

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

v.

ANDREW TRAEGER,  
Defendant.

No. 04 C 2685 (97 CR 697)

2004 U.S. Dist. LEXIS 12901

**July 8, 2004**, Decided

**July 9, 2004**, Docketed

**COUNSEL:** [**\*1**] For UNITED STATES OF AMERICA, plaintiff: Susan M. Haling, United States Attorney's Office, Chicago, IL.

ANDREW TRAEGER, defendant, Pro se, Terre Haute, IN.

**JUDGE:** Milton I. Shadur, Senior United States District Judge.

**OPINION:** MEMORANDUM OPINION AND ORDER

This Court initially (and promptly) conducted the required preliminary review of the self-prepared 28 U.S.C. § 2255 ("Section 2255") motion by which Andrew Traeger ("Traeger") has recently sought to attack his March 1999 conviction on charges of bank robbery and attempted bank robbery, pursuant to which he is serving a 210-month sentence (imposed some two years later) that he also challenges. This Court just as promptly issued its April 16, 2004 memorandum order that (1) summarily dismissed Traeger's "Ground One" but (2) required the United States to file an answer or other pleading to the balance of Traeger's motion on or before May 28. That in turn triggered a government motion to obtain Traeger's medical information and records, something that Traeger himself had requested in his letter received by this Court on March 18, 2004 ("March 18 Letter," a copy of which is attached as Ex. [**\*2**] 1), in which letter he had asked permission to file his belated Section 2255 motion that he tendered a month later.

After this Court granted the government's motion, the Assistant United States Attorney handling the case proceeded to get the requested information, and on June 30 the government filed its written response to Traeger's Section 2255 motion. On that same day (by sheer coincidence) this Court also received Traeger's handwritten amendment to his motion in which--like countless other criminal defendants--he seeks to invoke the Supreme Court's recent decision in **Blakely** v. Washington, 2004 U.S. LEXIS 4573, 72 U.S. Law Week 4546 (U.S. June 24, 2004) as providing another asserted basis for Section 2255 relief.

It should be made plain at the outset that the normal operation of Section 2255's one-year limitation period would bar Traeger's motion, with the possible

exception of his newest **Blakely**-based contention (of which more later). As for the one-year period as such, once Traeger's direct appeal resulted in the affirmance of his conviction and sentence on May 8, 2002 (see 289 F.3d 461 (7th Cir. 2002)) he sought certiorari review but was turned [**\*3**] down by the Supreme Court on November 12, 2002 (Traeger v. United States, 537 U.S. 1020, 154 L. Ed. 2d 428 (2002)). Hence his April 2004 Section 2255 filing was some five months out of time on its face (or even if he were instead to be credited with the date of the March 18 Letter as equivalent to a Section 2255 filing, he still would have been some four months out of time).

Because today's ruling is based on the untimeliness of Traeger's motion (a holding that, as will be seen, flatly rejects his equitable tolling argument discussed hereafter), this Court need not take the time and effort to address his several substantive grounds for relief. There is one noteworthy exception: "Ground Three," which occupies nine closely handwritten pages that form part of the motion, charges five instances of what Traeger characterizes as the constitutionally inadequate representation by his trial counsel Ronald Clarke ("Clarke"). But several other claimed inadequacies on Clarke's part had formed a major part of Traeger's direct appeal and were rejected by the Seventh Circuit (see 289 F.3d at 470-73). And that being so, United States v. Cooke, 110 F.3d 1288, 1299 (7th Cir. 1997) [**\*4**] (citations omitted and emphasis added) explains the impermissibility of Traeger's current effort to attack Clarke's performance for a second time:

This Court's reluctance to consider ineffective assistance claims on direct appeal stems, of course, from the fact that such claims are very unlikely to find any factual support in the trial record and an adverse determination on direct appeal will be res judicata in any subsequent collateral attack. As we have so often put it, "a defendant who presents an ineffective-assistance claim for the first time on direct appeal has little to gain and everything to lose."

In short, that aspect of the motion is barred by claim preclusion.

Now to the belatedness of the current motion. Except for the new **Blakely** issue, which will be dealt with at the end of this opinion, Traeger seeks to invoke the doctrine of equitable tolling to escape that limitations bar--and he does so in attempted reliance on the matters that he has set out in the March 18 Letter. But the government has responded to Traeger's generalized and conclusory self-evaluation contained in that letter in dispositive fashion: Ex. 2 to this opinion is the affidavit [**\*5**] of Dr. Thomas Hare that details (1) Traeger's treatment at the Springfield, Missouri Medical Center by Dr. Hare and his predecessors as well as (2) Traeger's conduct that gives the lie to his assertion of inability to prepare and submit a Section 2255 motion long before he did so here. Nothing in Dr. Hare's continuous personal observation of Traeger (informed of course by Dr. Hare's extensive professional experience), and nothing in the medical records that antedated Dr. Hare's arrival, provide even a smidgen of confirmation of Traeger's unsupported contention as to his inability to proceed with a Section 2255 motion in timely fashion--just the opposite is true. n1

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n1 One of Oscar Wilde's famous aphorisms is this one from Act III of *Lady Windermere's Fan*:

In this world there are only two tragedies. One is not getting what one wants, and the other is getting it.

In this instance Traeger has gotten what he said he wanted in his March 18 Letter, and that information has only succeeded in confirming the invalidity of his equitable tolling claim.

- - - - - End Footnotes- - - - - **[\*6]**

Our Court of Appeals has consistently taken an extremely dim view of efforts such as Traeger's, so much so that *Nolan v. United States*, 358 F.3d 480, 484 (7th Cir. 2004) has put the matter in these terms:

Equitable tolling is a remedy reserved for "extraordinary circumstances far beyond the litigant's control [that] . . . prevented timely filing." *Modrowski [v. Mote]*, 322 F.3d [965,] 967 [(7th Cir. 2003)] (quoting [*United States v. Marcelllo*, 212 F.3d [1005,] 1010 [(7th Cir. 2000)]]). Equitable tolling of the statute of limitations is such exceptional relief that "we have yet to identify a circumstance that justifies equitable tolling in the collateral relief context." *Id.* (citing *Lloyd v. VanNatta*, 296 F.3d 630, 633 (7th Cir. 2002)).

In a different context but to identical effect, *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996) has taught that the tolling of limitations because of claimed mental difficulties exists "only if the illness in fact prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them."

Throughout **[\*7]** the original underlying proceedings before this Court, Traeger proved himself to be highly manipulative and lacking in credibility. Those same traits, which he exhibited both before and after his trial, were in part exemplified and in part suggested by the matters set out in the opinion issued by the Court of Appeals on direct appeal. And his lifelong career of crime further supports the absence of credibility that calls for the rejection of his current claims.

In that respect Traeger's Presentence Investigation Report before this Court reflected, despite the fact that no fewer than five of his criminal convictions beginning at age 17 were too old to have been counted for criminal history

points under the Sentencing Guidelines, that he managed to amass 18 criminal history points as an adult--placing him in Criminal History Category VI, the top of the line (just 13 points would have been enough to put him in Category VI). And because two of Traeger's prior convictions, as well as the bank robbery of which he was convicted before this Court, were crimes of violence, he was a "career offender" within the meaning of Guideline § 4B1.1, driving his Guideline range up to 210-62 months. [\*8] n2 Indeed, perhaps nothing better demonstrates Traeger's career criminal mindset and predilections than the fact that he robbed the LaSalle Bank (which caused his conviction in this case) just one month after he had been released from serving a prison term for having robbed the same bank--in the first case with his having given a note to the teller containing a death threat of a bomb, and in the second case with his having given the teller an oral death threat:

I have a gun. Don't push the button. If you push the button, I'm going to kill you.

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n2 Apart from those crimes of violence, the other federal crime on which he was serving a concurrent sentence with his earlier bank robbery had involved the unlawful possession of credit cards stolen from the United States mail and then used unlawfully by Traeger--a crime directly involving dishonesty.

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Under the circumstances no useful purpose would be served, and no difference in result would be occasioned, by an evidentiary hearing on the current Section [\*9] 2255 motion. Even if Traeger were to convert his unsworn statement in the March 18 Letter to testimony under oath, this Court would not credit it against Dr. Hare's affidavit, which the government has obtained and proffered both for its own purposes and in response to Traeger's having requested that his medical history be provided to this Court. There is thus no way in which Traeger's self-serving claim of having been unable to proceed with a timely motion could support an equitable estoppel claim.

That then dispatches all aspects of Traeger's motion save one: the newest ground he seeks to advance--an attempted challenge to his sentence based on the recently decided **Blakely** case. That recently added challenge looks not to notions of equitable tolling, but rather to a claimed restarting of the Section 2255 limitations clock on the date that **Blakely** was decided. To that end Traeger must rely on that date qualifying under this alternative subdivision of Section 2255:

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. [\* 10]

Just to quote that provision, however, is to confirm its inapplicability. **Blakely** itself did not announce that it was applicable retroactively--and indeed the same-day decision in *Schriro v. Summerlin*, 2004 U.S. LEXIS 4574, 72 U.S.L.W. 4561 (U.S. June 24, 2004) teaches the strong unlikelihood that **Blakely** will hereafter be given retroactive effect.

In sum, "it appears that an evidentiary hearing is not required" (Rule 8(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts), so that the same rule calls for this Court to "make such disposition of the motion as justice dictates." That justice-dictated disposition is the denial of Traeger's entire Section 2255 motion, and this Court so orders.

Milton I. Shadur

Senior United States District Judge

Date: July 8, 2004