

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 5 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-35948

Plaintiff-Appellee,

D.C. Nos. 3:20-cv-01685-MO
3:16-cr-00351-MO-1

v.

AKIAZ MARQIEZ KING,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted October 19, 2022
Portland, Oregon

Before: BADE and SANCHEZ, Circuit Judges, and LEFKOW,** District Judge.

The question presented in the certificate of appealability issued by the district court, *see* 28 U.S.C. § 2253(c)(2), is whether Defendant-Appellant Akiaz King's motion under 28 U.S.C. § 2255 to set aside his conviction based on ineffective assistance of counsel is timely. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

§§ 1291 and 2253(a). We review de novo the district court’s determinations that the motion was untimely and that equitable tolling of the filing deadline was not warranted. *See United States v. Buckles*, 647 F.3d 883, 887 (9th Cir. 2011).

1. The one-year filing deadline for King’s § 2255 motion began to run on “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)(4). “[T]o have the factual predicate for a habeas petition based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could have discovered) facts suggesting both unreasonable performance *and* resulting prejudice.” *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001). Here, the clock began when King knew or should have known that his attorney incorrectly advised him that he would not have to register as a sex offender under Oregon law if he pleaded guilty to a violation of 18 U.S.C. § 2421(a) for transportation of an individual in interstate commerce for purposes of prostitution.

In July 2017, King acknowledged in his plea agreement that he “may be required to register as a sex offender under state law” but that he “does not believe he will be required to register and the government takes no position [on the issue].” In February 2018, early in his term of supervised release, a probation officer informed King that he was required to register as a sex offender under Oregon law.

On March 12, 2018, King filed an action in an Oregon circuit court, seeking a declaration that his conviction did not require sex-offender registration.¹ In a letter dated April 2, 2018, the Oregon Department of State Police informed King that he was required to report as a sex offender under Oregon law. On August 28, 2018, the Oregon circuit court ruled that Oregon law required sex-offender registration for a violation of 18 U.S.C. § 2421(a) if committed in Oregon. King sought appellate review, but the Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review, and judgment was entered on May 21, 2020. King filed his § 2255 motion on September 29, 2020.

King was equipped with the factual predicate for an ineffective assistance of counsel claim no later than August 28, 2018, when the Oregon circuit court ruled against him. After that ruling, King was aware that his attorney was wrong, which should have been no surprise given King’s acknowledgement of uncertainty in the plea agreement, the probation officer’s instruction to register, and the state police’s demand that he register. *See Hasan*, 254 F.3d at 1154 n.3 (noting in the context of

¹ Shortly before initiating the state-court action, King filed an emergency motion to prohibit the Probation Office from requiring him to register as a sex offender unless and until a state court directed him to do so. The court directed Probation to take no action against King for failure to register during the pendency of the state-court litigation but took “no position on whether Mr. King is required to register by state law.” This order had no bearing on the relevant question of when King discovered that his attorney was wrong about Oregon’s sex offender registration requirements.

28 U.S.C. § 2244 motions that the limitations period begins with the discovery of “facts,” not with recognition of “the legal significance of those facts”). King’s § 2255 motion, filed over two years after the Oregon circuit court’s ruling, was therefore untimely. We are unpersuaded by King’s argument that the § 2255 filing deadline did not begin to run until after he sought appellate review of the Oregon circuit court’s ruling.

2. Equitable tolling of a filing deadline is available where a habeas petitioner shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations and citation omitted). “This is a very high bar, and is reserved for rare cases.” *Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir. 2014). King does not clear that bar, for he points to no extraordinary circumstance that prevented him from filing his petition on time. *Cf. Doe v. Busby*, 661 F.3d 1001, 1010, 1015 (9th Cir. 2011) (applying equitable tolling where petitioner was “deceived, bullied and lulled by an apparently inept and unethical lawyer”). Thus, equitable tolling is unavailable.

AFFIRMED.