

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK ERVAN,

Defendant.

ORDER

99-CR-0106-03
04-C-0240-C

Defendant Jack Ervan has filed a motion pursuant to 28 U.S.C. § 2255, contending that his court appointed counsel was constitutionally ineffective. It is not necessary to determine whether defendant has any basis for his contention because he has waited too long to file the motion. Defendant was sentenced on August 31, 2000. He appealed from his conviction and sentence without success. The court of appeals affirmed both in an opinion entered on November 6, 2001. Defendant did not petition for a writ of certiorari. Under § 2255, he had one year from the date on which “the judgment of conviction [became] final” in which to bring a post conviction motion. The conviction would have become final 90 days after November 6, 2001, or February 4, 2002. Clay v. United States, 537 U.S. 529-30 (2003) (one-year statute of limitations does not begin to run until 90 days after time for

filing petition for writ of certiorari has expired, even if defendant does not file such petition).

Defendant argues that he should be granted an extension of time in which to file his post-conviction motion because he has been held in administrative segregation since February 2002. As I have explained to defendant on three occasions, his segregation status and frequent transfers to new institutions are not the kind of extraordinary conditions that would warrant equitable tolling of the one-year statute of limitations. Moreover, it is clear from his motion for post conviction relief that these conditions did not prevent defendant from filing during the fifteen months from the date of the court of appeals' decision denying his direct appeal. In fact, it appears that defendant did not enter administrative segregation until after his filing time had expired on February 4, 2002. Any impediments after that date are irrelevant.

At page 14 of his post conviction motion, defendant asserts that denial of an extension of the filing date would deprive him "of the one year during which, under the AEDPA, he was entitled to rest on his claim." Defendant misapprehends the requirements of the AEDPA. The one-year filing period is the period within which a defendant must file his post conviction motion or be barred forever from filing (unless he were to come within one of the narrow exceptions to the statute of limitations). It is not a period in which he is "entitled to rest on his claim."

At some future time, the Court of Appeals for the Seventh Circuit may find that a prisoner has made out a claim of extraordinary circumstances that would warrant an extension of the time for filing a post conviction motion. It has held out that possibility in United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000), although it held in that case the defendant had not made a showing of such circumstances despite his allegations that he never heard from his trial counsel, was unable to understand the docket sheet his lawyer sent him because of a language barrier, his lawyer never consulted him about appealing, he had limited education and lacked knowledge about the United States legal system and was in continuous transit status. Certainly, the court of appeals would not find such circumstances present in a case in which the defendant was unable to show any impediments to filing before the time for filing had expired.

ORDER

IT IS ORDERED that defendant Jack Ervan's motion for post conviction relief, filed

pursuant to 28 U.S.C. § 2255, is DENIED as untimely.

Entered this 28th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge