

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
V. : NO. 92-27-2
FRANK O'BRYAN :

MEMORANDUM AND ORDER

YOHN, J.

DECEMBER , 2000

Defendant was sentenced on October 11, 1996. He filed no appeal.

On February 2, 2000, defendant filed a pro se Motion to Vacate, Set Aside or Correct Sentence Under 18 U.S.C. § 3742(a)(2) and Federal Rule of Criminal Procedure 35(a). By order dated March 2, 2000, the court supplied to the defendant the "Miller" notice. By letter of March 12, 2000, defendant rejected the option to re-characterize or refile his motion as a § 2255 motion and elected to proceed under 18 U.S.C. § 3742(a)(2) and Federal Rule of Criminal Procedure 35(a). The court approved this election by order on March 21, 2000.

On May 22, 2000, the government filed a response to the motion which correctly pointed out that neither 18 U.S.C. § 3742(a)(2) nor Federal Rule of Criminal Procedure 35(a) was applicable to the defendant's contentions.

Thereafter, defendant filed a pro se Request for Leave to Amend Motion to Correct a Sentence on June 6, 2000. He then requested that the motion be amended to be filed pursuant to 28 U.S.C. § 2255, Rule 60(b)(6), or, in the alternative, a Writ of Error Corum Nobus.

Defendant then obtained counsel and, on August 11, 2000, filed an amended petition to

Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 requesting that all of the pro se motions be recast as one filed under § 2255. The government consents to this request and the court approves it so that all issues are waived except those raised in the counsel-amended petition under 28 U.S.C. § 2255. The government filed a response on October 16, 2000, and the defendant filed a reply on October 30, 2000.

The gravamen of defendant's contentions is that the presentence report prepared by the probation department and reviewed by counsel for the defendant, the defendant, and counsel for the government used the November 1, 1992 version of the sentencing guidelines. The acts of the defendant which constituted the bases for the offenses charged against him concluded by September 1990. § 2f1.1(b)(6) of the sentencing guidelines was amended after September 1990 to include a 4 point enhancement in the event that the offense substantially jeopardized the safety and soundness of a financial institution. In addition, § 3b1.1 of the sentencing guidelines was amended after September 1990 to allow the two point enhancement for abuse of a position of trust to be applicable to a defendant who also had an enhancement for his role in the offense. Because these amended guidelines were applied to the defendant in the presentence report, his offense level was increased by 6 points. Defendant rightly points out that the use of these sections violated the ex post facto clause of the U.S. Constitution and that his counsel was ineffective in failing to raise the issue at sentencing.

The government responds that the defendant's motion is untimely under the one year limitations period included in § 2255 because the defendant was sentenced on October 11, 1996, no appeal was filed, and this action, at best, was initiated on February 2, 2000. The defendant responds that under § 2255(4) the motion need only be filed within one year of the time when the facts supporting the claim could have been discovered through the exercise of due diligence and

that he complied with this provision. In addition, he points out that under Third Circuit law the limitation is considered a statute of limitations and not a jurisdictional matter so it is subject to equitable tolling.

Defendant is correct that under Third Circuit law the limitations period is subject to equitable tolling. In *Miller v. New Jersey State Board of Corrections*, 145 F.3d 616 (3d Cir. 1998), the court held that the period of limitations set forth in 28 U.S.C. § 2244(d)(1) is subject to equitable tolling. Miller argued that the time period should be equitably tolled because he was delayed in filing his petition because he was in transit between various institutions and did not have access to his legal documents. In addition, he contended that he did not learn of the new limitation period, which was effective April 24, 1996, until April 10, 1997. The court “observed” that:

...[E]quitable tolling is proper only when the “principles of equity would make [the] rigid application [of limitation period] unfair.” *Shendock*, 893 F.2d at 1462. Generally, this will occur when the petitioner has “in some extraordinary way ... been prevented from asserting his or her rights.” *Oshiver*, 38 F.3d 1380. The petitioner must show that he or she “exercised reasonable diligence in investigation and bringing [the] claims.” *New Castle County*, 111 F.3d at 1126. Mere excusable neglect is not sufficient. See *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L.Ed.2d 435 (1990); *New Castle County*, 111 F.3d at 1126.

Miller 145 F.3d at 618-19.

In *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999), the court noted:

In other cases, we have explained that equitable tolling “may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has ‘in some extraordinary way’ been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.” *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (quoting *Kocian v. Getty Refining & Mktg. Co.*, 707 F.2d 748, 753 (3d Cir. 1983)). In *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236 (3d Cir. 1999), we recently held that “equitable tolling may be appropriate [in a Title VII action] when a claimant received inadequate

notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her.” *Id.* at 240 (citing *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984)). In the final analysis, however, “a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.” *Midgley*, 142 F.3d at 179 (quotations marks and citation omitted); see also *Seitzinger* 165 F.3d at 239 (“The law is clear that courts must be sparing in their use of equitable tolling.”).

Thus, it is clear that the doctrine of equitable tolling applies to this proceeding. What is unclear is whether the defendant will be able to establish the factual predicate for the application of that doctrine to his case through the window of § 2255(4). An evidentiary hearing will be required.

An appropriate order follows.

