

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10958
Non-Argument Calendar

D.C. Docket Nos. 1:15-cv-21702-JAL,
1:10-cr-20410-JAL-5

DEXTER EARL KEMP,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 25, 2021)

Before JILL PRYOR, LAGOA and BRASHER, Circuit Judges.

PER CURIAM:

Dexter Kemp, a federal prisoner proceeding *pro se*, appeals the district court's dismissal of his Federal Rule of Civil Procedure 60(b) motion seeking relief from its judgment dismissing as untimely his 28 U.S.C. § 2255 motion and

the court's denial of reconsideration under Federal Rule of Civil Procedure 59(e). After careful review, we affirm.

I.

Kemp and several codefendants were charged and convicted of drug and firearms offenses. Kemp and seven of his co-defendants appealed, and this Court affirmed on November 15, 2013. *See United States v. Gray*, 544 F. App'x 870 (11th Cir. 2013) (unpublished). Kemp and several codefendants moved for an extension of time to file a petition for rehearing, and this Court granted the motion. One of Kemp's codefendants filed a petition for rehearing en banc. Kemp then again joined several codefendants in requesting a second extension of time, and this Court granted the request. A second codefendant petitioned for rehearing en banc. It appears that Kemp neither filed a petition for rehearing nor joined either of the petitions filed with the Court. This Court denied the two petitions for rehearing on May 22, 2014. Although some of Kemp's codefendants filed petitions for certiorari in the Supreme Court of the United States, Kemp neither joined these petitions nor filed a petition of his own.

On April 29, 2015, Kemp moved under § 2255 to vacate his sentence, raising several claims of ineffective assistance of counsel. On September 30, 2016, the district court dismissed his motion as untimely. The court determined that Kemp's judgment of conviction became final on February 13, 2014, 90 days after

this Court affirmed his conviction and his period to file a petition for a writ of certiorari with the Supreme Court of the United States expired. Since Kemp's § 2255 motion was filed more than one year later, the court concluded, it was beyond the statute of limitations in 28 U.S.C. § 2255(f).

On June 22, 2018, Kemp moved in the district court to reopen his proceedings under Rule 60(b), arguing that his petition was timely under Supreme Court Rule 13.3. Ordinarily a party must petition the Supreme Court for certiorari within 90 days of entry of the relevant judgment. Sup. Ct. R. 13.1. But under Rule 13.3:

[I]f a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

Id. R. 13.3. Kemp argued that the district court had failed to account for 13.3, which made his petition timely.

The district court denied Kemp's Rule 60(b) motion as untimely. The court determined that Kemp's motion fell under Rule 60(b)(1) because it alleged the court made a "mistake," and that such motions must be filed within one year, which Kemp's was not. *See* Fed. R. Civ. P. 60(b)(1), (c)(1). The court acknowledged that a motion under Rule 60(b)(6)—which permits the court to grant

relief from a judgment for “any other reason that justifies relief”—is timely if filed “within a reasonable time.” Fed. R. Civ. P. 60(b)(6), (c)(1). But, the court explained, relief under the two subsections is mutually exclusive and Kemp’s argument was a classic Rule 60(b)(1) claim. On March 6, 2020, Kemp moved for reconsideration under Federal Rule of Civil Procedure 59(e). The district court denied the motion, concluding that it was untimely and, alternatively, meritless.

Kemp appealed, and this Court issued him a certificate of appealability on whether the district court erred in denying Kemp’s motions, where his § 2255 motion may have been timely filed in light of Supreme Court Rule 13.3.

II.

We review a district court’s denial of relief under Rule 60(b) only for an abuse of discretion. *Jackson v. Crosby*, 437 F.3d 1290, 1295 (11th Cir. 2006). We also review for an abuse of discretion a district court’s denial of relief under Rule 59(e). *Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). We liberally construe the pleadings of *pro se* litigants. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

III.

Kemp argues that the district court erred in dismissing as untimely his § 2255 petition. The district court’s error in finding otherwise, he contends, constituted extraordinary circumstances warranting relief under Rule 60(b)(6), so

the district court erred in construing his Rule 60(b) motion as brought under Rule 60(b)(1) and dismissing it as untimely. For these same reasons, he argues that the district court erred in denying his Rule 59(e) motion. Although it does appear Kemp's § 2255 motion was timely, the district court was within its discretion to deny his motions for relief under Rules 60(b) and 59(e).

A district court may relieve a party from a final judgment, order, or proceeding for several reasons, including, as relevant here: "(1) mistake, inadvertence, surprise, or excusable neglect;" or "(6) any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (6). A party may also, no later than 28 days after entry of a judgment, move a district court to alter or amend it. Fed. R. Civ. P. 59(e).

A motion under Rule 60(b) must be made within a reasonable time, and under (b)(1), no more than a year after the entry of the judgment or order. Fed. R. Civ. P. 60(c)(1). Relief under Rule 60(b)(6) is an extraordinary remedy that is appropriate only upon a showing of exceptional circumstances. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Further, Rule 60(b)(1) and (b)(6) are mutually exclusive: "a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (internal quotation marks omitted). Rule

60(b)(1) encompasses mistakes in the application of the law and the mistakes of judges. *Parks v. U. S. Life & Credit Corp.*, 677 F.2d 838, 839–40 (11th Cir. 1982).

Kemp’s initial § 2255 motion, filed on April 29, 2015, appears to have been timely. Section 2255(f) provides that a motion to vacate must be filed within one year of certain triggering dates, and here the relevant one is the date on which the judgment of conviction became final. 28 U.S.C. § 2255(f)(1). For federal criminal defendants who do not file a petition for a writ of certiorari with the Supreme Court on direct review, § 2255’s one-year limitation period starts to run when the time for seeking such review expires. *Clay v. United States*, 537 U.S. 522, 532 (2003). Kemp’s judgment became final—and the 90-day period for him to seek certiorari began to run—when we denied his co-appellants’ petitions for rehearing en banc on May 22, 2014. *See* Sup. Ct. R. 13.3. He did not file a petition for a writ of certiorari. Thus, the deadline for Kemp to file his § 2255 motion was August 20, 2015, one year after the expiration of the 90-day period within which he could have sought certiorari. *See Clay*, 537 U.S. at 532; Sup. Ct. R. 13.1, 13.3; 28 U.S.C. § 2255(f)(1). Kemp filed his motion before this date.

However, the district court did not abuse its discretion in treating Kemp’s Rule 60(b) motion challenging the § 2255 judgment as filed under Rule 60(b)(1) and dismissing it as untimely under Rule 60(c)(1). Kemp’s arguments are precisely the sort of judicial mistakes in applying the relevant law that Rule

60(b)(1) encompasses. *See* Fed. R. Civ. P. 60(b)(1); *Parks*, 677 F.2d at 839–40.

The district court properly construed Kemp’s motion as one under Rule 60(b)(1) and dismissed it as untimely because he filed it more than one year after entry of the judgment from which he sought relief. *See* Fed. R. Civ. P. 60(c)(1). For the same reasons, the court did not abuse its discretion in denying Kemp’s motion for reconsideration under Rule 59(e). *See* Fed. R. Civ. P. 59(e).

Thus, although, Kemp is correct that his § 2255 motion was timely filed, the district court ultimately did not reversibly err in dismissing as untimely his motion under Rule 60(b) and denying reconsideration under Rule 59(e). We affirm.

AFFIRMED.