

**United States District Court
Northern District of Indiana
Hammond Division**

DWAYNE SWIMS,)	
)	
Petitioner,)	
)	
v.)	Case No. 2:14-CV-211 JVB
)	(arising out of 2:09-CR-233)
UNITED STATES OF AMERICA,)	
)	
Respondent,)	

OPINION AND ORDER

Dwayne Swims, a federal prisoner, has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (DE 143). The question before the Court is whether it must hold an evidentiary hearing on his motion, and if not, whether Swims is entitled to any relief under § 2255.

A. Background

On June 7, 2011, Swims pleaded guilty, without the benefit of a plea agreement, to possession of a firearm as a felon and three counts of distributing crack cocaine. He was sentenced to the statutory minimum term of fifteen years under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), because he had three previous convictions for violent felonies. He appealed his sentence to the Court of Appeals for the Seventh Circuit. On February 28, 2013, the Seventh Circuit entered final judgment affirming his sentence (DE 142-2).

On June 18, 2014, one year, three months, and twenty-one days after the Seventh Circuit entered its final judgment, Swims filed this motion, alleging that his trial counsel was constitutionally ineffective for failing to subpoena restoration of rights letters or procure an

affidavit regarding the restoration of his civil rights after two Illinois convictions that might have prevented two of his conviction from counting as predicate offenses for the purposes of imposing the fifteen-year mandatory minimum sentence under the ACCA. He also claims that both his trial and appellate counsel were ineffective because they failed to argue that, on the basis Seventh Circuit and Supreme Court precedent, his conviction under 720 Ill. Comp. Stat. 5/19-1 for second degree burglary could not be a predicate offense. The Government argues, among other things, that Swims's motion is barred as untimely.

B. Legal Standards

Title 28 U.S.C. § 2255(b) provides that unless a § 2255 motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court must grant a hearing on the motion. A § 2255 petitioner is entitled to an evidentiary hearing if he alleges facts that, if proven would entitle him to relief. *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002).

Under § 2255(f), a one-year period of limitation applies to a § 2255 motion. The limitation period runs 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 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.

18 U.S.C. § 2255(f).

A federal conviction becomes final under § 2255(f)(1) with the expiration of the time within which to file a petition for a writ of certiorari. *Clay v. United States*, 537 U.S. 522, 525 (2003). Under Supreme Court Rule 13(1), a petition for a writ of certiorari to review a judgment must be filed within ninety days after entry of the judgment. Moreover, “[t]he time to file a petition for a 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 . . .” Supreme Court Rule 13(3).

C. Discussion

The first question the Court must decide is whether Swims’s § 2255 motion is timely. The Court concludes that this issue can be resolved on the record before it without a hearing.

For his motion to be timely under § 2255(f)(1), the motion must have been filed no more than one year and ninety days after the Seventh Circuit’s final judgment on Swims’s appeal was entered, that is, by May 29, 2014. Swims did not file his motion until June 16, 2014.

Accordingly, his motion is time-barred unless some other provision of § 2255(f) applies.

Swims alleges no facts to suggest that illegal governmental action prevented him from filing his § 2255 motion. Therefore, he cannot extend the period of limitations under § 2255(f)(2). Nor does he assert that facts supporting his claim could not have been discovered until more than a year after his conviction became final. Thus § 2255(f)(4) does not help him.

The only remaining question is whether § 2255(f)(3) serves to extend the limitation period for Swims. The answer is no.

In support of his claim that his conviction under 720 Ill. Comp. Stat. 5/19-1 for second

degree burglary does not count as a violent felony under the ACCA, Swims relies on *Descamps v. United States*, 133 S.Ct. 2276 (2013), which was decided on June 20, 2013. In that case the Supreme Court held that a burglary conviction is not a violent felony conviction under the ACCA if the statute under which the defendant was convicted includes elements that meet the definition of generic burglary and other elements that are broader than generic burglary and the statute is indivisible. *Id.* at 2283. The one-year limitation period would begin to run from the date of that decision, and Swims's motion would therefore be timely, only if the decision applied to Swims's case and recognized a new right that has been made retroactively applicable to cases on collateral review, according to § 2255(f)(3).

As numerous other district courts have held, *Descamps* did not recognize a new right. *See, e.g. Pulley v. United States*, No. 2:13-CV-257, 2014 WL 2206893 (N.D. Ind. May 27, 2014). In the *Descamps* opinion, Justice Kagan stated that prior Supreme Court case law “all but resolves the case.” *Id.* at 2283. Not only does the case not establish a new rule of law, but it has not been made retroactive to cases on collateral review. *See Groves v. United States*, 755 F.3d 588, 593 (7th Cir. 2014). (“To date, the Supreme Court has not made *Descamps* retroactive on collateral review.”) Accordingly, the decision in *Descamps* does not extend the limitation period for Swims. His § 2255 motion is untimely and he is entitled to no relief.

D. Certificate of Appealability

Rule 11 of the Rules Governing Section 2255 Proceedings requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to a petitioner on a § 2255 motion. A petitioner is entitled to a certificate of appealability only if he can present “a

substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He must demonstrate that reasonable jurists would find this Court’s assessment of his constitutional claims debatable or wrong. *See United States v. Fleming*, 676 F.3d 621, 635 (7th Cir. 2012).

While Swims attempted to raise constitutional issues in his § 2255 motion, the Court has determined that his motion is untimely and finds that reasonable jurists could not debate whether the motion should have been resolved in a different manner. Therefore, the Court will not grant a certificate of appealability.

E. Conclusion

The Court DENIES Dwayne Swims’s motion to vacate, set aside or correct his sentence (DE 143) and declines to issue a certificate of appealability as to any issue.

SO ORDERED on November 18, 2014.

s/ Joseph S. Van Bokkelen
Joseph S. Van Bokkelen
United States District Judge