UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HIDALGO GUZMAN

v. C.A. No. 00-556-T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge.

Hidalgo Guzman has moved, pursuant to 28 U.S.C. § 2255, to vacate his sentence. For the reasons set forth below, the motion is denied.

Background

Guzman pled guilty to illegal reentry after deportation in violation of violation of 8 U.S.C. § 1326. On April 13, 1999, Guzman was sentenced to 57-months imprisonment and 3-years of supervised release. Judgment entered on April 22, 1999. No appeal was taken.

Guzman's sentence was more than the two-year maximum under the "general" penalty provision of § 1326(a) but was less than the 20-year maximum under § 1326 (b)(2) which applies when the deportation "was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2).

Although Guzman had been deported after being convicted of drug trafficking charges, that fact was not alleged in his indictment for illegal reentry.

Guzman argues that, in light of the Supreme Court's recent decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), his

sentence should be vacated because the indictment did not allege that his deportation was subsequent to his commission of an aggravated felony. This Court need not address the merits of Guzman's argument because his § 2255 motion is time barred.

Discussion

There is a one-year statute of limitations applicable to motions filed pursuant to 28 U.S.C. § 2255. The portion of the statute that is relevant in this case provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–
>
> (1) the date on which the judgment of conviction becomes final;
>
> * * *
>
> (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.

Guzman's § 2255 motion was not filed within the time allowed by subsection (1). Guzman's conviction became "final" for § 2255 purposes on May 3, 1999, when the time period for appealing his sentence expired. Fed. R. App. P. 4(b)(1)(A); 26(a). See Kapral v. United States, 166 F.3d 565 (3rd Cir. 1999). However, Guzman's § 2255 motion was not filed until November 3, 2000, more than one year later. Therefore, the motion is not timely under subsection (1).

Nor does the fact that Guzman's § 2255 motion was filed within

one-year of the Supreme Court's June 26, 2000, decision in Apprendi make the motion timely under subsection (3). The First Circuit has held that the Supreme Court has not made Apprendi retroactively applicable to cases on collateral review. Sustache-Rivera v. United States, 221 F.3d 8,15 (1st Cir. 2000)(quoting, In re Vial, 115 F.3d 1192, 1197(4th Cir. 1997)(A rule has been made retroactive to cases on collateral review by the Supreme Court "only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding")), petition for cert filed (U.S. Oct. 23, 2000)(No. 00-6740).

Although Sustache-Rivera dealt with § 2255's limitations on successive petitions, its holding is applicable here because the statutory language regarding retroactivity is virtually identical in the two cases. See United States v. Hopwood, 122 F.Supp.2d 1077 (D. Neb. 2000) (stating that language of subsection (3) of statute of limitations is sufficiently similar to language pertaining to successive petitions that it should be construed in same manner).

In Apprendi, the Supreme Court said nothing about making its holding retroactively applicable. Nor did Apprendi involve a collateral proceeding.

In short, Guzman did not file his § 2255 motion within one year of the date that his conviction became final as required by subsection (1); and subsection (3) is inapplicable because the

Supreme Court has not made Apprendi retroactive to cases on collateral review. Therefore, Guzman's § 2255 motion is time barred.

Conclusion

For all of the foregoing reasons, Guzman's § 2255 motion is denied.

It is so ordered.

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Ernest C. Torres
Chief Judge

Dated: