

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALEM M. ABDEL-FARES,

Defendant.

OPINION AND ORDER

00-cr-20-bbc
13-cv-224-bbc

Defendant Salem M. Abdel-Fares has filed a motion for post conviction relief under 28 U.S.C. § 2255 and a request to proceed in forma pauperis. A review of the motion shows that it must be dismissed because it is untimely.

Defendant was charged in 2000 with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(2) and possession of a firearm by a felon in violation of 18 U.S.C. § 922(g) and § 924(1)(2). Before the charges were filed, he fled the country and was not arrested for two years. He was arrested in 2002, pleaded guilty and sentenced on January 6, 2003. On appeal, the Court of Appeals for the Seventh Circuit affirmed his conviction but remanded his case so that this court could determine whether his sentence

remained appropriate under United States v. Booker, 125 S. Ct. 738 (2005). In an order entered on June 14, 2005, I explained that I would have imposed the same sentence knowing that the guidelines were not mandatory. Defendant did not appeal from this order. Therefore, unless he can show that he comes under one of the special filing times set out in 28 U.S.C. § 2255(f), his time for filing expired one year after June 24, 2006. (Under § 2255(f)(1) the one-year period of limitation applicable to § 2255 motions runs from the date on which the judgment of conviction “becomes final.” Under § 2244, which supplies the rule of finality for § 2255, if the defendant does not appeal, the limitation period starts to run “from the latest of—the date in which the conviction became final by the conclusion of direct review or the expiration of the time for seeking such review.” In 2005, a defendant had 10 days from the date of imposition of judgment in which to file a direct appeal of his conviction.) Defendant says that because he could not raise this argument before February 19, 2013, when the Supreme Court decided Bailey v. United States, 132 S. Ct. 1031, which he thinks applies to his case. Once that case was decided, he argues, § 2255(f)(3) gives him one year from the date of that decision in which to file a post conviction motion. This provision starts the one-year period of limitation running when “the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”

In Bailey, the Court held that a person cannot be detained in connection with a

warrant to search the premises if the person is not physically within the immediate vicinity of the premises to be searched. In those circumstances, law enforcement cannot claim that it has the same concerns as when the person is on the premises: allowing officers to search without fearing that the occupants would be disruptive or would destroy evidence; facilitation of the completion of the search; and the interest in preventing flight of the occupants. United States v. Summers, 452 U.S. 692 (1981). In Bailey, two occupants of a residence that was about to be searched left the premises by car, were followed by detectives and eventually pulled over and arrested. The Court held the arrest unlawful because it did not implicate any of the law enforcement interests identified in Summers.

The problem for defendant is that his circumstances are entirely different from those in Bailey. He was not arrested in connection with the execution of a search warrant at his residence or work place. He was arrested on an NCIC alert called in by local law enforcement after a witness reported that defendant had come to a woman's residence and threatened to shoot her when he saw her. The validity of his arrest rose and fell on the adequacy of the facts known to law enforcement at the time of his arrest and not on any action arising in connection with the search of his residence. (Only after he had been arrested and taken into custody did law enforcement apply for a warrant to search his residence for the gun displayed during the threat.)

Defendant did not file his post conviction motion within a year of his judgment of

conviction becoming final; he cannot take advantage of the recent decision in Bailey v. United States, 132 S. Ct. 1031, and he has not alleged that any other provision of § 2255(f) would allow him to bring his motion for post conviction relief. Therefore, his motion must be denied.

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 Salem Abdel-Fares's motion for post conviction

relief under 28 U.S.C. § 2255 is DENIED as untimely. His motion to proceed in forma pauperis is DENIED as moot. Further, it is ordered that no certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 4th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge