

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-3481

Randy Horton,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 50121--Philip G. Reinhard, Judge.

Argued January 19, 2000--Decided June 29, 2000

Before Bauer, Cudahy and Evans, Circuit Judges.

Cudahy, Circuit Judge. Randy Horton was a leader of a nineteen-person drug ring active between 1989 and 1993 in Rockford, Illinois. In 1994, a federal jury convicted Horton of conspiring to distribute cocaine or cocaine base, in violation of 21 U.S.C. sec. 846, and of distributing 62.6 grams of cocaine base in two transactions, in violation of 21 U.S.C. sec. 841(a)(1). The court sentenced Horton to life imprisonment for the sec. 846 conviction and 40 years imprisonment, to run concurrently, for the sec. 841 convictions. Horton did not take a direct appeal from his conviction, instead appealing only his sentence, which this panel affirmed in *United States v. Russell*, 96 F.3d 1450, 1996 WL 508598 (7th Cir. Dec. 20, 1996) (unpublished order). Horton now appeals the denial of his recent motion under 28 U.S.C. sec. 2255.

I. Facts and Disposition Below

We have already described the underlying drug conspiracy in other opinions, see *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997); *United States v. Evans*, 92 F.3d 540 (7th Cir. 1996); *Russell*, 1996 WL 508598, at *1, so we need not do so again. But some details of the proceedings leading to this appeal are warranted. In 1993, a federal grand jury returned a fifteen-count

indictment, charging Horton, along with eighteen others, with conspiring knowingly and intentionally to possess with intent to distribute mixtures containing cocaine and cocaine base (Count I). Horton was also indicted on two substantive counts for distributing 21.6 grams of cocaine base on one occasion and 41 grams on another (Counts VII and XIII). The jury convicted Horton of all three charges against him. At sentencing, the district court determined that Horton and his coconspirators had conspired to possess with intent to distribute about ten kilograms of cocaine and ten kilograms of cocaine base. See Russell, 1996 WL 508598, at *5. On December 15, 1994, the district court sentenced Horton to life in prison on the sec. 846 conspiracy count with concurrent 40-year sentences on the two substantive distribution counts. Horton appealed only his sentence to the Seventh Circuit, and we affirmed the district court on December 20, 1996. See Russell, 1996 WL 508598, at *3-*5. Horton filed a petition for writ of certiorari with the Supreme Court, which was denied on April 21, 1997. Horton did not petition the Supreme Court for rehearing.

Horton filed the present motion under 28 U.S.C. sec. 2255 in the district court on April 23, 1998, claiming that the jury instructions on the drug conspiracy count resulted in an ambiguous and unconstitutional verdict. The trial court had instructed the jury on the conspiracy count as follows:

The government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. Neither does the government have to prove that the amount of cocaine or cocaine base charged in the indictment was distributed or possessed. However, the government must prove that the conspiracy, the distribution charges, and the possession charges involved measurable amounts of cocaine or cocaine base.

The jury's general verdict of guilty on the sec. 846 conspiracy was ambiguous, Horton argues, because the phrase "measurable amounts of cocaine or cocaine base" used in the instruction opened up the possibility that, for example, four jurors thought Horton conspired to distribute only cocaine while the other eight thought he conspired to distribute only cocaine base. This verdict, argues Horton, was therefore not unanimous and denied him his constitutional right to a jury verdict, contending that the Supreme Court's decision in *Edwards v. United States*, 118 S. Ct. 1475 (1998), supports this position. The government filed its response to this motion late, but the district court decided to accept

the filing (by granting the government's motion to accept the response) without a hearing. The government raised three grounds for denial of Horton's amended sec. 2255 motion: (1) Horton's original motion was untimely, since it was filed more than one year after his judgment of conviction had become final; (2) Horton's jury instruction claim was procedurally defaulted because he failed to raise this claim in his direct appeal; and (3) the Supreme Court's decision in *Edwards* actually supported the denial of Horton's sec. 2255 motion. Although it noted that there may be problems with the timeliness of Horton's motion, the district court denied Horton's motion on the merits. Horton moved to reconsider that ruling, which the district court denied. This appeal followed.

II. Discussion

Horton's appeal places two issues squarely before us: (1) was his motion under sec. 2255 timely filed? And (2) is the object of a sec. 846 conspiracy an element of the offense to be determined by the jury? We review *de novo* a district court's decision denying a motion under 28 U.S.C. sec. 2255, see *Lanier v. United States*, 205 F.3d 958, 962 (7th Cir. 2000), and we can affirm the district court's decision "on any ground that was not waived or forfeited in the district court." See *United States v. Jackson*, 207 F.3d 910, 917 (7th Cir. 2000)./1

A. Timeliness

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, a sec. 2255 motion must be filed within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. sec. 2255(1). Horton filed this sec. 2255 motion on April 23, 1998--a year and two days after the Supreme Court denied certiorari on his direct appeal. Although the district court opted not to address the timeliness of Horton's sec. 2255 motion, the government certainly argued it, and given the importance of procedure under the AEDPA, we will decide this issue. Therefore, we must determine whether the two extra days rendered Horton's filing untimely.

Horton contends that his sec. 2255 motion is not barred by AEDPA's one-year limitation period because his conviction did not become "final" under sec. 2255(1) until after his opportunity to move the Supreme Court to reconsider its denial of certiorari had passed. Horton argues that because he had 25 days to file such a motion with the Court, see Sup. Ct. R. 44.2, his conviction was

not "final" until that 25-day period had expired. On this basis, he claims that, rather than being two days late, his sec. 2255 motion was filed 23 days before the expiration of the limitation period.

In a case decided while this opinion was in the works, this court held that a defendant's conviction becomes "final" when his petition for certiorari is denied. See *United States v. Marcello*, Nos. 99-2294, 99-2451, 2000 WL 580669, at *2 (7th Cir. May 15, 2000). However, this does not quite end our analysis because the *Marcello* opinion does not address Horton's argument that the 25-day period during which he could have petitioned the Supreme Court for rehearing delayed the finality of his conviction. The Fifth Circuit and the Tenth Circuit have, on the other hand, recently addressed arguments similar to Horton's and reached the same conclusion we reached in *Marcello*: both other circuits concluded that, absent an actual suspension of an order denying certiorari by the Court or a Justice, a judgment of conviction is "final" for purposes of the one-year limitation period in sec. 2255(1) when the petition for writ of certiorari is denied. See *United States v. Thomas*, 203 F.3d 350, 355 (5th Cir. 2000); *United States v. Willis*, 202 F.3d 1279, 1280-81 (10th Cir. 2000). *Marcello*, *Thomas* and *Willis* all relied on Supreme Court Rule 16.3, which states:

Whenever the Court denies a petition for writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup. Ct. R. 16.3. Essentially, this Rule makes plain that an "order denying certiorari is effective at the time of its entry by the Supreme Court," *Marcello*, 2000 WL 580669, at *2, barring extraordinary intervention from the Court or a Justice, see *Thomas*, 203 F.3d at 355-56; *Willis*, 202 F.3d at 1281. Nor does the mere filing for a petition for rehearing with the Supreme Court affect the legal import of the denial of certiorari. See *Thomas*, 203 F.3d at 356; *Willis*, 202 F.3d at 1281. Thus, *Marcello*, *Thomas* and *Willis* without exception hold that the denial of certiorari itself renders a defendant's conviction final under 28 U.S.C. sec. 2255(1).

Horton, however, argues that our decision in *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998), cert. denied sub nom., *Ahitow v. Glass*, 119 S. Ct. 1758 (1999), requires this panel to

disagree with Marcello and the other circuits we have noted and hold that his conviction was not "final" until the period during which he could have petitioned the Supreme Court for rehearing but did not had passed. In Gendron, we held that when a federal prisoner decides not to seek certiorari at all, his conviction becomes final on the date this court issues the mandate in his direct criminal appeal, see 154 F.3d at 674, and Horton's argument begins, quite simply, with the proposition that, because the court of appeal's mandate issues only after the period to petition for rehearing expires, see Fed. R. App. P. 41(b) and (d)(1), a conviction does not become "final" under Gendron until after the possibility of a petition for rehearing expires. So, in this case, Horton argues that, even though he did not seek a rehearing from the Supreme Court, his conviction did not become "final" until after his opportunity to do so was foreclosed. Horton's proposal seemingly points to a tension between Marcello and Gendron, but his argument is clearly misplaced, as a look at the applicable court rules demonstrates.

Petitions for rehearing before the courts of appeals and petitions for rehearing before the Supreme Court have strikingly different effects. Filing a timely petition for rehearing in the court of appeals automatically stays the mandate until the petition for rehearing is decided. See Fed. R. App. P. 41(d)(1). Thus, the filing of a petition for rehearing delays the court of appeal's last act in disposing of the case, which is the issuance of the mandate. However, a petition for rehearing before the Supreme Court does essentially nothing with respect to the matters of concern here. See Sup. Ct. R. 16.3. A rehearing petition does not stay the denial of certiorari: the denial of certiorari is effective when issued, and it disposes of the case before the Supreme Court. See *id.* See also Marcello, 2000 WL 580669, at *2; Thomas, 203 F.3d at 356; Willis, 202 F.3d at 1281. Thus, the critical difference for the purpose of sec. 2255(1) finality between a petition for rehearing before the court of appeals and before the Supreme Court is that the former automatically delays the termination of the court's involvement with the case and the latter does not. Because Gendron's holding can be read to imply that once a court's last required action is taken to dispose of the case (there the issuance of the appellate mandate), Gendron itself supports a finding that Horton's conviction became "final" when the Supreme Court denied certiorari on his direct appeal. After Horton's petition for a writ of certiorari was denied on April 21, 1997, no federal court needed to take another action to dispose of Horton's appeal. Since no further

action was required from any court, Horton's conviction was "final" at that time. We, therefore, see no reason to depart from our recent holding in Marcello, and we hold that a defendant's conviction becomes "final" under sec. 2255(1) when the Supreme Court denies the defendant's petition for a writ of certiorari (absent a suspension order from the Court or a Justice), irrespective of the opportunity to petition the Supreme Court for rehearing. Accordingly, Horton's conviction became final on April 21, 1997. Because Horton's sec. 2255 motion was not filed until April 23, 1998, one year and two days later, his sec. 2255 motion was untimely and properly dismissed by the district court.

B. Merits

Although we hold that Horton's sec. 2255 motion is untimely, we will, for the sake of completeness, briefly address his merits argument. Horton's argument that the jury instructions were constitutionally flawed in stating that the jury could convict upon finding that the conspiracy distributed "measurable amounts of cocaine or cocaine base" turns on whether the particular drug that forms the object of a sec. 846 conspiracy is an element of the offense or merely a sentencing factor. "An element of the crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt." *United States v. Hardin*, 209 F.3d 652, 654 (7th Cir. 2000). "A sentencing factor, by contrast, need not be set forth in the indictment, may be decided by the judge, and must be proved only by a preponderance of the evidence or perhaps in extreme circumstances by clear and convincing evidence." *Id.*

In a drug offense, the type of drug is a sentencing factor, and not an element of the offense. We have held that when a defendant is convicted of a sec. 846 conspiracy charge, the judge alone determines which drug was distributed, and in what quantity. *United States v. Edwards*, 105 F.3d 1179, 1180 (7th Cir. 1997), *aff'd* 118 S. Ct. 1475 (1998). Our *Edwards* decision is on all fours with the case before us. The appellants in *Edwards* were, in fact, Horton's codefendants, and they were challenging the same jury instruction that Horton challenges now, but on a different basis.

In *Edwards*, the appellants challenged their sentences, arguing that they should have been sentenced based on a cocaine-only conspiracy because the general jury verdict was ambiguous regarding whether the object of the conspiracy was cocaine only, cocaine base only or both. The

Edwards panel rejected these arguments and explained that, ultimately, what a jury believes about which drug the conspirators distributed is not conclusive at sentencing, and a verdict that fails to answer a question committed to the judge has no effect on the judge's sentencing options. See *id.*, 105 F.3d at 1181. Horton, however, challenges his conviction on the ground that the jury was not unanimous on an element of the offense--in his argument, the type of drug. But our conclusion in Edwards that the type and quantity of drug distributed by a conspiracy is a sentencing factor to be determined by the sentencing judge, see *id.*, 105 F.3d at 1181-82, necessarily implies that type and quantity are not elements of the offense. See *Hardin*, 209 F.3d at 654. This is not an auspicious beginning for Horton's challenge.

However, our Edwards decision was not the final word: the Supreme Court granted certiorari and heard the case. The Supreme Court affirmed our decision in Edwards, but Horton argues that because that affirmance did not expressly adopt our reasoning, we should reach a different result in this case. This argument is wholly without merit. The Supreme Court clearly explained that "regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the 'controlled substances' at issue consisted of cocaine, crack, or both." *Edwards v. United States*, 118 S. Ct. 1475, 1477 (1998). By treating the type of drug as a sentencing factor, the Supreme Court's Edwards decision firmly supports the conclusion that the type of drug is not an element of the offense.^{/2} Accordingly, even if Horton's sec. 2255 motion had been timely, which it was not, we would have rejected Horton's argument on the merits.

III. Conclusion

For the above-stated reasons, and because we find the remainder of Horton's arguments to be without merit, the judgment of the district court is Affirmed.

^{/1} Horton argues that the government has waived its timeliness argument on appeal because it filed the response to his sec. 2255 motion late in the district court. Under Fed. R. Civ. P. 6(b), a district court has the authority to accept a late filing, but Horton argues that the district court erred in doing so here because an extension can only be given for "excusable neglect." See *id.* The district court certainly had the discretion to determine whether to accept the government's late filing on the basis of excusable neglect, and in doing so we do not believe that it abused

its discretion. See *Silva v. City of Madison*, 69 F.3d 1368, 1377 (7th Cir. 1995). Therefore, Horton's argument that the government waived its untimeliness argument fails.

/2 Although it has no bearing on the case before us, we note that the Supreme Court seemed to indicate that what a jury believes about the object of a conspiracy--whether, for example, it is cocaine or cocaine base--may matter in some circumstances, but only if "the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." *Edwards*, 118 S. Ct. at 1477-78. This is so, explained the Court, not because the type of drug suddenly becomes an element of the offense but "because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." *Id.* This certainly does not undermine the validity of Horton's conviction, nor would it affect his sentence. The district court found that Horton conspired to distribute approximately ten kilograms of powder cocaine and ten kilograms of cocaine base, and either of these findings independently yields a statutory maximum sentence of life imprisonment. See 21 U.S.C. sec. 841(b)(1)(A) (stating that more than five kilograms of cocaine or more than fifty grams of cocaine base yield a sentence "which may not be less than 10 years or more than life").