

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

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
VS	:	3:CR-02-250
	:	3:CV-05-286
SHAWN SYLVESTER,	:	
Defendant	:	(CHIEF JUDGE VANASKIE)

ORDER

March 17, 2006

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 22, 2003, Shawn Sylvester was sentenced to a prison term of 240 months on his plea of guilty to Count 2 of the indictment returned against him, charging distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). As part of the plea agreement, the Government agreed to strike the averment in Count 2 of the indictment that the quantity of cocaine base exceeded five (5) grams.¹ As a consequence, the statutory maximum sentence confronting Sylvester was limited to 20 years, the prison term he received.

Sylvester's sentence was determined pursuant to a written plea agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, which this Court accepted. Significantly, had the Government proved the quantity of cocaine base alleged in Count 1 of the indictment, *i.e.*, more than 50 grams of cocaine base, Sylvester, who had two prior narcotics

¹ Sylvester stipulated in the plea agreement that he was responsible for the distribution of more than 1.5 kilograms of crack cocaine. (Plea Agreement, ¶ 12.)

trafficking convictions, would have received a mandatory term of life imprisonment, as required by 21 U.S.C. § 841(b). (Presentence Investigation Report at ¶ 54.) Paragraph 25 of the plea agreement provided that “in exchange for the defendant’s guilty plea, and in exchange for the defendant’s agreement to waive his right to appeal and his right to challenge his conviction and sentence in a collateral proceeding, the government has agreed to give up some of its rights, including the right to prosecute the defendant for offenses which, upon conviction, could result in the imposition of a sentence of life without parole.” Thus, the plea agreement contemplated a final resolution of this matter upon acceptance of the plea agreement by this Court and the imposition of a 20 year prison term.

On July 28, 2003, notwithstanding his waiver of the right to appeal, Defendant took an appeal to the United States Court of Appeals for the Third Circuit. (Dkt. Entry 49.) On December 10, 2003, however, Defendant filed a motion to dismiss his appeal. (Dkt. Entry 58, at Ex. H) On December 31, 2003, the Third Circuit granted Defendant’s motion to dismiss his appeal pursuant to Federal Rule of Appellate Procedure 42(b). (Dkt. Entry 55.)

On February 9, 2005, more than one year after the dismissal of his appeal, Defendant, through counsel, filed a motion to vacate his sentence under 28 U.S.C. § 2255. (Dkt. Entry 57.) Defendant claimed ineffective assistance of counsel in connection with the negotiation of the

plea agreement.² After Defendant and his attorney replied to this Court's Order issued pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999), and Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000), indicating that Defendant chose to have his § 2255 motion ruled on as filed, (Dkt. Entry 60), the Government was directed to respond to the § 2255 motion.

On April 1, 2005, the Government moved to dismiss the § 2255 motion, contending that it was barred by the one-year statute of limitations. (Gov.'s Br. in Supp. of Mot. to Stay Briefing Schedule and to Dismiss Def.'s § 2255 Mot., Dkt. Entry 65, at 4-5.) The Government also asserted that Defendant's waiver of the right to pursue a collateral challenge to his conviction and sentence was enforceable. (Id., at 6-8.) On April 6, 2005, this Court stayed the briefing on the substantive issues presented by Defendant's § 2255 motion pending resolution of the Government's motion to dismiss. (Dkt. Entry 66.) Defendant did not respond to the motion to dismiss.

DISCUSSION

Motions to vacate or set aside a federal conviction are subject to a one-year limitation

² Sylvester essentially contended that his attorney's alleged ineffectiveness deprived him of the opportunity to accept a plea deal that would have resulted in a prison term of less than 240 months. Sylvester does not proclaim his innocence or dispute that at least 1.5 kilograms of cocaine base could be attributed to his drug trafficking activities. Even if Sylvester could pursue the ineffective assistance claim and was successful, the result would be to allow him to withdraw his plea and confront the possibility of a prison term of life. It should also be noted that, absent the statutory mandatory life term and giving him credit for acceptance of responsibility, Sylvester's guideline prison term range is 292 to 365 months. (Presentence Investigation Report at ¶ 53.)

period. The limitation period 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, ¶ 6.

None of the circumstances described in paragraphs 2 through 4 above are present here. The dispositive question, therefore, is whether Sylvester's conviction became final more than one year before February 9, 2005, the date the § 2255 motion was filed.

Our Court of Appeals has held:

[A] "judgment of conviction becomes final" within the meaning of § 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires. If a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired.

Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999.) In essence, the Third Circuit in

Kapral broadly categorized defendants into two groups: those whose convictions are affirmed by the court of appeals and those who do not file a timely direct appeal to the court of appeals.

Defendant filed a timely appeal to the court of appeals, but then voluntarily dismissed his appeal prior to any ruling by the Third Circuit on the validity of his conviction and sentence. The § 2255 motion was filed more than one year after the Court of Appeals granted the motion for voluntary dismissal. If Sylvester's conviction became final upon dismissal of the appeal, then this proceeding is time-barred.

"A withdrawal of an appeal is an expression of the intent of the parties (principally, of course, the appellant) not to pursue the appeal any further and brings the appeal to an end." United States v. Outen, 286 F.3d 622, 631 (2d Cir. 2002). The Fifth, Sixth, Seventh, and Ninth Circuits have found that appellate courts do not have jurisdiction over the merits of an appeal once the appeal is voluntarily dismissed. United States v. Arevalo, 408 F.3d 1233, 1236 (9th Cir.), cert. denied, 126 S.Ct. 310 (2005); Futernick v. Sumpter Township, 207 F.3d 305, 312 (6th Cir. 2000); Barrow v. Falck, 977 F.2d 1100, 1103 (7th Cir. 1992); Williams v. United States 553 F.2d 420, 422 (5th Cir. 1977.) The Seventh Circuit noted, for example, that "a notice of appeal filed and dismissed voluntarily is gone, no more effective in conferring jurisdiction on a court than a notice never filed." Barrow, 977 F.2d at 1103. In this circumstance, a petition for a writ of certiorari would appear to be unavailable as there is no issue on which the Court could grant the request for review. See Stern v. United States, No. 2:05-CV-207, 2005 WL 2922457

at *2 (S.D. Ohio, Nov. 3, 2005)(Magistrate Judge Report and Recommendation)(“because the appeal was voluntarily dismissed, there was no basis on which to seek a petition for a writ of certiorari”), adopted, 2005 WL 3338704 (S.D. Ohio, Dec. 8, 2005). At the point of the voluntary dismissal of the appeal, therefore, the judgment of conviction would be “final” in the sense that no avenue of direct review (as of right or by discretion) would remain.

Consistent with this view, the Sixth Circuit in Craddock v. Mohr, 215 F.3d 1325, 2000 WL 658023, at *1 (6th Cir. 2000)(table), observed that it was undisputed that a conviction became final when a motion to voluntarily dismiss a direct appeal was granted. Similarly, in Lemons v. Conway, No. CV-05-243, 2006 WL 560642, at *3 (D. Idaho, March 7, 2006), the court concluded that a conviction became final, and the habeas corpus limitations period began to run, when the appeals court granted the defendant’s motion for voluntary dismissal of a direct appeal.

Although there was no occasion in Kapral to address the question of when the limitations period begins to run where the defendant voluntarily discontinues the appeal, its analysis, which depends upon the *availability* of certiorari review, points to the conclusion that Sylvester’s conviction became final when direct review ended. In this sense, he falls within the category of defendants who did not take an appeal in the first instance. In other words, the conviction becomes final when further direct review is foreclosed. Thus, for a defendant who does not appeal, the conviction becomes final when the 10-day appeal period expires. For a

defendant who does appeal, the conviction becomes final when the direct review process is completed. For a defendant whose conviction is affirmed, the process ends with a Supreme Court determination on certiorari review or at the expiration of the time for seeking such review. But for a defendant who voluntarily withdraws the appeal, such as Sylvester, further direct review is foreclosed. Consistent with the rationale of Kapral, the limitations period in this scenario commences when the court of appeals loses jurisdiction over the matter. At the latest, therefore, the conviction became final when Sylvester took the affirmative step of ending direct review and the Court of Appeals acted on his request.

As a result, Defendant's conviction became final, and the one-year statute of limitations began running, no later than December 31, 2003 – the date on which the Court of Appeals granted the motion for voluntary dismissal. Thus, Sylvester's § 2255 motion, filed on February 9, 2005, is untimely. Moreover, Sylvester has not suggested any basis for equitable tolling of the limitations period.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Government's motion to dismiss (Dkt. Entry 65) is **GRANTED**.
2. The motion for relief under 28 U.S.C. § 2255 (Dkt. Entry 57) is **DISMISSED**.

3. The Clerk of Court is directed to mark the related civil action (No. 3:05-CV-00286)

CLOSED.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania