001. He did not petition for a writ of certiorari from the United States Supreme Court. Pursuant to § 2255, he had one year from the date on which his conviction “became final” in which to file a motion to vacate or modify his sentence. Under case law, a conviction does not become final until all opportunities for appeal have expired. In defendant’s case, that would have included the time for his appeal to be resolved plus the period of time (69 days) during which he could have filed a petition for a writ of certiorari in the United States Supreme Court. United States v. Clay, 123 S.Ct. 1072 (2003). His conviction would have become final about December 20, 2001, giving him until December 20, 2002, in which to file a motion pursuant to § 2255. He filed this motion on June 30, 2003, long past the deadline for filing, but he argues that he should be excused from the deadline because he was kept in a special housing unit during the last half of 2002 and the early part of 2003 and immediately thereafter was in transit to FCI-Florence.

Defendant’s housing assignment does not constitute the “extraordinary circumstances” that would relieve him of the requirement to file his motion within one year of the date on which his conviction became final. United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (death of counsel’s father just weeks before filing deadline was not extraordinary circumstance that permitted extension of limitations deadline). Defendant does not allege that he was denied access to all legal materials during his time in special housing or that he did not have an opportunity in early 2002 to prepare his motion, before

he was placed into the special housing unit. The absence of such allegations (and evidence to back them up) is fatal to his argument that he should not be held to the filing deadline. Defendant does not contend that the government imposed any other kind of impediment to his filing of a motion or that the right he is asserting was not recognized until after he had filed his appeal *and* that it has been made retroactively applicable to cases on collateral review or that the facts on which he bases his claims could not have been discovered earlier through the exercise of due diligence. § 2255.

Even if defendant had not missed the deadline for filing, he could not prevail on his motion because he has shown no reason why he could not have raised on direct appeal the same issues he is trying to raise in this motion or any prejudice he would incur if these issues are not decided. A defendant cannot raise an issue on collateral review that he could have raised on direct appeal unless he can show both cause for his failure to raise it earlier and actual prejudice resulting from the denial of an opportunity to be heard. Mankarious v. United States, 282 F.3d 940, 943 (7th Cir. 2002) (citing Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996)). And even if he could surmount this hurdle, he would lose because the issues he wants to raise have no merit. Adequate grounds existed for denying his motion for severance; he was not prejudiced by the court's failure to ask the jury to determine the quantity of drugs attributable to him because he was sentenced as if he had been responsible for the minimal amount of drug quantity; and there was sufficient evidence

to support his sentencing enhancement for use of a person under the age of eighteen to avoid detection and apprehension. Furthermore, any claim he might have to ineffective assistance of counsel at trial (and in my view, he has none) was resolved against him on appeal, when he was represented by new counsel appointed specifically for the appeal.

ORDER

IT IS ORDERED that defendant Robert Flemister's motion for post-conviction relief, brought pursuant to 28 U.S.C. § 2255, is DENIED as untimely.

Entered this 9th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge