

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW EVANS,

Defendant.

OPINION AND ORDER

07-cr-159-bbc

On April 4, 2012, defendant Matthew Evans filed a motion for an extension of time to file a motion for post conviction relief under 28 U.S.C. § 2255. At that point, the March 12, 2012 deadline had passed for the filing of the motion, as I explained in an order entered on April 5, 2012. Dkt. #363. Defendant said that he needed the time because of his transfer from one institution to another and because he had lost the help of a prisoner who was a paralegal. I told him that it was unlikely that these two occurrences would constitute an extraordinary circumstance that would entitle him to relief from the one-year filing deadline, but I gave him an opportunity to make the showing. Defendant responded to the order on April 17, submitting a sworn affidavit in which he averred that he had been in the United States Penitentiary at Lee County, where he had been employed seven days a week

and which was often on lockdown status for various reasons. Dkt. #364. He averred that he had finished most of his motion with the help of another inmate who had a paralegal certificate, but the inmate was transferred, forcing defendant to finish the motion himself. Thereafter, he was transferred to the Federal Correctional Institution at Oxford, Wisconsin, arriving there on February 21, 2012, one month before the deadline for filing. He received his property on March 1, 2012 and was told he could keep only 25 letters. By mistake, he chose not to keep a letter from the Supreme Court, telling him when his petition for certiorari had been denied (and thus, when his motion for post conviction relief would be due). He says that he then wrote the court for an extension of time.

The Supreme Court has held that district courts have the authority to accept post conviction motions and petitions after the statutory one-year filing period has expired, but only in extraordinary circumstances. In Holland v. Florida, 130 S. Ct. 2549, 2560 (2010), the Court held that the one-year statute of limitations on petitions for federal habeas relief by state prisoners was subject to tolling for equitable reasons “in appropriate cases,” but that a movant is entitled to such tolling only if he can show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Id. (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). In Holland, the extraordinary circumstances were the grossly negligent, egregious actions and omissions of petitioner’s court-appointed counsel. In this case, none of the grounds that defendant sets forth in this

affidavit are sufficient to warrant equitable tolling of the deadline, whether considered separately or together. The transfer of the inmate helping defendant prepare his § 2255 motion and the delay of his property in his transfer do not meet the criteria for tolling the statute. As I told defendant in the April 5 order, the law in this circuit is clear that such impediments do not amount to the kind of extraordinary circumstance that might warrant equitable tolling.

The court of appeals has yet to find any circumstances sufficiently extraordinary to justify tolling. From the cases cited in the earlier order, it is evident that the court would not find anything extraordinary about the transfers of defendant and his inmate helper or defendant's separation from his property for a short period of time. The fact that defendant had in his property a letter from the Supreme Court reminding him of his deadline for filing his motion is proof that he had notice of the beginning of the one-year period. He may have been unable to work on his motion during his time in transit, but he had from late March 2011 until he was transferred in early 2012 in which to prepare and file his motion. Although he lost his helper, he could have written out the grounds for his motion himself. He did not need to cite the law or make any legal argument in support of the grounds, so long as he explained the facts that led him to believe that he had been convicted or sentenced unconstitutionally.

In summary, I conclude that the reasons for delay set out in defendant's affidavit do

not support an equitable tolling of the statute of limitations for defendant's filing of a motion for post conviction relief under 28 U.S.C. § 2255.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Matthew Evans's motion for post conviction relief is DENIED as untimely under 28 U.S.C. § 2255. No certificate of appealability shall issue.

Defendant may seek a certification from the court of appeals under Fed. R. App. P. 22.

Entered this 30th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge