

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HEATHER JO COX,)
Petitioner-Appellant,)
v.)
UNITED STATES OF AMERICA,)
Respondent-Appellee.)

FILED
Feb 07, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Heather Jo Cox, a pro se federal prisoner, appeals a district court's order denying her motion to vacate her sentence under 28 U.S.C. § 2255. Cox has filed an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Additionally, Cox moves to proceed in forma pauperis on appeal.

In March 2012, Cox pleaded guilty to six counts of committing drug offenses, in violation of 21 U.S.C. §§ 841 and 846. Cox had two prior convictions for "crimes of violence," so she was determined to be a career offender under USSG § 4B1.1. In July 2012, the district court sentenced her to 151 months in prison, to be followed by four years of supervised release. Cox did not appeal.

In June 2016, Cox filed her motion to vacate, arguing that, under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the predicate convictions for her career-offender designation were no longer crimes of violence, and thus she was entitled to resentencing. Specifically, she argued that her prior convictions fell within the residual clause of the "crime of violence" definition in the sentencing guidelines, found in a prior version of USSG § 4B1.2(a), which was identical to the residual clause in the Armed Career Criminal Act that *Johnson* invalidated as unconstitutionally vague.

Shortly after Cox filed her motion to vacate, however, the Supreme Court clarified that “the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause.” *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). Cox was sentenced under the guidelines, so *Johnson* does not apply. Accordingly, the magistrate judge recommended denying Cox’s motion. The magistrate judge reasoned that Cox could not demonstrate the existence of a new constitutional right, so her motion was time-barred under section 2255. *See* 28 U.S.C. § 2255(f). The district court adopted the magistrate judge’s recommendation over Cox’s objections, denied her motion to vacate, and declined to issue a COA.

To be entitled to a COA, Cox must demonstrate “that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court’s conclusion that Cox’s motion does not implicate *Johnson* and that it is thus time-barred.

A motion to vacate sentence is subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). Cox argued that her limitations period began to run from the date of the Supreme Court’s decision in *Johnson*, because the case announced a new right made retroactively applicable to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016); 28 U.S.C. § 2255(f)(3). However, because *Beckles* held that the advisory sentencing guidelines are not subject to vagueness challenges, reasonable jurists would not debate the district court’s conclusion that *Johnson* does not apply to Cox’s career-offender designation. *Beckles*, 137 S. Ct. at 895.

Accordingly, the statute of limitations began to run from “the date on which [Cox’s] judgment of conviction [became] final,” § 2255(f)(1), because Cox did not argue that any of the other statutory provisions apply. Because Cox did not appeal her judgment of conviction, it became final when her time to appeal expired. *See Sanchez-Castellano v. United States*, 358 F.3d 424, 428 (6th Cir. 2004). Under Federal Rule of Appellate Procedure 4(b)(1)(A), Cox had fourteen days after her judgment was entered, or until July 2012, to appeal. Thus, to be timely,

she had to file her motion to vacate by July 2013. Therefore, reasonable jurists would not debate the district court's conclusion that her motion to vacate, filed in June 2016, was untimely.

Accordingly, this court **DENIES** Cox's COA application and **DENIES** as moot her motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:16-CV-00098-JHM
CRIMINAL ACTION NO. 1:12-CR-00004-JHM

HEATHER JO COX

MOVANT/DEFENDANT

VS.

UNITED STATES OF AMERICA

RESPONDENT/PLAINTIFF

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law. Movant/Defendant has filed a pleading styled "notice of appeal" (DN 94) which the Court construes as an objection to the Magistrate's Findings. The Court being sufficiently advised,

IT IS HEREBY ORDERED that Movant/Defendant's objection is **overruled** and the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Movant/Defendant's motion to vacate under 28 U.S.C. § 2255 (DN 78) is **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED** as to the claims asserted in the motion to vacate (DN 78).

Copies: Heather Jo Cox, *pro se*
 Counsel of Record


Joseph H. McKinley, Jr., Chief Judge
United States District Court

July 19, 2017

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
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FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION

INTRODUCTION

Movant/defendant Heather Jo Cox has moved this court to vacate, set aside, or reduce her sentence pursuant to 28 U.S.C. § 2255 (DN 78). The United States filed a motion to dismiss (DN 80). Cox addressed the motion to dismiss (DN 81). This matter was assigned to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter (DN 79). The undersigned ordered additional briefing in light of Sixth Circuit precedent (DN 84). Cox provided additional briefing (DN 85), and the United States subsequently filed a second motion to dismiss (DN 89) and separately briefed the new additional issue (DN 90). The Court being sufficiently advised, this matter is ripe for recommendation. For the reasons set forth below, Cox's petition (DN 78) should be dismissed because Beckles forecloses any possibility of a constitutional challenge on vagueness grounds to Cox's sentence. As a result, Cox's petition is time barred.

BACKGROUND

The facts underlying Cox's conviction are not relevant. What matters is only that Cox pled guilty to several drug trafficking charges (DN 37 SEALED at PageID #113). Judgment was entered against Cox on July 5, 2012 (DN 36). Cox did not appeal.

ANALYSIS

There is a one year statute of limitations that applies to motions to vacate, set aside, or correct sentence filed by persons in custody pursuant to a federal court judgment. 28 U.S.C. § 2255(f). Specifically, the statute of limitations reads as follows:

- (f) 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;
 - (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 constitutional right asserted was initially recognized by the Supreme Court, if the 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(f). Generally, a conviction becomes final upon conclusion of direct review.

See Sanchez-Castellano v. United States, 358 F.3d 424, 426 (6th Cir.2004) (citing *United States v. Cottage*, 307 F.3d 494, 498 (6th Cir. 2002)). However, when a federal criminal defendant does not appeal to the court of appeals, the judgment becomes final upon the expiration of the period in which the defendant could have filed the notice of appeal. *Johnson v. United States*, 457 Fed. App'x 462, 464-65 (6th Cir. 2012). At the time relevant to this matter, the period was

14 days after entry of judgment. Fed. R. App. P. 4(b)(1) (2012). Fourteen days after July 5, 2012 was July 19, 2012. The one year statute of limitations began to run for Cox's claim on July 20, 2012, and expired on July 19, 2013.

Cox filed a letter (DN 48) with the Court on June 11, 2013 which the District Judge construed as a motion requesting additional time to file a motion under 28 U.S.C. § 2255 (DN 49 at PageID # 222-23). The District Judge denied this motion and ordered that a § 2255 form be sent to Cox (Id.). Notwithstanding this order, Cox did not file the motion now before the Court until June 20, 2016, nearly three years past the original deadline (DN 78).

While § 2255's statute of limitations contains alternative elements that may allow for filing past the one year deadline, Cox does not qualify for any of them. Given that Cox was sentenced pursuant to § 4B1.2 of the Sentencing Guidelines, she may have been able to assert a constitutional claim, depending on the outcome and retroactivity of the Beckles case. Beckles v. United States, 137 S.Ct. 886 (2017). Unfortunately for Cox, the Supreme Court did not invalidate any portion of the Sentencing Guidelines. On the contrary, the Court held that the Sentencing Guidelines are wholly unsusceptible to challenges brought under the vagueness doctrine of the Due Process Clause. Id. at 894-97. As a result, Cox cannot demonstrate the existence of a new constitutional right, and her claims are time barred.

The only remaining issue is whether a Certificate of Appealability should issue as to this claim. In Slack v. McDaniel, the Supreme Court established a two-pronged test that is used to determine whether a Certificate of Appealability should issue on a habeas claim denied on procedural grounds. 529 U.S. 473, 484-85 (2000). To satisfy the first prong of the Slack test, Cox must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 484. To satisfy the second prong, Cox

must show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Notably, the Court need not conduct the two-pronged inquiry in the order identified or even address both parts if Cox makes an insufficient showing on one part. Id. at 485. For example, if the Court determines Cox failed to satisfy the procedural prong, it need not determine whether the constitutional prong is satisfied. Id. Here, the time bar is so apparent that no jurist would debate its correctness. Moreover, Beckles could not be clearer in its holding, and Cox cannot make a claim that she has been denied a constitutional right. Therefore, the undersigned recommends that a Certificate of Appealability not issue as to this claim.

RECOMMENDATION

For the reasons set forth above, the undersigned recommends Cox's petition (DN 78) be denied and that a Certificate of Appealability not issue as to any of Cox's claims.


H. Brent Brennenstuhl
United States Magistrate Judge

June 29, 2017

NOTICE

Therefore, under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir.), aff'd, 474 U.S. 140 (1984).


H. Brent Brennenstuhl
United States Magistrate Judge

June 29, 2017

Copies: Heather Jo Cox, *pro se*
 Counsel of Record