

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

UNITED STATES OF AMERICA	:	No. 00-cr-203
	:	
v.	:	
	:	
CAI-ASIA REED	:	No. 05-cv-1465

MEMORANDUM AND ORDER

PRATTER, DISTRICT JUDGE

AUGUST __, 2006

The *pro se* habeas corpus petition filed by Petitioner Cai-Asia Reed pursuant to 28 U.S.C. § 2255 presently pending before the Court seeks to have the Court vacate the sentence imposed upon her as a result of her guilt of one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1). For the following reasons, the Court finds that Ms. Reed’s motion is fatally untimely and that she is not entitled to habeas relief. Accordingly, her petition is denied.

I. BACKGROUND

On June 22, 2000, Ms. Reed pled guilty to one count of possessing cocaine base (“crack”) with intent to distribute in violation of 21 U.S.C. § 841(a)(1) pursuant to a plea agreement. The plea agreement itself provided, *inter alia*, that the district court could impose a maximum sentence of life in prison and specifically memorialized that there was a mandatory minimum sentence of 10 years imprisonment. The plea agreement further documented Ms. Reed’s acknowledgement that no one had promised her what her sentence would be.

During the change of plea hearing before District Court Judge Franklin Van Antwerpen,¹ Ms. Reed stated that she understood that her sentence was solely in the hands of the court and that no one could promise her what sentence would be handed down. Ms. Reed also stated that she understood that the mandatory minimum prison sentence for her crime was 10 years, and the maximum penalty was life in prison. When questioned by the court, Ms. Reed also stated that she understood that any sentencing departures were at the discretion of the sentencing court. The district court found that Ms. Reed entered the plea agreement knowingly and voluntarily and accepted her plea of guilty to the charge of possessing crack cocaine with the intent to distribute.

On November 22, 2000, at Ms. Reed's sentencing hearing, the Government moved for a downward departure pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e) based on Ms. Reed's cooperation and substantial assistance. The district court granted the Government's motion and departed six levels downward, from level 29 to 23, which carried a sentencing range of incarceration for 84 to 105 months. Ms. Reed ultimately received a sentence of 84 months incarceration, the bottom of the guideline range, with five years of supervised release. Ms. Reed did not appeal her sentence to the Court of Appeals for the Third Circuit.

Nonetheless, on March 30, 2005, Ms. Reed filed the instant *pro se* motion for habeas corpus relief pursuant to 28 U.S.C. § 2255, requesting relief from the 84 month sentence. Ms. Reed argues that relief here is proper because (1) her counsel provided ineffective assistance; (2) United States v. Booker, 543 U.S. 220 (2005), requires resentencing because her sentence was calculated under the mandatory guidelines; and (3) the Bureau of Prisons has failed to give her

¹ Judge Van Antwerpen has since been elevated to the Third Circuit Court of Appeals.

credit for time spent in state custody.² The Government responded to Ms. Reed's petition, asserting that habeas relief must be denied on the merits and because Ms. Reed's petition is untimely. For the following reasons, the Court finds that Ms. Reed's petition is untimely and equitable tolling does not operate to excuse its untimeliness. Accordingly, Ms. Reed's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is denied.

II. STANDARD OF REVIEW FOR 28 U.S.C. § 2255

Section 2255 allows a prisoner in custody to attack her sentence if it was "imposed in

² With respect to Ms. Reed's argument that habeas relief pursuant to Section 2255 is proper because the Bureau of Prisons has refused to credit her federal sentence with time served for a state sentence, Section 2241 "is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence." Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001) (citing United States v. Mares, 868 F.2d 151 (5th Cir. 1989) (claim for credit for time served must proceed pursuant to Section 2241)). Specifically, "the exclusive remedy for challenging the BOP's calculation of a federal sentence is a habeas corpus petition filed pursuant to 28 U.S.C. § 2241, directed to the district court in the United States District where the petitioner is incarcerated, and naming the warden of the federal facility as a respondent." United States v. Allen, No. 03-4643, 124 Fed. Appx. 719, 721 (3d Cir. Jan 24, 2005).

Before filing a habeas petition pursuant to Section 2241, however, the prisoner must first exhaust her administrative remedies. Moscato v. Federal Bureau of Prisons, 98 F.3d 757, 760 (3d Cir. 1996); see also Callwood v. Enos, 230 F.3d 627, 634 (3d Cir. 2000) ("[W]e have consistently applied an exhaustion requirement to claims brought under § 2241."); 28 C.F.R. §§ 542.10-16. If a petitioner has failed to exhaust her administrative remedies, the district court, in its discretion, may either "excuse the faulty exhaustion and reach the merits, or require the petitioner to exhaust his administrative remedies before proceeding in court." Ridley v. Smith, No. 04-4273, 2006 U.S. App. LEXIS 11127, at *6-7 (3d Cir. May 3, 2006) (citation omitted).

As an initial matter, Ms. Reed's claim that the Bureau of Prisons has improperly calculated her sentence must be raised pursuant to Section 2241 and not Section 2255, the provision pursuant to which the instant petition was filed. Furthermore, it is not apparent from the record that Ms. Reed has exhausted her administrative remedies. Ms. Reed, although stating that she has not been provided with a reason for the refusal to credit her sentence, has not provided the Court with evidence that she has pursued her administrative remedies within the Bureau of Prisons. In an exercise of discretion, the Court denies Ms. Reed's request for relief relating to the calculation of her federal sentence and will require Ms. Reed to exhaust her administrative remedies before proceeding with a proper Section 2241 petition for habeas relief.

violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. Thus, a petitioner may only prevail on a Section 2255 habeas claim by demonstrating that an error of law was constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). The petitioner is entitled to an evidentiary hearing as to the merits of his claims unless the “files and records of the case conclusively show the petitioner is not entitled to relief.” 28 U.S.C. § 2255. The decision as to whether it is clear from the record that the prisoner is not entitled to relief is within the sound discretion of the district court. United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989) (citation omitted). Here, the Court finds that Ms. Reed is not entitled to an evidentiary hearing because it is clear from the record that her sentence should not be set aside, vacated, or corrected pursuant to Section 2255.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), effective April 24, 1996, imposes a one year limitations period on the filing of habeas motions. Section 2255, in pertinent part, provides that the one-year statute of limitations begins to run from the latest of:

- (1) the date on which the judgment of conviction 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, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which 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; 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. § 2255.³ If a petitioner does not file a direct appeal to the court of appeals, her sentence becomes final and the statute of limitations begins to run on the date when the time for filing such an appeal expired. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). For the following reasons, the Court finds that Ms. Reed's petition for habeas corpus relief is untimely pursuant to the Section 2255 one-year statute of limitations and is not saved by equitable tolling. Accordingly, Ms. Reed's habeas petition is denied.

1. The Date When the Judgment of Conviction Became Final

As stated above, Ms. Reed was sentenced on November 22, 2000, and judgment was entered on November 27, 2000. Ms. Reed did not file a direct appeal to the Third Circuit Court of Appeals within 10 days of the entry of judgment. Thus, Ms. Reed's conviction and sentence became final (and the AEDPA one year statute of limitations began to run) on December 11, 2000, when the 10 day period for filing a notice of appeal expired.⁴ Ms. Reed did not file her petition for habeas relief until March 30, 2005, over four years after her conviction and sentence became final. Therefore, Ms. Reed's petition is untimely pursuant to 28 U.S.C. § 2255(1).

³ Ms. Reed does not argue that there was any unlawful governmental impediment to her filing a timely motion for habeas corpus relief, nor that there is any newly discovered facts or claims which would extend the statute of limitations for filing her habeas petition. Thus, the Court will only consider her arguments with respect to subsections (1) and (3).

⁴ Federal Rule of Appellate Procedure 4(b)(1)(A) provides, in relevant part: "In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." FED. R. APP. P. 4(b). Pursuant to Federal Rule of Appellate Procedure 26(a)(2), the time for filing a notice of appeal is computed by excluding intermediate Saturdays, Sundays, and legal holidays.

2. Intervening, Retroactive New Rule of Constitutional Law

Ms. Reed argues that the Supreme Court decisions in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), which applied Blakely to the federal sentencing guidelines, provided a new rule of constitutional law pursuant to which her sentence can be challenged because she was sentenced in accordance with the Sentencing Guidelines. See Lloyd v. United States, 407 F.3d 608, 611 (3d Cir. 2005) (Blakely challenges to the federal sentencing guidelines are governed by the intervening Booker decision). Ms. Reed's arguments regarding the application of Blakely and Booker to her conviction and sentence are unavailing, however, because those decisions only apply to cases on direct appeal and not to initial habeas motions. Lloyd, 407 F.3d at 615-616. Specifically, the Third Circuit Court of Appeals held that Booker does not apply retroactively to initial Section 2255 motions where the judgment was final before January 12, 2005, the day the Booker opinion was issued. Lloyd, 407 F.3d at 615-616. As stated above, Ms. Reed's sentence was final on December 11, 2000, well before the issuance of Booker on January 12, 2005. Thus, Booker does not apply and Ms. Reed's petition remains untimely.

3. Equitable Tolling

As discussed above, Ms. Reed did not file her petition for habeas relief in a timely fashion. However, although AEDPA generally requires habeas petitions to be filed within one year of the final judgment, the "one-year filing requirement is a statute of limitations, not a jurisdictional rule, and thus a habeas petition should not be dismissed as untimely filed if the petitioner can establish an equitable basis for tolling the limitations period." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citing Miller v. N.J. State Dep't of Corr., 145 F.3d 616, 618

(3d Cir. 1998)); United States v. Bendolph, 409 F.3d 155, 170 (3d Cir. 2005) (Nygaard, J., dissenting) (“AEDPA’s statute of limitations is subject to equitable tolling.”). Equitable tolling is warranted when “the petitioner has in some extraordinary way been prevented from asserting his or her rights . . . [and] has exercised reasonable diligence in investigating and bringing the claims.” Miller, 145 F.3d at 618. Mere excusable neglect is not sufficient. Id. Our Court of Appeals has set forth three circumstances where equitable tolling can be appropriate: “(1) if 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, but has mistakenly done so in the wrong forum.” Jones, 195 F.3d at 159 (citations omitted).

Ms. Reed has failed to provide any evidence, or even allege, that the government actively misled her in any fashion which prevented her from filing a habeas petition in the year following December 11, 2000, the date when her conviction and sentence became final. Ms. Reed likewise does not present any evidence that she has, in some extraordinary way, been prevented from asserting her right to collateral review. To the extent that Ms. Reed is arguing that counsel was ineffective for failing to file a direct appeal despite her direction to do so, even taking these allegations as true, they do not rise to “extraordinary circumstances” that would justify equitable tolling. While attorney misconduct may be grounds for equitable tolling in narrow circumstances, see, e.g., Nara v. Frank 264 F.3d 310, 320 (3d Cir. 2001) (habeas petitioner accused his counsel of leading him to believe that the attorney would file a habeas petition on his behalf and that there were no time constraints on habeas petitions), Ms. Reed does not make any allegations of such extraordinary circumstances, and she does not argue that counsel misled her into believing that counsel would file a habeas petition or appeal. Moreover, even if Ms. Reed

were somehow lulled into inaction during the time she felt counsel should have been filing a direct appeal on her behalf, Ms. Reed did not attempt to file a direct appeal or habeas petition at any time during the year after her conviction and sentence became final, during which lengthy period of time she certainly would have known that counsel's appeal was not forthcoming. Rather, Ms. Reed waited over four years before filing the instant habeas petition. Finally, Ms. Reed has presented no evidence or argument that she mistakenly asserted her rights in the wrong forum. Therefore, Ms. Reed has not made the requisite showing of extraordinary circumstances necessary for the application of equitable tolling, and, accordingly, her habeas petition is denied as untimely.

III. REQUEST FOR COUNSEL

In correspondence to the Court dated January 19, 2005, Ms. Reed requested that counsel be appointed on her behalf to litigate the issues in this case. It is well-settled that there is no constitutional right to counsel in a federal habeas proceeding, and the decision whether to appoint counsel rests within the sound discretion of the Court. Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991). The Court must first consider whether Ms. Reed has presented a non-frivolous claim and whether counsel would benefit both Ms. Reed and the Court. Id. at 263-64. In making such a determination, a court must consider such factors as “the complexity of the factual and legal issues in the case, as well as the pro se petitioner’s ability to investigate the facts and present claims.” Id. A district court does not abuse its discretion, however, by declining to appoint counsel were the issues in the case are “straightforward and capable of resolution on the record” or the petitioner has a “good understanding of the issues and the ability to present forcefully and coherently his contentions.” Id. at 264 (citations omitted).

The Court finds that the issues in this case are neither factually or legally complex. Ms. Reed presents her claims in her habeas petition over four years after her conviction and sentence became final and over three years after the time for filing a timely habeas petition expired. Ms. Reed presents no evidence nor argument which would support the application of equitable tolling. Thus, the Court declines to appoint counsel for Ms. Reed.

IV. CONCLUSION

For the foregoing reasons, the Court denies Ms. Reed's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA	:	No. 00-cr-203
	:	
v.	:	
	:	
CAI-ASIA REED	:	No. 05-cv-1465

ORDER

AND NOW, this ___ day of August, 2006, upon consideration of Petitioner Cai-Asia Reed's Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 25) and the Government's Response thereto (Docket No. 28) it is hereby ORDERED that the Motion is DENIED.

IT IS FURTHER ORDERED that no certificate of appealability will be issued on the ground that Petitioner Reed has not made a substantial showing of a denial of a constitutional right as required by 28 U.S.C. § 2253(c).

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE