

NOT RECOMMENDED FOR PUBLICATION

No. 18-6237

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 15, 2020
DEBORAH S. HUNT, Clerk

ALLEN R. WALKER,)	
)	
Petitioner-Appellant,)	
)	
v.)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
UNITED STATES OF AMERICA,)	THE MIDDLE DISTRICT OF
)	TENNESSEE
Respondent-Appellee.)	
)	
)	

ORDER

Before: CLAY, McKEAGUE, and BUSH, Circuit Judges.

Allen R. Walker, a former federal prisoner who is on supervised release and proceeding through counsel, appeals the district court’s order denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. The parties do not request oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, Walker pleaded guilty to conspiracy to possess with intent to distribute and dispense controlled substances not for a legitimate medical purpose and not in the usual course of professional medical practice, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C). The district court sentenced Walker to 96 months of imprisonment, to be followed by three years of supervised release. Walker did not appeal.

In August 2016, Walker, proceeding *pro se*, filed a letter with the district court requesting legal assistance and additional time to file a § 2255 motion. The letter also outlined potential grounds for the intended motion to vacate. After a response from the government, the district court denied Walker’s request for an extension of time. In August 2017, Walker filed a motion to vacate.

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After the appointment of counsel, Walker filed an amended motion to vacate, raising claims that trial counsel performed ineffectively by failing to file a notice of appeal and that Walker's guilty plea was involuntary. Walker acknowledged that his motion to vacate was untimely but argued that the district court should construe his August 2016 letter requesting an extension of time as a timely filed § 2255 motion. The district court declined to so construe the letter and denied the motion to vacate as untimely. The district court also denied Walker a certificate of appealability ("COA") and denied his motion for reconsideration.

This court initially denied Walker a COA. This court determined that reasonable jurists could not debate that the district court had properly found that Walker's § 2255 motion was untimely, *see* 28 U.S.C. § 2255(f), and declined to construe the August 2016 letter as a motion to vacate because it "was clearly framed as a request for additional time and for legal assistance in filing a future § 2255 motion." *Walker v. United States*, No. 18-6237 (6th Cir. Apr. 22, 2019) (order). Walker, represented by counsel, filed a petition for panel rehearing, arguing alternatively that the government had waived its statute-of-limitations defense or that the district court had erred by failing to provide him with notice and an opportunity to respond before denying his petition as untimely. We granted the petition for rehearing, issuing a COA on "whether the government forfeited or deliberately waived its statute of limitations defense and, if the government forfeited its defense, whether the district court erred by failing to provide Walker with notice and an opportunity to respond before denying his 28 U.S.C. § 2255 motion as untimely."

On appeal, Walker reiterates his arguments that the government waived its limitations defense, or, in the alternative, that the district court did not give him notice and an opportunity to respond. The government asserts that it forfeited, rather than waived, its limitations defense. The government acknowledges that Walker had alluded to a potential equitable-tolling argument in his amended motion to vacate, but he was not afforded notice and an opportunity to present his position before the district court *sua sponte* denied his petition for untimeliness. The government therefore recommends that this court remand the question to the district court and allow Walker to present his equitable-tolling arguments in the first instance without being subject to the restrictions placed on his motion for reconsideration under Federal Rule of Civil Procedure 60(b). In reply,

Walker argues that, if the case is remanded, the district court should reevaluate whether *sua sponte* consideration of the timeliness of his motion was appropriate.

When reviewing a district court's denial of a § 2255 motion to vacate, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *Adams v. United States*, 622 F.3d 608, 610–11 (6th Cir. 2010). We review mixed questions of law and fact *de novo*. *See Campbell v. United States*, 686 F.3d 353, 357 (6th Cir. 2012). A district court is authorized to consider *sua sponte* the timeliness of a prisoner's habeas petition or motion to vacate, provided that it provides the parties with fair notice and an opportunity to be heard on the issue. *See Wood v. Milyard*, 566 U.S. 463, 472–73 (2012); *Day v. McDonough*, 547 U.S. 198, 209–10 (2006); *Shelton v. United States*, 800 F.3d 292, 293–94 (6th Cir. 2015) (applying *Day* in the § 2255 context). The notice requirement provides the parties with “the opportunity to bring essential information not evident from the face of the motion to the court's attention, including the possibility that equitable tolling applies.” *Shelton*, 800 F.3d at 295. A court's ability to address timeliness *sua sponte* also depends on whether the government's failure to raise the issue was the result of a mere forfeiture or instead a deliberate waiver, since it would be “an abuse of discretion to override [the government's] deliberate waiver of a limitations defense.” *Day*, 547 U.S. at 202; *see also Wood*, 566 U.S. at 470 n.4, 471 n.5. “[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) (second alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

Walker argues that the government was on notice of the untimeliness of his motion to vacate due to his 2016 request for an extension of time, which the district court denied, and because he acknowledged the timeliness issue in his amended motion to vacate. He therefore asserts that the government's failure to address the timeliness issue in its response amounted to a deliberate waiver of the defense. The government acknowledges that it failed to raise untimeliness in its response but contends that this failure does not rise to the level of an affirmative relinquishment or intentional abandonment of the defense.

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The district court has not yet had an opportunity to consider Walker's waiver argument. And because the parties agree, at the least, that the petition should be remanded to the district court to allow Walker an opportunity to present his position on the timeliness of his motion to vacate without the restrictions placed on Rule 60(b) motions, the prudent course of action is to remand and allow the district court to address in the first instance whether the government deliberately waived its limitations defense. If the district court determines that the government merely forfeited its limitation defense, Walker should be allowed an opportunity to be heard on the issue and to present his equitable-tolling arguments to the district court without the restrictions placed on Rule 60(b) motions. If the district court determines that the government waived its limitations defense, assuming that there are no other issues that need to be addressed, it should proceed to address the merits of Walker's § 2255 motion.

Accordingly, we **VACATE** the district court's judgment and **REMAND** to the district court with instructions to consider Walker's waiver and timeliness arguments in the first instance.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk