

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TORY J. EPPS,

Defendant.

ORDER

08-cr-161-bbc

11-cv-487-bbc

Defendant Tory J. Epps has filed an untimely motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied constitutionally adequate representation when his counsel failed to tell him he had a right to appeal from his April 28, 2009 conviction in this court. He explains his late filing by saying that he did not have an opportunity to file a post conviction motion until recently. Unfortunately for defendant, his reasons for his late filing are not sufficient to give him the benefit of equitable tolling of the time limit for filing post conviction motions.

Defendant's judgment and commitment order was entered on May 1, 2009. The one-year period in which he could file a motion for post conviction relief started running ten days later, when the time for filing an appeal had expired. He filed this motion on July 11, 2011,

more than two years after he had been sentenced. He says that he was never advised about filing a § 2255 motion, that he did not have access to federal law for a year while he was serving time in state custody, that he was in transit after that and when he arrived at the federal prison, it was in lockdown status and he was unable to finish his paper work.

The Supreme Court has held that courts have the authority to accept 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 petitioner 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.

Defendant has not alleged any circumstances that come close to those discussed in Holland. His only allegations are that he is unfamiliar with the law, that he did not have access to federal law while in state prison, that he was in transit after that and that the prison he is now in has been on lockdown. The court of appeals has found similar claims insufficient to justify tolling of the time limits for filing. E.g., Modrowski v. Mote, 322 F.3d 965, 967 (7th Cir. 2003) (incapacity of counsel did not justify tolling); (Lloyd v. VanNatta, 296 F.3d

630, 633 (7th Cir. 2002) (state's failure to provide defendant transcript of trial did not justify tolling); Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001), (equitable tolling not justified in circumstances in which defendant's counsel failed to respond to a letter defendant sent him, defendant was unable to understand the docket sheet his counsel sent him because he spoke little English, he lacked knowledge of legal matters and had been transferred to a different prison before his year for filing had elapsed), overruled on other grounds by Ashley v. United States, 266 F.3d 671 (7th Cir. 2001); United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (death of attorney's father several weeks before deadline and uncertainty about deadlines did not justify equitable tolling); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) (counsel's mistake about deadline did not justify tolling)).

Defendant has not alleged that he has been working diligently on his § 2255 motion but that extraordinary circumstances prevented him from completing it within the one-year period permitted him by statute. Without such a showing, he cannot escape the effect of the one-year deadline for filing. His motion must be dismissed as untimely.

ORDER

IT IS ORDERED that defendant Tory J. Epps's motion for post conviction relief

under 28 U.S.C. § 2255 is DENIED as untimely.

Entered this 20th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge