

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM BATTLE, JR.,

Petitioner,

-vs-

Case No. 8:06-CV-1137-T-27TGW

JAMES McDONOUGH, et al.,

Respondents.

ORDER

Petitioner, a State of Florida inmate, initiated this cause of action *pro se* by filing a petition for federal habeas relief pursuant to 28 U.S.C. §2254 (Dkt. 1) and an affidavit of indigency seeking leave to proceed *in forma pauperis* (Dkt. 2). Petitioner is challenging convictions and sentences entered in 2004 by the Thirteenth Judicial Circuit Court, Hillsborough County, Florida (Dkt. 1). Having undertaken a preliminary examination of the petition in accord with Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (2006), the Court concludes that the petition is subject to dismissal without service on the Respondents.

Discussion

Pursuant to a plea agreement, Petitioner pled guilty on February 9, 2004, to charges of possession of cocaine and possession of a firearm by a convicted felon. Petitioner was sentenced as an habitual felony offender to serve a term of 10 years in prison. He did not

file a timely notice of appeal. Petitioner's April 29, 2004 request to file a belated appeal was denied on July 29, 2004. See *Battle v. State*, Case No. 2D04-1890 (Fla. 2d DCA 2004).

Proceeding *pro se*, Petitioner filed a state application for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 raising the *Blakely v. Washington*¹ claim that he raises in the present petition. Petitioner's Rule 3.850 motion was denied. The appellate court denied Petitioner's motion for a rehearing of its decision affirming the rejection of his Rule 3.850 motion on May 26, 2006. The mandate issued on June 8, 2006. See *Battle v. State*, Case No. 2D06-325 (Fla. 2d DCA 2006).

The instant petition was filed on June 15, 2006, see Dkt. 1 at 7. The sole ground advanced in support of the request for federal habeas relief is "whether Petitioner's conviction and sentence [are] unconstitutional pursuant to *Blakely v. Washington*, . . . where the Petitioner did not admitted [sic] to being in actual or constructive possession of a firearm which enhanced his offense to a felony violated Petitioner's right under Sixth Amendment to trial by jury" (Dkt. 1, Attach. at 1). For reasons discussed below, this claim lacks merit.

According to Petitioner's sworn statements, see Dkt. 1 at 7, his convictions were entered on February 9, 2004 (Dkt. 1 at 2). Because he did not file a timely notice of appeal, Petitioner's convictions became final on March 10, 2004. See Fla R. App. P. 9.110(b); *Gust v. State*, 535 So.2d 642 (Fla. 1st DCA 1988). Petitioner's request to file a belated appeal had no effect on the finality of his convictions and sentences. See *Moore v. Crosby*, 321 F.3d 1377, 1380-81 (11th Cir. 2003) (discussing the effect of a motion to file a belated appeal).

¹524 U.S. 296, 313-14 (2004) (reaffirming the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.").

In sum, Petitioner's convictions and sentences were final well before the Supreme Court entered its decision in *Blakely* on June 24, 2004, and the decision does not apply retroactively on collateral review. See *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005); *In re Dean*, 375 F.3d 1287, 1289 (11th Cir. 2004). Because Petitioner has failed to present a claim cognizable under 28 U.S.C. § 2254, the petition is subject to summary dismissal.

ACCORDINGLY, the Court **ORDERS** that:

1. The request to proceed *in forma pauperis* is **DENIED** (Dkt. 2).
2. The petition for federal habeas relief is **DENIED** (Dkt. 1).
3. The Clerk shall terminate any pending motions and close this case.

ORDERED in Tampa, Florida, on June 27th, 2006.



JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

SA/jsh

Copy furnished to:
Pro Se Petitioner