

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALETA NECOLE THOMAS,

Defendant.

Case Nos. 21-CR-239-GKF-1
22-CV-301-GKF-CDL

ORDER

Before the court is the Motion to Vacate, Set Aside, or Correct Sentence filed by defendant Aleta Necole Thomas pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the Motion is denied.

I. Factual Background

On May 19, 2021, Ms. Thomas was named in a five-count indictment charging her with making false statements in violation of 18 U.S.C. § 1014 to fraudulently obtain loans from financial institutions under the Payroll Protection Program (PPP) enacted by Congress during the Covid-19 pandemic. [Doc. 2; PSR, p. 4, ¶ 1]. The full investigation into Ms. Thomas' scheme determined she engaged in the nearly year-long effort with two co-defendants and at least eight other individuals to submit thirty-three fraudulent PPP loan applications to various lenders. [Presentence Investigation Report (PSR), p. 9, ¶ 14]. As a result of these fraudulent applications, the banks and lenders approved seventeen of the applications and deposited more than \$795,000 into bank accounts controlled by Ms. Thomas. [*Id.*].

On October 13, 2021, Ms. Thomas and her two co-defendants were named in a seventeen-count second superseding indictment. [Doc. 48; PSR, pp. 6-8, ¶ 5]. Counts one through five of the second superseding indictment mirrored the original indictment. [*Id.*]. Counts six through

fifteen of the second superseding indictment alleged Ms. Thomas and her co-defendants made false and fraudulent statements on PPP loan applications to additional financial lenders for small businesses the defendants claimed to own. [*Id.*]. Counts sixteen and seventeen of the second superseding indictment alleged Ms. Thomas committed identity theft as part of her scheme to submit the fraudulent loan applications. [Doc. 48; PSR pp. 6, 8, ¶¶ 3, 5].

On December 7, 2021, Ms. Thomas entered a guilty plea to counts three and four of the second superseding indictment, which involved Ms. Thomas' submission of two specific fraudulent PPP loan applications. [Doc. 77, p. 2]. Ms. Thomas entered into a written plea agreement with the United States under Federal Rule of Civil Procedure 11(c)(1)(C) wherein the parties stipulated that an appropriate disposition to the case was a sentence of not greater than forty-eight months in prison. [Doc. 78, p. 18, ¶ 17(a)]. Further, Ms. Thomas agreed to a money judgment for restitution in the amount of \$795,158.50. [*Id.*, p. 8, ¶ 11(1)].

As a result of Ms. Thomas' plea, her sentencing was originally set for May 25, 2022. [Docs. 75, 83]. On May 16, 2022, Ms. Thomas submitted a Motion for Sentencing Variance and argued her moral character, good acts, and community involvement warranted a reduction from the sentencing guidelines. [*See* Doc. 97]. In support, Ms. Thomas attached sixteen character letters as exhibits to the Motion for Sentencing Variance from relatives, friends, and church members identifying the good deeds Ms. Thomas has performed and the support she provides to the community. [*See* Doc. 97-1]. The United States responded and objected to Ms. Thomas' Motion for Sentencing Variance on May 23, 2022. [Doc. 101]. Further, on May 18, 2022, Ms. Thomas filed objections to the PSR, which focused on minimizing her role in the fraudulent scheme for purposes of the relevant conduct attributable to her for sentencing guideline purposes. [Doc. 98]. The United States filed a response to these objections on May 25, 2022. [Doc. 102]. To afford

the court sufficient time to consider the belated Motion for Sentencing Variance and the United States' response, the court struck the original sentencing date and rescheduled the sentencing hearing for June 7, 2022.¹ [Doc. 99].

On June 2, 2022, Ms. Thomas's attorney moved to continue the sentencing hearing again on the basis he had been provided, and was still receiving, information from "numerous supporters" of Ms. Thomas which could not be "easily formatted for the Court." [Doc. 106, p. 1, ¶ 3]. Ms. Thomas' attorney indicated this information was "highly relevant" to her request for downward variance and the sentencing issues on which the parties were "sharply divided." [*Id.*]. Ms. Thomas requested a two-week continuance to allow her attorney sufficient time to "provide evidence that is relevant to [her] PSR objections and to her motion for variance." [*Id.*].

The United States objected to a second continuance of the sentencing hearing, arguing Ms. Thomas did not "sufficiently describe or explain how this newly discovered information [would] aid the Court in determining an appropriate sentence." [Doc. 110, p. 2]. Further, the United States pointed out Ms. Thomas did not explain how or why the materials needed to be formatted for submission to the court. [*Id.*] The United States argued Ms. Thomas had "ample opportunity to file motions, to gather letters of support, and present information to the Court" prior to the rescheduled sentencing date. [*Id.*]. Based on these arguments, the court denied the requested continuance and held Ms. Thomas' sentencing hearing on June 7, 2022. [Doc. 111].

At sentencing, the court overruled Ms. Thomas' objections to the PSR and determined the proper guideline range for her sentence was 63 to 78 months. [Doc. 123, pp. 9-15]. However, the court granted Ms. Thomas's request for a downward variance and sentenced her to thirty months

¹ Local Criminal Rule 32-6 requires motions for variance to be filed at least fourteen days before sentencing.

in prison, a sentence well below the stipulated maximum sentence set forth in the parties' 11(c)(1)(C) plea agreement.² [Doc. 113, p. 2].

II. Ms. Thomas' 2255 Motion

Ms. Thomas' present 2255 Motion asserts she is entitled to vacation of her sentence because she was provided ineffective assistance of counsel during the sentencing phase of her case.³ The sole ground for relief alleges her attorney, Keith Ward, "received approximately 30 to 40 character letters in support of [her] mitigation at sentencing" but "never submitted the character letters" to the court.⁴ [Doc. 125, p. 5]. Ms. Thomas claims Mr. Ward's "deficiency caused the Court to impose a disfavoring sentence...and deprived [Ms. Thomas] a fair sentencing, all to [her] prejudice." [*Id.*]. Ms. Thomas provides no additional argument, evidence, or authority to support her contentions and does not cite to, or attach as evidence, any of the character letters Mr. Ward did not submit to the court.

In opposition to the Motion, the United States argues Mr. Ward advocated effectively on Ms. Thomas' behalf during the sentencing proceedings and secured an eight-level downward variance to her sentencing guideline range. [Doc. 161, p. 5]. The United States notes that Mr. Ward provided the court with sixteen character letters supporting leniency as part of his Motion

² In the Rule 11(c)(1)(C) plea agreement, the parties stipulated that the appropriate sentence was one not greater than 48 months in prison. [Doc. 78, p. 18].

³ In addition to the 2255 Motion, Ms. Thomas submitted a handwritten letter, dated October 2, 2022, in which she requests modification of her sentence to either allow for home confinement or to permit her early release because her elderly grandmother is no longer able to care for Ms. Thomas' adopted children. [Doc. 160]. This court does not have jurisdiction to modify Ms. Thomas' sentence. *See United States v. Blackwell*, 81 F.3d 945, 949 (10th Cir. 1996) (holding that district courts do not possess "inherent jurisdiction" to modify sentences outside the limited instances permitted by Federal Rules of Criminal Procedure 35 and 36).

⁴ The 2255 Motion contained a second ground to vacate Ms. Thomas' sentence – specifically that trial counsel failed to investigate allegedly exculpatory statements made by a co-defendant. On September 23, 2022, Ms. Thomas moved to withdraw this contention from her Motion [Doc. 157], which the court granted [Doc. 158]. Consequently, Ms. Thomas' proceeds only on her claim that Mr. Ward was ineffective for failing to submit the additional character letters during the sentencing phase of her case.

for Sentencing Variance. [Doc. 97-1]. While Mr. Ward's efforts to continue the sentencing hearing and permit him to develop and submit additional character statements were denied by the court, the United States contends any additional character letters were merely cumulative and unnecessary to the sentencing determination. [Doc. 161, p. 5-6].

In opposition to Ms. Thomas' 2255 Motion, the United States produced an affidavit from Mr. Ward detailing his defense strategy and the mitigation efforts he undertook during the sentencing proceedings. [Doc. 161-1]. Initially, Mr. Ward received sixteen character letters in support of leniency from Ms. Thomas via emails sent between April 4, 2022 and April 20, 2022. [*Id.*, p. 3, ¶ 8]. Mr. Ward submitted these emails as an exhibit to the Motion for Sentencing Variance filed on May 16, 2022 and Mr. Ward summarized each in the body of this filing. [*Id.*; *see also* Doc. 97]. Over two weeks later, on May 31, 2022, Mr. Ward received approximately twenty emails from Ms. Thomas containing additional character statements on her behalf. [*Id.*, ¶ 9]. Ms. Thomas "attributed" these statements "to other people who supported leniency for her." [*Id.*]. Some of these emails from Ms. Thomas "contained screen shots of statements reportedly made on Ms. Thomas's behalf and others contained protestations of Ms. Thomas's factual guilt." [*Id.*]. Mr. Ward further notes "the emails contained pictures that were taken with a cell phone that were not adequately explained by Ms. Thomas." [*Id.*].

According to Mr. Ward, Ms. Thomas' submission of this information one week prior to her scheduled sentencing hearing was "tardy" and did not allow him sufficient time to "adequately process[] it and [make] it available to the Court in a meaningful fashion without a continuance of the hearing." [*Id.*]. Even if the court had granted Ms. Thomas' request for continuance of her June 7, 2022 sentencing hearing, Mr. Ward concedes "some of the additional information" supporting leniency "was duplicative of the character letters" previously submitted to the court as part of the

Motion for Sentencing Variance. [*Id.*]. Mr. Ward does “not believe that any of the late information provided to [him on May 31, 2022] furthered any meaningful arguments that had not already been made to the Court” and he would not have produced any statements protesting Ms. Thomas’ guilt, as it would have jeopardized her receiving credit for acceptance of responsibility. [*Id.*].

Based on Mr. Ward’s testimony, the United States emphasizes he never actually possessed the thirty or forty letters that Ms. Thomas suggests he declined to submit in support of leniency. [Doc. 161, p. 7]. Rather, Mr. Ward merely received “screenshots and piecemeal messages” which required “further investigation and formatting” and Ms. Thomas’ failure to provide Mr. Ward with the character statements in a timely manner was the cause of their omission from consideration during her sentencing. [*Id.*] On the record before the court, Ms. Thomas’ Motion is ripe for consideration.⁵

III. Legal Standard

Pursuant to 28 U.S.C. § 2255(a), “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” Here, Ms. Thomas appears to argue her counsel’s alleged failures rose to a constitutional violation requiring relief under § 2255.

The Sixth Amendment to the U.S Constitution requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. “[T]he right to counsel is the right to the effective assistance of counsel.”

⁵ No evidentiary hearing is necessary when “the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.” *United States v. Lopez*, 100 F.3d 113, 119 (10th Cir. 1996) (quoting *United States v. Galloway*, 56 F.3d 1239, 1240 n.1 (10th Cir. 1995)).

Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). “In giving meaning to the requirement, however, [the court] must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.*

To determine an ineffective assistance of counsel claim, the court must apply the two-prong test articulated by the U.S. Supreme Court in *Strickland*. *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015). Under the *Strickland* test, the movant first “must show that counsel’s performance was deficient.” *Strickland*, 466 U.S. at 687. Deficiency is “a demanding standard,” *Barrett*, 797 F.3d at 1213, and requires the movant to show that defense counsel’s representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688; *see also id.* (“[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”). Review under this first prong is “highly deferential.” *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (quoting *Hooks v. Workman*, 606 F.3d 715, 723 (10th Cir. 2010)). This “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689.

Second, movant must demonstrate “that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. The prejudice showing requires movant to demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Barrett*, 797 F.3d at 1214 (quoting *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)). “Courts are free to address these two prongs in any order, and failure under either is dispositive.” *Id.* (quoting *Byrd*, 645 F.3d at 1168).

IV. Analysis

As noted above, Ms. Thomas alleges Mr. Ward provided ineffective assistance by failing to submit “30 to 40 character letters” to the court for consideration during the sentencing phase of her case. However, Mr. Ward originally received sixteen letters in support of leniency between April 4 and April 20, 2022 and submitted these to the court as part of Ms. Thomas’ Motion for Sentencing Variance on May 16, 2022. [Doc. 161-1, p. 3, ¶ 8; *see also* Doc. 97]. Indeed, as the sentencing hearing transcript confirms, the court was aware of these sixteen letters, had read them, and considered them while deliberating on the punishment appropriate for Ms. Thomas’ actions. [Doc. 123, p. 34].

Mr. Ward’s affidavit reveals that the additional mitigation statements referenced by Ms. Thomas in her 2255 Motion were belatedly provided to him via email on May 31, 2022 – only seven days before the rescheduled sentencing hearing – and were unsigned, unsupported, and of questionable evidentiary value. [Doc. 161-1, p. 3, ¶ 9]. Further, Mr. Ward asserts the alleged character statements emailed to him from Ms. Thomas were merely “attributed to other people who supported leniency for her” and that others “contained screen shots of statements reportedly made on Ms. Thomas’s behalf.” [*Id.*] These emails also “contained pictures taken with a cell phone that were not adequately explained by Ms. Thomas.” [*Id.*]. Significantly, Mr. Ward did not believe “any of the late information provided [by Ms. Thomas] furthered any meaningful arguments that had not already been made to the Court.” [*Id.*].

Despite their questionable value, and although the court had previously continued the sentencing hearing, Mr. Ward sought another continuance to further vet and develop the character statements Ms. Thomas belatedly provided on May 31, 2022. [Doc. 106]. The court denied this request following briefing on the motion. [Doc. 111]. Mr. Ward’s affidavit reaffirms that denial

of Ms. Thomas' June 2, 2022 motion to continue solely for the purposes of gathering and formatting additional character statements was appropriate. Ms. Thomas' own failure to provide this information to Mr. Ward in a usable or timely manner prior to her sentencing resulted in their exclusion from consideration by the court – not any deficiency of Mr. Ward, who reasonably and diligently pursued a continuance as part of his efforts to mitigate Ms. Thomas' sentence. Therefore, his actions do not demonstrate any deficiency necessary to demonstrate ineffective assistance of counsel under *Strickland*.

And even if Ms. Thomas had identified a deficiency in Mr. Ward's representation, she also fails to demonstrate any prejudice resulting from the deficiency, and therefore fails to satisfy *Strickland's* second prong. Ms. Thomas fails to show that the materials contained any novel or substantively different information than what Mr. Ward previously presented as part of the Motion for Sentencing Variance. And Mr. Ward does not believe that any of the late information provided to him furthered any meaningful arguments that had not already been made to the court. Mr. Ward's alleged failure to submit the late information Ms. Thomas provided on May 31, 2022 cannot reasonably be considered prejudicial. Therefore, Ms. Thomas' § 2255 Motion fails on both prongs of the *Strickland* test.

V. Conclusion

WHEREFORE, the Motion to Vacate, Set Aside, or Correct a Sentence [Doc. 125] is denied.

IT IS SO ORDERED this 31st day of March, 2023.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE