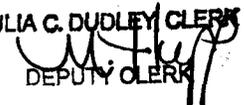


JUL 23 2014

JULIA C. DUDLEY CLERK
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA)
)
v.) **Criminal Action No. 4:10-cr-00018-1**
)
) **MEMORANDUM OPINION**
)
JOSE ROBERTO SERVILLA,)
) **By: Hon. Jackson L. Kiser**
Petitioner.) **Senior United States District Judge**

Jose Roberto Servilla, a federal inmate proceeding pro se, filed a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. Petitioner requests a new sentence because he believes recent case law invalidates his designation as a career offender. The United States filed a motion to dismiss, and the time for Petitioner to respond expired, making the matter ripe for disposition. After reviewing the record, I grant the United States' motion to dismiss the § 2255 motion as time barred.

I.

I entered Petitioner's criminal judgment on July 12, 2011, sentencing him to, inter alia, 360 months' incarceration after Petitioner knowingly and voluntarily pleaded guilty to possessing a machine gun during and in relation to a drug trafficking offense. The Court of Appeals for the Fourth Circuit dismissed an appeal on June 8, 2012, pursuant to Petitioner's motion to voluntarily dismiss the appeal. Petitioner filed the instant action no earlier than September 24, 2013.

II.

Courts and the public can presume that a defendant stands fairly and finally convicted after conviction and exhaustion, or waiver, of any right to appeal. United States v. Frady, 456 U.S. 152, 164 (1982). Nonetheless, federal convicts in custody may attack the validity of their federal sentences by filing § 2255 motions within a one-year limitations period. This period

begins to 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 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; 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).

Petitioner's criminal judgment became final on June 8, 2012, when the Court of Appeals granted Petitioner's motion to voluntarily dismiss the appeal. See United States v. Clay, 537 U.S. 522, 524 (2003) (stating a conviction becomes final once the availability of direct review is exhausted). Accordingly, for purposes of § 2255(f)(1), Petitioner had until June 10, 2013, to timely file a § 2255 motion, but he did not file the instant motion until September 24, 2013. See Rule 3, R. Gov. § 2255 Proceedings (discussing prison-mailbox rule for § 2255 motions).

Petitioner simply states that his motion should be considered timely filed because the "delay in filing th[is] . . . motion was due to the anticipated reduction motion [for substantial assistance] by the United States that has never been filed." However, the fact the United States did not file a motion to reduce sentence for substantial assistance is not an "impediment" that prevented Petitioner from filing the § 2255 motion and is not a fact supporting a claim that could have been discovered through due diligence. See 28 U.S.C. § 2255(f)(2), (4). Furthermore, Petitioner acknowledged in the relevant portion of the written plea agreement both that he was not promised a motion for substantial assistance and that the United States had no obligation to file that motion, even if Petitioner fully cooperated with law enforcement. Plea Ag't 4.

Petitioner testified under oath both that the written plea agreement constituted the entire agreement with the United States and that no one had promised or assured Petitioner anything other than the terms and conditions described in the written plea agreement. Plea Hr'g Tr. 26-27. Petitioner's allegations in support of the § 2255 motion that contradict his sworn statements during the plea colloquy must be treated as frivolous and false. United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005). Consequently, § 2255(f)(1) is the appropriate limitations period, and Petitioner filed the instant motion more than one year after his conviction became final.

Equitable tolling is available only in “those rare instances where – due to circumstances external to the party’s own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (internal quotation marks omitted) (citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)). Thus, a petitioner must have “been pursuing his rights diligently, and . . . some extraordinary circumstance stood in his way” to prevent timely filing. Holland v. Florida, ___ U.S. ___, 130 S. Ct. 2549, 2560 (2010). I do not find any extraordinary circumstance in the record that relieves Petitioner from the limitations period. See, e.g., United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (noting pro se status and ignorance of the law does not justify equitable tolling); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (noting that unfamiliarity with the law due to illiteracy or pro se status does not toll the limitations period). Accordingly, I find that Petitioner filed his § 2255 motion beyond the one-year period, Petitioner is not entitled to equitable tolling, and the petition must be dismissed.

III.

For the foregoing reasons, I grant the United States’ motion to dismiss and dismiss the § 2255 motion. Based upon my finding that Petitioner has not made the requisite substantial

showing of a denial of a constitutional right as required by 28 U.S.C. § 2253(c), a certificate of appealability is denied.

ENTER: This 23rd day of July, 2014.


Senior United States District Judge