

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

UNITED STATES OF AMERICA : CRIMINAL  
 :  
 v. :  
 :  
 SHARIF JAMAL GIVENS : NO. 93-540-1

MEMORANDUM OPINION

NORMA L. SHAPIRO, S.J.

July 21, 2004

I. BACKGROUND

Sharif Jamal Givens ("Givens") filed a *habeas* motion to vacate, set aside or correct a sentence under 28 U.S.C. § 2255. Magistrate Judge M. Faith Angell ("Angell"), to whom the matter was referred, recommended the *habeas* motion be denied as untimely. Petitioner submitted timely objections to Judge Angell's Report and Recommendation ("MJRR").

Givens participated in an automobile theft and robbery near the corner of Oxford and Columbia Avenues in Philadelphia. Givens and co-defendant Al Turner: struck the victim with a gun; took \$140 in currency from the victim; and stole his car keys and personal identification. Givens and Turner then used the automobile to travel to Bryn Mawr where they robbed a Dunkin Donuts shop.<sup>1</sup>

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<sup>1</sup>Givens was convicted in Montgomery County of the Dunkin Donuts robbery and was sentenced to 8 1/2 to 20 years imprisonment.

On April 4, 1994, Givens entered a plea of guilty to three counts charging him with conspiracy (18 U.S.C. § 371), taking a motor vehicle with intent to cause serious bodily harm (U.S.C. § 2119) and carrying a firearm during a violent crime (18 U.S.C. § 924 (c)). At a Total Offense Level of 21 and a Criminal History Category of IV, Givens's presumptive sentence was fifty-seven to seventy-one months in addition to sixty months consecutive for the firearm charge. The government's § 5K1.1 motion under the United States Sentencing Guidelines ("USSG") was granted, and Givens was sentenced to a period of forty-two months' imprisonment on August 25, 1994.

The instant § 2255 motion is signed and dated December 10, 2002, was filed on January 14, 2003. Givens seeks relief on the following grounds:

"(1) The conviction was obtained and sentence imposed in violation of the Sixth Amendment Right to Effective Assistance of Counsel at all critical stages of the criminal proceedings; and

(2) The conviction was obtained and sentence imposed in violation of the Fifth Amendment Right to Due Process of Law and Equal Protection of the Laws." See Petitioner's Memorandum of Law at pp 1-2.

## **II. DISCUSSION**

Petitioner's objections have been considered *de novo*.

### **A. Objections to Finding of Fact #3:**

Givens states that he is not aware of any document of record stating that he commenced his federal sentence on November 22,

2001, and he is unaware there is a place called "FCI Lewisberg."

Records of the U.S. Bureau of Prisons confirm that Givens was transferred to federal custody on November 22, 2001, and assigned to the United States Penitentiary at Lewisburg (USP Lewisburg). Givens is correct that there is no FCI Lewisberg.

B. The AEDPA's Statute of Limitations and Claims of Actual Innocence.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one year statute of limitations for federal defendants who attempt to attack a conviction and/or sentence collaterally. The limitation period runs from the latest of the date on which the conviction became final with three statutory exceptions, none of which is applicable here. 28 U.S.C. § 2255.

The Court of Appeals has also recognized equitable tolling when the rigid application of the limitations period would be 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.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999)(citing Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998)). Further, equitable tolling may be appropriate if (1) the defendant has actively misled the plaintiff; (2) the plaintiff has "in some extraordinary way" been prevented from

asserting his rights; or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum. Id. (citations omitted). Equitable tolling may be appropriate where a motion for appointment of counsel is pending or where the court has misled the plaintiff into believing that he had done everything required of him, but in the final analysis, equitable tolling applies only in the rare situation where it is demanded by sound legal principles as well as the interests of justice. See id.

These examples do not apply here. Givens claims his petition is not untimely because he has alleged a "constitutional violation that resulted in a fundamental defect amounting to a complete miscarriage of justice." He claims his sentence was based on an erroneous calculation of criminal history that is the functional equivalent of a claim of actual innocence.

"To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, [the Supreme Court] explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995). Givens, having entered a knowing and voluntary plea of guilty to three counts of an indictment, does not claim he was innocent of those charges. He claims that a Gideon violation in calculating his criminal history is a

jurisdictional defect tantamount to a claim of actual innocence. Meritorious claims of actual innocence are extremely rare and based on "factual innocence not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998).

Givens presents no evidence of his innocence or any reason to believe his sentence is unjust. Merely alleging a constitutional violation does not rise to the level of a legitimate claim of actual innocence overcoming the one year statute of limitations.

C. AEDPA Statute of Limitations and Federal Custody.

Givens claims the AEDPA statute of limitations does not apply because it did not begin to run until he was in federal custody, and he was not transferred to federal custody within one year of the date his conviction became final. He relies on the Supreme Court decision in Heflin v. United States, 358 U.S. 415 (1959), that a prisoner incarcerated under one sentence cannot challenge a sentence he was not serving at the time. He claims Heflin and the explicit language of § 2255 make clear that petitioner must be in custody under a federal sentence before he is eligible for relief under 28 U.S.C. § 2255.

Heflin was decided in 1959, long before the 1996 enactment of the AEDPA in 1996, but even if it remains the law, the petition is still untimely. It was filed more than one year after Givens was transferred to federal custody so his petition is

still untimely under AEDPA. No statutory or equitable tolling provisions apply; petitioner's motion to vacate, set aside or correct sentence will be denied without an evidentiary hearing.

### **III. CONCLUSION**

For the foregoing reasons, Givens's Objections to the Report and Recommendation will be overruled. An appropriate Order follows.

