

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

FLORENTINO CASTILLO,

Defendant.

MEMORANDUM

05-cr-39-bbc

Defendant Florentino Castillo wants to bring a motion for postconviction relief under 28 U.S.C. § 2255, but he claims that he has been unable to secure copies of the legal materials that he prepared before he was transferred to federal prison. Defendant has advised the court that he worked on the materials from the time he learned of the denial of his direct appeal in 2008 and that when he was to be transferred to federal prisoner, he sent copies of the materials and his work to his attorney, because he was told that his papers could not travel with him to the federal prison to which he was designated. He arrived at U.S.P. Hazelton in September 2009 and immediately asked his attorney to mail the legal materials to him. The attorney did so, but the prison lost all of the materials after they arrived, as attested to by defendant's unit counselor at Hazelton. Defendant says that his

attorney assured him that he had copies of all of defendant's materials but he has failed to send them despite numerous requests from defendant.

It is unlikely that defendant can show that he is entitled to relief from the one-year statute of limitations under § 2255(f)(2), which delays the start of the running of the statute until "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." It would be difficult for defendant to prove that the prison's mishandling of his legal materials was anything more than an unfortunate act of negligence. However, defendant may be able to show that he was pursuing his rights diligently and that exceptional circumstances prevented him filing a timely motion. Nolan v. United States, 358 F.3d 480, 483, 484 (7th Cir. 2004) (courts have power to grant equitable tolling of statute of limitations for § 2255 motion, but "remedy is reserved for '[e]xtraordinary circumstances far beyond the litigant's control [that] . . . prevented timely filing"); see also Holland v. Florida, 130 S. Ct. 2549, 2564-65 (2010) (holding that garden variety claim of excusable neglect does not warrant equitable tolling of statute of limitations applicable to § 2254 motion, but that litigant need not show maximum feasible diligence; "reasonable diligence" will suffice); Lawrence v. Florida, 549 U.S. 327, 336 (2007) (litigant seeking benefit of equitable tolling for filing of § 2254 motion must show that he has pursued his rights diligently and that he was prevented from filing on time by

extraordinary circumstances).

Defendant has made an effort to show that he has pursued his rights diligently, but counsel would be able to develop the facts more thoroughly. I will ask the Federal Defender to appoint counsel for defendant to help determine whether he is entitled to an extension of the one-year statute of limitations, and if so, to raise any meritorious challenges he had to his sentence.

Entered this 16th day of November, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge