

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ALEXIS TELESFORD,)	
)	
Petitioner,)	
)	
v.)	Cr. A. No. 89-49-6-KAJ
)	Civ. A. No. 97-210-KAJ
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

MEMORANDUM ORDER

I. INTRODUCTION

On April 24, 1997, federal prisoner Alexis Telesford filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 440.) On June 25, 1997, this Court dismissed the § 2255 motion as time-barred.¹ (D.I. 461.) On August 26, 1998, the Third Circuit Court of Appeals affirmed the dismissal. (D.I. 515.)

Presently before the Court is Telesford's Rule 60(b) motion to reopen his § 2255 proceeding, (D.I. 564.) and a Rule 35(a) motion to correct an illegal sentence. (D.I. 567.) For the following reasons, the Court will deny Telesford's motions.

¹This matter was originally assigned to the Honorable Joseph J. Longobardi, Jr., but was reassigned to the undersigned on September 24, 2003.

II. RULE 60(b) MOTION

1. Did Telesford File a Successive § 2255 Motion or a Proper Rule 60(b) Motion?

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The AEDPA provides that a petitioner cannot file in district court a second or successive § 2255 motion without first obtaining authorization from the appropriate court of appeals. 28 U.S.C. §§ 2244(a); 2255. Therefore, when a petitioner seeks relief from a district court's denial of § 2255 motion through a Rule 60(b) motion under the Federal Rules of Criminal Procedure, the reviewing court must determine whether the motion is, in essence, a second or successive § 2255 motion or a true motion for relief from judgment under Rule 60(b). See *Harper v. Vaughn*, 272 F. Supp. 2d 527, 531 (E.D.Pa. 2003).

Although the United States Supreme Court and the Third Circuit have not addressed this issue, other courts within this circuit have followed the approach of the First and Seventh Circuits. See *Harper*, 272 F. Supp. 2d at 531; *United States v. Harris*, 268 F. Supp. 2d 500, 502-04 (E.D.Pa. 2003); *Pridgeon v. Shannon*, 2002 WL 31122131, at *3 (E.D.Pa. Sept. 26, 2002). Under this approach, if the motion challenges the federal habeas proceeding itself, rather than the underlying conviction, then

the motion constitutes a Rule 60(b) motion and not a successive habeas motion. See *United States v. Cabiness*, 278 F. Supp. 2d 478, 481 (E.D.Pa. 2003). The main question to ask is whether the motion challenges the legal standards applied by the federal habeas court. *Id.*

Here, this Court dismissed Telesford's original § 2255 motion as time-barred because he filed it one day too late. (D.I. 461.) Now, in his Rule 60(b) motion, Telesford argues that the Court should equitably toll the limitations period because the late filing was due to his counsel's alleged ineffective assistance. The Court concludes that this argument focuses on the circumstances surrounding the filing and disposition of his 1997 habeas motion. As such, Telesford does not need authorization from the Third Circuit and the Court will consider the issue raised in Telesford's Rule 60(b) motion.

2. Is Telesford Entitled to Relief Under Rule 60(b)?

Having determined that Telesford filed a true Rule 60(b) motion, the Court must next decide whether to grant relief. "The decision to grant or deny relief pursuant to Rule 60(b) lies in the 'sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances.'" *United States v. Hernandez*, 158 F. Supp. 2d 388, 392 (D. Del. 2001) (citation omitted).

Although Telesford filed his motion pursuant to Rule 60(b), he did not identify any particular subsection. The Court concludes that the only possible subsection providing the particular relief sought is Rule 60(b)(6), which permits a court to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). However, "[r]elief under Rule 60(b)(6) 'is available only in cases evidencing extraordinary circumstances.'" *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999) (citation omitted).

Here, Telesford argues that the Second Circuit opinion *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) recognized that an attorney's extraordinary malfeasance could equitably toll the one-year filing period. (D.I. 564.) He contends that his attorney's failure to timely file his 2255 motion should equitably toll the one-year filing period in his case. In essence, Telesford proffers the *Baldayaque* holding as an extraordinary circumstance justifying the reconsideration of his habeas proceeding.

The Court rejects this reasoning. It is well-settled that "intervening developments in the law rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997) (citation omitted). The *Baldayaque* decision hardly qualifies as an

extraordinary "intervening development" in the law, because, as Telesford admits, a Second Circuit opinion is not precedential in this Circuit.

More importantly, the decision to equitably toll the one-year statute of limitations is made on a case by case basis. Under Third Circuit precedent, "attorney error, miscalculation, inadequate research or other mistakes have not been found to rise to the extraordinary circumstances required for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001). Even the *Baldayaque* court recognized that "simple mistakes about the rules applied to the deadlines for filing of habeas petitions... are ordinary [not extraordinary]." *Baldayaque*, 338 F.3d at 152.

Here, Telesford alleges one error only: failure to timely file. Clearly, Telesford's attorney's mistake regarding the one-year filing period does not constitute the "extraordinary" actions of the attorney in *Baldayaque*.² Thus, the Court concludes that the doctrine of equitable tolling is not triggered.

Moreover, equitable tolling is not appropriate unless the petitioner demonstrates that he exercised due diligence in pursuing his claim. Here, Telesford was aware of his counsel's

²The extraordinary actions performed by the attorney in *Baldayaque* included: (1) the failure to file any 2255 petition at all; (2) the failure to communicate with petitioner at all; and (3) the failure to perform any legal research. *Baldayaque*, 338 F.3d at 152.

alleged failure to calculate the one-year filing period when this Court dismissed his § 2255 motion on June 25, 1997. Yet, he has never once raised the issue in the 6 years and 3 months since the denial of his § 2255 motion. In light of that delay, Telesford's argument is unpersuasive.

Accordingly, Telesford's Rule 60(b) motion will be denied.

III. RULE 35 MOTION

Invoking the version of Federal Rule of Criminal Procedure 35(a) applicable to offenses committed prior to November 1, 1987, Telesford now moves to correct his allegedly illegal conspiracy sentence. Telesford was sentenced on June 11, 1990 for various offenses, one of which was the conspiracy to distribute heroin and cocaine from the spring of 1987 through July 18, 1989. He argues that the offense of conspiracy is completed when the agreement to conspire is entered. He reasons that, because he entered the conspiracy in the spring of 1987, the former version of Rule 35 should apply.

The version of Rule 35 applicable to offenses committed prior to November 1, 1987 provides:

(a) The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked...

In contrast, the version of Rule 35 applicable to offenses committed after November 1, 1987 limits a courts ability to correct or reduce a sentence. Under Rule 35(a), a motion to correct sentence must be brought within 7 days after sentencing, and only authorizes a court to "correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a) (2002). Rule 35(b) authorizes only the Government to file motions for modification of sentence to reflect a defendant's substantial assistance.

As an initial matter, the Court notes that the entire conspiracy offense actually straddled the November 1, 1987 effective date of the amendment to Rule 35. Consequently, it is uncertain as to which version of Rule 35 should apply here. Nevertheless, neither version of Rule 35 permits the Court to grant the requested relief.

Even if the former version of Rule 35(a) applies, Telesford still had to file his motion within 120 days of his sentencing date. See Fed. R. Civ. P. 35(a) (b) (prior to Nov. 1, 1997) Telesford was sentenced on June 11, 1990, and he filed the current motion on October 8, 2003, well outside the 120-day filing period under former Rule 35(a). Likewise, the motion was not filed within the 7-day time period required under the amended version of Rule 35(a). Accordingly, the Court will dismiss Telesford's Rule 35(a) motion as untimely.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Alexis Telesford's Rule 60(b) motion to reopen his § 2255 motion is DENIED. (D.I. 564.)

2. Telesford's Rule 35(a) motion to correct sentence is DENIED. (D.I. 567.)

Date: March 31, 2004

Kent A. Jordan
UNITED STATES DISTRICT JUDGE