

Farnan, District Judge.

Presently before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 213) filed by Defendant, Parris L. Wall, Jr. For the reasons discussed, Defendant's Motion will be denied as untimely.

BACKGROUND

Defendant and four other individuals were charged in a multiple count indictment for various drug offenses. Two of the five defendants pled guilty and testified at Defendant's trial as government witnesses. After a ten day jury trial, Defendant was convicted of two counts of distributing crack cocaine. Defendant was sentenced to 180 months imprisonment and a term of five years of supervised release.

Defendant appealed his conviction and sentence, and the Third Circuit affirmed Defendant's conviction and his term of imprisonment. However, the Third Circuit vacated the term of supervised release imposed by the Court and remanded the matter so that the Court could impose a supervised release term of three years.

On June 21, 2001, the Court resentenced Defendant consistent with the Third Circuit's instructions. Following his resentencing, Defendant filed a direct appeal. The Third Circuit granted the Government's motion for summary affirmance on

September 27, 2001, and dismissed Defendant's appeal. Defendant did not file a petition for certiorari, but instead, filed a petition for rehearing in the Third Circuit on December 15, 2001.

Defendant's petition for rehearing was untimely filed, and the Third Circuit treated it as a "Motion To File Petition For Rehearing Out Of Time." On April 1, 2002, the Third Circuit granted the motion and ordered the clerk to circulate it to the full court. Thereafter, on April 22, 2002, the Third Circuit denied Defendant's request for rehearing.

On July 1, 2002, Defendant filed a Section 2255 Motion in this Court. Defendant's Motion was timely filed, but he elected to withdraw the Motion when completing his AEDPA election form. (D.I. 201). Consistent with Defendant's election form, the Court dismissed the July 1 Section 2255 Motion on September 20, 2002.

On January 15, 2003, Defendant filed the instant Section 2255 Motion. The Government has responded fully to the instant Motion, but contends, as a threshold matter, that the Motion is untimely, because it was not filed within the one-year limitations period required by the AEDPA.

DISCUSSION

I. Whether Defendant's Section 2255 Motion Is Time-Barred

Effective April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), amended 28 U.S.C. § 2255 to impose a one year limitations period on the filing of Section

2255 motions. In pertinent part, Section 2255 provides that the statute of limitations begins to run from the latest of:

- (1) the date on which the judgment becomes final;
- (2) 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;
- (3) the date on which the right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

In this case, Defendant was resentenced on June 21, 2001. Defendant appealed, and the Third Circuit summarily dismissed his appeal on September 27, 2001. In the context of a Section 2255 Motion, a judgment becomes final "on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires." Kapral v. United States, 166 F.3d 565, 575, 577 (3d Cir. 1999).

Pursuant to Supreme Court Rules 13.1 and 13.3, Defendant had ninety days from the date of the Third Circuit's September 27, 2001 Order to file a timely petition for certiorari. Thus, the time for Defendant to file a timely petition for certiorari expired on December 26, 2001. Applying the one year limitations

period to that date, Defendant had until December 26, 2002 to file a timely Section 2255 Motion.

Defendant contends that his untimely filed motion for rehearing should toll the limitations period, because the Third Circuit granted the motion and rendered a decision on the merits of his request for a rehearing. However, pursuant to Supreme Court Rule 13.3, only timely filed petitions for rehearing may extend the time that a party has to file a petition for certiorari. See Sup. Ct. R. 13.3 (providing that “[t]he time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate”) (emphasis added). Although the Third Circuit granted Defendant’s request for a rehearing, the court treated it as an untimely motion by designating it as a Motion To File For Rehearing Out Of Time. Because Defendant’s request for a rehearing was untimely and treated as such by the Third Circuit, the Court concludes that it had no effect on the date upon which his conviction became final for purposes of the AEDPA. United States v. Bendolph, 2001 WL 641084 (D. Del. Jan. 2, 2001) (untimely petition for certiorari, which Supreme Court accepted for filing and denied on the merits, did not extend time for filing defendant’s § 2255 motion), petition for certificate of appealability granted, No. 01-2468 (3d Cir. 2003). Because Defendant was required to file his

Section 2255 Motion by December 26, 2002, and he did not file it until January 15, 2003, the Court concludes that the Motion is time-barred.

Additionally, the one-year period of limitation may be equitably tolled. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 122 S. Ct. 323 (2001); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999); Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998). Equitable tolling applies:

only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller, 145 F.3d at 618-19 (citations omitted). In other words, equitable tolling may be appropriate in the context of a Section 2255 Motion if: (1) the defendant was actively misled by the plaintiff, (2) the defendant has 'in some extraordinary way' been prevented from asserting his or rights, or (3) the defendant has timely asserted his or her rights mistakenly in the wrong forum. Jones, 195 F.3d at 159 (citing United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)).

In the instant case, Defendant's failure to timely file his Section 2255 Motion was, at most, based on his misunderstanding of the required time for filing. Such circumstances are

insufficient to justify the application of equitable tolling principles. See Johnson v. Hendrick, 314 F.3d 159, 162-163 (3d Cir. 2002) (holding that equitable tolling is unavailable where late filing was caused by advice from attorney); Fahy, 240 F.3d at 244-245 (remarking in dicta that equitable tolling is unavailable based on misunderstanding of when filing was required in non-capital cases). Accordingly, the Court will deny Defendant's Section 2255 Motion as time-barred.

II. Whether A Certificate Of Appealability Should Issue

The Court may issue a certificate of appealability only if Defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court observes that the Third Circuit has granted a certificate of appealability in the decision upon which the Court has primarily relied, United States v. Bendolph, 2001 WL 641084 (D. Del. 2001). Although Bendolph involved circumstances in which the Court sua sponte raised the limitations period, the Third Circuit has granted a certificate of appealability to consider the issue of whether, assuming the Court had the authority to sua sponte raise the limitations period, the defendant's Section 2255 motion should have been deemed timely in light of the Supreme Court having accepted for filing his untimely petition for certiorari review. Although the circumstances in Bendolph are not identical to the circumstances in this case, the Court believes they are

sufficiently analogous to justify the granting of a certificate of appealability. Accordingly, the Court will grant Defendant a certificate of appealability so that he may pursue this issue before the Third Circuit.

CONCLUSION

For the reasons discussed, Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody is denied as untimely.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. :
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PARRIS L. WALL, JR., :
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 Defendant. :
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ORDER

At Wilmington, this 9th day of February 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 213) is DENIED as untimely.

2. Because the Court finds that Defendant has made "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is GRANTED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE