

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARVIN JEFFREY, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

No. C 10-01114 CW
CR 04-40154 CW

ORDER DENYING
MOVANT'S MOTION
UNDER 28 U.S.C.
§ 2255 TO VACATE,
SET ASIDE, OR
CORRECT SENTENCE
(Docket No. 73)

Movant Marvin Jeffrey, a federal inmate at the United States Penitentiary in Atlanta, Georgia, filed this motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Respondent opposes the motion, asserting that it is barred by the statute of limitations and that Movant is not entitled to relief on the merits. The motion was taken under submission on the papers. After considering all the papers filed by the parties, the Court DENIES the motion.

BACKGROUND

On September 27, 2004, pursuant to a plea agreement, Movant plead guilty to two counts under 18 U.S.C. §§ 1349 and 1344, for conspiracy to commit bank fraud and executing a plan or scheme to defraud a financial institution with false pretenses. In the agreement, Movant agreed to waive his right to file a collateral attack against his convictions or sentence, including a motion under § 2255, except for a claim of ineffective assistance of

1 counsel. Plea Agreement ¶ 5.

2 The Amended Presentence Investigation Report (PSR) recommended
3 that Movant be classified in Criminal History Category V and the
4 offense level at 34, which included a four-level increase for an
5 offense involving fifty or more victims and a three-level increase
6 based on Movant's managerial role in the offense. This placed
7 Movant's advisory sentencing guideline range at 235-293 months.
8 The probation officer recommended a sentence of 264 months. The
9 government agreed with the PSR, but requested a downward departure
10 to 212 months based on various factors. In his sentencing
11 memorandum, Movant requested a further reduction to 103 months,
12 arguing for an offense level of 26 and a criminal history category
13 of IV.¹

14 At the May 14, 2008 sentencing hearing, the Court determined
15 that Movant's offense level was 28, his criminal history category
16 was V and his guideline range was 130-162 months.² This included
17 the four-level increase for number of victims and a three-level
18 reduction based on Movant's acceptance of responsibility, and
19 excluded the PSR's recommendation for a three-level increase based
20 on Movant's managerial role in the offense. The Court further
21 departed downward from the advisory guideline range based on other
22 considerations, including the 28 U.S.C. § 3353 factors. The Court

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24 ¹ Movant appears to have miscalculated the offense level in
25 his sentencing memorandum. He objected to the PSR based on its
26 three-level enhancement for a managerial role in the offense and
27 requested a three level reduction for acceptance of responsibility.
28 This would place the offense level at 28, not 26.

² Movant erroneously states that the Court determined that
his offense level was 26.

1 sentenced Movant to 108 months.

2 In his motion, Movant argues that his counsel was ineffective
3 for failing to object to the U.S.S.G. § 1B1.1(b)(2)(B) enhancement
4 that increased his offense level by four levels based on a
5 determination that the offense involved fifty or more victims.
6 Without the enhancement, his total offense level would be 24 and
7 his advisory guideline range would be 92-115 months.³

8 LEGAL STANDARD

9 A prisoner, in custody under sentence of a federal court,
10 making a collateral attack against the validity of his or her
11 conviction or sentence must do so by way of a motion to vacate, set
12 aside or correct the sentence pursuant to 28 U.S.C. § 2255 in the
13 court which imposed the sentence. Tripati v. Henman, 843 F.2d
14 1160, 1162 (9th Cir. 1988). Under 28 U.S.C. § 2255, a federal
15 sentencing court may grant relief if it concludes that a prisoner
16 in custody was sentenced in violation of the Constitution or laws
17 of the United States. United States v. Barron, 172 F.3d 1153, 1157
18 (9th Cir. 1999).

19 DISCUSSION

20 I. Timeliness

21 Respondent argues that Movant is not entitled to relief
22 because his claim is barred by the statute of limitations.

23 A motion under § 2255 must be filed within one year of the
24 latest of the date on which: (1) the judgment of conviction became

25 _____
26 ³ Because Petitioner believes the Court placed his offense
27 level at 26, he mistakenly argues that he deserves an offense level
28 of 22 with a criminal history category of V.

1 final; (2) an impediment to making a motion created by governmental
2 action was removed, if such action prevented the petitioner from
3 making a motion; (3) the right asserted was recognized by the
4 Supreme Court, if the right was newly recognized by the Supreme
5 Court and made retroactive to cases on collateral review; or
6 (4) the facts supporting the claim or claims presented could have
7 been discovered through the exercise of due diligence. 28 U.S.C.
8 § 2255(f).

9 A federal prisoner's judgment becomes final for purposes of
10 the one year statute of limitations when "a judgment of conviction
11 has been rendered, the availability of appeal exhausted, and the
12 time for a petition of certiorari elapsed or a petition for
13 certiorari finally denied." Griffith v. Kentucky, 479 U.S. 314,
14 321 n.6 (1987).

15 The statute of limitations in § 2255 is subject to equitable
16 tolling. United States v. Battles, 362 F.3d 1195, 1196 (9th Cir.
17 2004). Equitable tolling is available only when "extraordinary
18 circumstances beyond the prisoner's control make it impossible to
19 file a petition on time and the extraordinary circumstances were
20 the cause of the untimeliness." Id. at 1197 (citing Laws v.
21 LaMarque, 351 F.3d 919, 922 (9th Cir. 2003)). The prisoner bears
22 the burden of showing that this "extraordinary exclusion" should
23 apply to him. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.
24 2002).

25 Here, Movant does not allege an impediment created by
26 government action, nor do his claims depend on a newly recognized
27 right or on facts that could not have been discovered, with
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1 reasonable due diligence, at the time of sentencing. Therefore,
2 under the first prong of § 2255(f), the one-year statute of
3 limitations for Movant's claim began to run at the time his
4 sentence became final. Movant was sentenced on May 14, 2008, and
5 judgment was entered on May 16, 2008. Because Movant did not
6 appeal, the judgment became final ten days from the entry of
7 judgment, pursuant to Federal Rule of Appellate Procedure 4(b).⁴
8 Thus, the judgment became final on May 26, 2008. Movant's § 2255
9 motion was filed on March 15, 2010, more than six months beyond the
10 statutory deadline.

11 Movant claims under penalty of perjury that he placed his
12 motion in the prison mailing system on May 11, 2009, and that it is
13 therefore timely filed. That motion was never received by the
14 Court. Assuming without deciding that Movant placed the motion in
15 the prison mailing system in a timely manner, the Court will
16 evaluate Movant's motion on the merits.

17 II. Ineffective Assistance of Counsel

18 Movant argues that his counsel was ineffective because she
19 failed to object to the four-level enhancement under U.S.S.G.
20 § 1B1.1(b)(2)(B) at sentencing. Movant contends that application
21 of the enhancement was erroneous because there were less than fifty
22 victims, and asserts that individual account holders do not qualify
23 as victims when they do not sustain any part of the actual loss and
24 their losses are not included in the loss calculation. To support
25 his assertions, Movant cites two cases in his supplemental brief,

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27 ⁴ Effective December 1, 2009, the ten-day filing period was
28 changed to a fourteen day period.

1 United States v. Pham, 545 F.3d 712, 720 (9th Cir. 2008), and
2 United States v. Armstead, 552 F.3d 769, 780-83 (9th Cir. 2008),
3 both issued after his May 14, 2008 sentencing.

4 A claim of ineffective assistance of counsel is cognizable as
5 a claim of denial of the Sixth Amendment right to counsel, which
6 guarantees not only assistance, but effective assistance of
7 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The
8 benchmark for judging any claim of ineffectiveness must be whether
9 counsel's conduct so undermined the proper functioning of the
10 adversarial process that the trial cannot be relied upon as having
11 produced a just result. Id.

12 To prevail under Strickland, a movant must pass a two-prong
13 test. First, the movant must show that counsel's performance was
14 deficient in a way that falls below an objectively reasonable
15 standard. Id. at 687-88. Judicial scrutiny of counsel's
16 performance must be highly deferential, and a court must indulge a
17 strong presumption that counsel's conduct falls within the wide
18 range of reasonable professional assistance. Id. at 689; Wildman
19 v. Johnson, 261 F.3d 832, 838 (9th Cir. 2001).

20 Second, the movant must show that such deficiency prejudiced
21 him, which requires a showing that counsel's unprofessional errors
22 were so serious that, but for these errors, there is a reasonable
23 probability that the result of the proceeding would have been
24 different. Strickland, 466 U.S. at 694. A reasonable probability
25 is a probability sufficient to undermine confidence in the outcome.
26 Id. It is unnecessary for a federal court considering an
27 ineffective assistance of counsel claim to address the prejudice
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1 prong of the Strickland test if the movant cannot establish
2 incompetence under the first prong. Siripongs v. Calderon, 133
3 F.3d 732, 737 (9th Cir. 1998).

4 Here, the record does not show that counsel's performance was
5 deficient. Movant sought a sentence of 103 months and was
6 sentenced to 108 months, which was a significant reduction from the
7 264 months recommended by the probation officer and the 212 months
8 recommended by the government.

9 Furthermore, Movant was sentenced on May 14, 2008; Armstead
10 was decided on October 15, 2008 and Pham was decided on September
11 23, 2008. Counsel could not reasonably be expected to know of case
12 law decided after the date of Movant's sentencing. Therefore,
13 Movant's argument does not support a claim that his counsel's
14 performance was deficient.

15 Although failure to establish the first prong of the
16 Strickland test is sufficient for denial of Movant's motion, he
17 also fails to meet the second prong of Strickland. He is unable to
18 show a reasonable probability of a better result had counsel
19 objected to the four level enhancement under U.S.S.G.
20 § 1B1.1(b)(2)(B). Movant's sentence of 108 months was based on
21 downward departure and is within the advisory guideline range that
22 he now seeks under his § 2255 motion.

23 The Court imposed the sentence it viewed as reasonable,
24 considering all of the appropriate factors at issue. Movant's
25 sentence was substantially below the guidelines, and would not have
26 been lower even if the multiple victim enhancement had not applied.

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Movant fails to establish ineffective counsel under either of the Strickland factors and his claim for relief is denied.

CONCLUSION

For the foregoing reasons, Movant's § 2255 motion (Docket No. 73) is DENIED.

IT IS SO ORDERED.

Dated: 11/24/2010


CLAUDIA WILKEN
United States District Judge