

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR422-065
	)	
DARA BUCK	)	

**GOVERNMENT’S MOTION TO DISMISS
BUCK’S 28 U.S.C. § 2255 MOTION**

Dara Buck moves the Court to vacate her conviction and sentence pursuant to 28 U.S.C. § 2255. (Doc. 66.) Buck raises three grounds of error: (1) her attorney lacked jurisdiction to represent her in the state of Georgia; (2) various claims of ineffective assistance of counsel at the guilty-plea stage; and (3) she was selectively prosecuted and harshly sentenced because of her military status. The government respectfully requests the Court dismiss Buck’s Motion to Vacate, Set Aside, or Correct Sentence as it is untimely.

Background

Buck waived indictment and was charged via information on May 13, 2022, with one count of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. (Docs. 1; 24; 28; 30; 40 ¶¶ 1-2; 52 at 2.) Buck, an active-duty soldier in the United States Army (Chief Warrant Officer 2), led a fraud scheme wherein she and co-conspirators submitted more than 150 fraudulent Payroll Protection Program loan applications for COVID-19 relief funds, as well as over a dozen fraudulent student loan discharge applications to the United States Department of Education. (Docs. 1 at 7, 9; 30 at 4, 6; 40 ¶¶ 7-11; 52 at 2.) In total,

Buck was attributed with \$5,025,424 in intended loss, and \$3,680,247 in actual loss. (Docs. 40 ¶ 12; 52 at 2.)

Initially, Buck was represented by Edgar D. Bueno and Matt Wilmot, who noted in their June 15, 2022, Notice of Appearance that Applications for Admission Pro Hac Vice would be filed contemporaneously for additional counsel for Buck.¹ (Doc. 8.) Motions for Leave to Appear Pro Hac Vice were filed by James May and Peter McCoy on June 15, 2022, both of whom were members of the South Carolina Bar as well as the Bar of the United States District Court for the District of South Carolina.² (Docs. 9; 10.) The Court granted McCoy and May admission to appear pro hac vice in the United States District Court for the Southern District of Georgia on June 16, 2022. (Docs. 12; 13.)

A change of plea hearing was held before the Court on July 14, 2022, wherein Buck's plea agreement was accepted. (Docs. 29; 30.) In anticipation of sentencing, the United States Probation Officer prepared an Initial Presentence Investigation Report on September 19, 2022, and a Final Presentence Investigation Report on December

¹ Both Edgar D. Bueno and Matt Wilmot purported to be licensed to practice law in Georgia at the time of their Notice of Appearance. The State Bar of Georgia shows, as of June 5, 2024, Bueno and Wilmot are active members in good standing and were both admitted to the Bar prior to representing Buck. Georgia State Bar Member Directory, *available at* <https://www.gabar.org/> (last viewed June 5, 2024).

² Both James May and Peter McCoy purported to be licensed to practice law in South Carolina at the time of their Motions for Leave to Appear Pro Hac Vice. The South Carolina Bar shows, as of June 5, 2024, May and McCoy are active members in good standing and both were admitted to practice prior to representing Buck. South Carolina Bar Directory, *available at* <https://www.scbart.org/lawyers/directory/> (last viewed June 5, 2024).

21, 2022. (Docs. 31; 40.) “With a total offense level of 27 and a criminal-history category of I, her prison range under the advisory sentencing guidelines was 70 to 87 months. However, because the statutorily authorized maximum sentence of five years was less than the minimum of the applicable guideline range, Buck’s guideline term of imprisonment was 60 months.” (Doc. 49 at 1, *citing* Doc. 40 ¶¶ 30, 33, 51, 52.) On January 5, 2023, the Court varied downward by sentencing Buck to 42 months’ imprisonment followed by three years’ on supervised release, and allowed her to self-surrender to the Bureau of Prisons. (Docs. 42; 44.) Judgement was filed on January 10, 2023, and Buck did not directly appeal. (Doc. 44.)

Subsequently, Buck filed three motions for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A), which have been denied. (Docs. 48; 52; 53; 55; 61.³) Buck filed a fourth motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) on December 13, 2023, which the government opposed on December 20, 2023. (Docs. 62; 64.) A motion to reduce sentence was filed by Buck on February 21, 2024, prior to the Clerk’s docketing of the instant motion on March 6, 2024, and the Court has denied Buck’s reduction request. (Docs. 65; 66; 68.)

Relevant Standard

Buck’s burden of proof is high. “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28

³ This latter order addressed both the second and third motions for compassionate release.

U.S.C. § 2255(a). “[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.” United States v. Frady, 456 U.S. 152, 166 (1982). One must demonstrate that an error constitutes a fundamental defect which inherently results in a complete miscarriage of justice. Moore v. United States, 2017 U.S. Dist. LEXIS 2635, at *4 (S.D. Ga. Feb. 24, 2017), *citing* United States v. Addonizio, 442 U.S. 178, 184-86 (1979). No evidentiary hearing is required where “the motion and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also* Hill v. Lockhart, 474 U.S. 52, 60 (1985) (denying petition without a hearing where petitioner “failed to allege the kind of ‘prejudice’ necessary to satisfy the second prong of the Strickland v. Washington test”).

Argument

Buck seeks postconviction relief based on three grounds, one attacks her plea counsels’ ability to have represented her, one is based on various claims plea counsels rendered ineffective assistance of counsel under the well-established Sixth Amendment standard, and one which claims she was selectively prosecuted and harshly sentenced because of her military status. (Doc. 66 at 12.) Buck also contends her motion is timely given her efforts to obtain counsel. Id. Although her three claims implicate two separate triggering dates under the governing statutory framework, see 28 U.S.C. § 2255(f), each of her claims is untimely. Accordingly, the Court should dismiss Buck’s 28 U.S.C. § 2255 motion.

A. Buck’s claims that plea counsels lacked authority to represent her and that she was discriminated against at sentencing are untimely.

A one-year period of limitation applies to § 2255 motions. 28 U.S.C. § 2255(f). Generally, the limitations period runs from “the date on which the judgment of conviction becomes final.” *Id.* at (f)(1). For a petitioner who does not appeal, her conviction becomes final upon the expiration of the period for filing a timely notice of appeal, which is 14 days after entry of judgement. Fed. R. App. P. 4(b)(1)(A). The one-year limitation period applies to all claims brought under § 2255, including claims based in jurisdictional terms. Williams v. United States, 383 F. App’x 927, 929-30 (11th Cir. 2010).

The Court entered final judgment in Buck’s criminal case on January 10, 2023. (Doc. 44.) Because she did not pursue an appeal, Buck’s conviction became final on January 24, 2023. Accordingly, Buck had until January 24, 2024, to timely file her § 2255 motion.

Buck signed her § 2255 motion on February 10, 2024, and her sworn declaration states that she placed her motion in the prison’s mail system on that date. (Doc. 66 at 11.) Under the prison mailbox rule, Buck’s motion thus was filed on February 10, 2024. *See Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014). Clearly, Buck’s claim in ground one that her attorneys lacked authority to represent her, and her claim in ground three that she was selectively prosecuted and harshly sentenced because of her military status, were filed beyond § 2255(f)(1)’s one-year statute of limitations. Therefore, Buck’s claims alleged in grounds one and three are time-barred and should be dismissed.

B. Buck's ineffective assistance of counsel claims are untimely.

In her second ground, Buck raises various claims of ineffective assistance of counsel. Buck's IAC claims include: she never received a copy of the Presentence Investigation Report nor reviewed it with counsels; she never received nor was informed of discovery; she was never able to review her plea deal; she was never offered a safety valve; she demanded a trial; she requested counsels to appeal her sentence; all deals between counsels and the government occurred without her knowledge; prosecutor reassignment prior to sentencing; and that she never received a fair chance at sentencing. (Doc. 66 at 12.) As explained herein, all but one of Buck's IAC claims are time-barred for the same reason that Buck's claims alleged in grounds one and three are untimely; her remaining IAC claim also is time-barred, albeit under a slightly different analysis.

For purposes of determining the timeliness of her IAC claims, Buck's most significant allegation is her claim that plea counsels failed to appeal her sentence, as Buck allegedly requested of them. (Doc. 66 at 12.) This IAC claim turns on a separate triggering date for the one-year period of limitation than Buck's other § 2255 grounds.

"A § 2255 motion based on counsel's failure to file a requested direct appeal is considered timely under § 2255(f)(4) if the movant files within one year of the date he could have discovered, through the exercise of due diligence, that no appeal had been filed." Thirkield v. United States, 2012 U.S. Dist. LEXIS 44676, at *11 (N.D. Ga. Feb. 29, 2012), *quoting* Aron v. United States, 291 F.3d 708, 711 (11th Cir. 2002); *see also* Beeman v. United States, 871 F.3d 1215, 1219 (11th Cir. 2017) ("The § 2255(f) statute

of limitation ‘requires a claim-by-claim approach to determine timeliness.’”).

In determining whether a motion is timely under § 2255(4), a district court must first consider whether the petitioner exercised due diligence in discovering the facts underlying his claim. Due diligence does not require a litigant to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts to discover the facts underlying each claim. If the court finds that a petitioner was not diligent in his efforts, it must proceed to consider when the petitioner could have discovered the facts essential to his claim had he been acting diligently. So long as the petition is filed within one year of the date on which the facts could have been discovered with reasonable diligence, the petition will be timely.

Thirkield, 2012 U.S. Dist. LEXIS 44676, at *11-12, *quoting Tucker v. United States*, 249 F. App’x 763, 764 (11th Cir. 2007).

According to Buck, “[a]fter [her] sentencing [she] asked to appeal [her] case for 13 days straight. [Her] lawyer did not acknowledge [her] until day 14 saying he saw no reason to appeal anything.” (Doc. 66 at 12.) By her own admission, Buck asserts she became aware plea counsels would not be appealing her conviction 14 days after her sentencing on January 5, 2023. (Doc. 42.) Therefore, Buck had one year from January 19, 2023, to timely file a § 2255 motion asserting ineffective assistance of counsel for failure to directly appeal her conviction. However, Buck did not file her § 2255 motion until February 10, 2024. (Doc. 66.) Therefore, the Court should dismiss as untimely Buck’s claim that she received ineffective assistance of counsel for failing to directly appeal her conviction.

As to Buck’s remaining ineffective assistance of counsel arguments, the Court should dismiss those as untimely based on the same rationale as grounds one and

three as the triggering dates for those arguments was January 24, 2023. Therefore, Buck had until January 24, 2024, to raise her remaining ineffective assistance of counsel claims in a § 2255 challenge but failed to timely do so.

C. Buck is not entitled to equitable tolling of her claim for ineffective assistance of counsel for failing to appeal her conviction.

Buck asserts her § 2255 motion is timely due to her unsuccessful attempts to contact plea counsels for purposes of appeal and to seek court appointed counsel, which occurred prior to Buck's filing her § 2255 motion. (Doc. 66 at 12.) Should this assertion be construed as an argument for equitable tolling, the assertion is without merit and Buck fails to meet her burden of showing that she is entitled to equitable tolling.

Equitable tolling is an extraordinary remedy meant to be applied sparingly and is only available “when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005), *quoting* Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he 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), *quoting* Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). The diligence required is reasonable diligence, not maximum feasible diligence. Holland, 560 U.S. at 653; *see also* San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011). In proving an “extraordinary circumstance,” a petitioner must “show a causal connection between the alleged extraordinary circumstances and the

late filing of the petition.” San Martin, 633 F.3d at 1267. The extraordinary circumstance must be “beyond his control and unavoidable even with diligence.” Sandvik, 177 F.3d at 1271–72. “The burden of proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner,” and “[m]ere conclusory allegations are insufficient to raise the issue of equitable tolling.” San Martin, 633 F.3d at 1268.

A petitioner is not entitled to equitable tolling where the petitioner fails to exercise due diligence once discovering a direct appeal had not been filed. Thirkield, 2012 U.S. Dist. LEXIS 44676, at *16. In Thirkield, the petitioner’s counsel told petitioner within ten days of sentencing that there was nothing to appeal and no benefit could possibly come from pursuing an appeal, yet petitioner waited seven months to contact his attorney to determine whether an appeal had been filed. Id. at *13-14. The court held that this did not constitute reasonable diligence. Id. at *16.

In a similar vein, Buck has not diligently pursued her rights. Since the time her conviction became final and the time that she supposedly learned her sentence would not be appealed, Buck has filed four pro se motions for compassionate relief and a motion to reduce sentence before filing the instant § 2255 challenge. (Docs. 48; 53; 55; 62; 65.) Buck failed to raise any of her substantive § 2255 claims within either a year of her conviction becoming final or a year from when she learned her conviction had not been appealed because counsel told her there was nothing to appeal. Clearly, Buck had ample opportunity and sufficient familiarity with the court procedures to timely file the instant motion prior to the one-year deadline.

Buck seemingly believes her time spent attempting to retain prior counsels to represent her followed by attempts to gain court appointed counsel should toll the one-year deadline. However, the Eleventh Circuit has made clear that the pursuit of private counsel does not show diligence. *See Arthur v. Allen*, 452 F.3d 1234, 1250–51 (11th Cir. 2006), *opinion modified on reh'g*, 459 F.3d 1310 (11th Cir. 2006) (efforts to obtain private counsel did not show diligence in pursuing habeas claims); *accord Jihad v. Hvass*, 267 F.3d 803, 806 (8th Cir. 2001). Additionally, “attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline.” *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005). Here, Buck did not reasonably pursue her rights under a § 2255 challenge until she was denied other forms of post-conviction relief multiple times. Therefore, she has not acted with reasonable diligence and is not entitled to equitable tolling as her pursuit for counsel is not a recognized basis to prove reasonable diligence.

While Buck cannot meet the first prong of the equitable tolling test, the government also submits that Buck fails to meet the second prong as well. Buck solely contends her untimely filing is a result of her seeking to retain or be appointed counsel. She makes no additional showing to support tolling. (Doc. 66 at 12.) A prisoner does not have a constitutional right to counsel when mounting a collateral attack upon their conviction. *Pennsylvania v. Finley*, 481 U.S. 551, 555, (1987). Buck provides no citation to binding or persuasive authority demonstrating that an attempt to retain or be appointed counsel so one may pursue a § 2255 challenge

constitutes an extraordinary circumstance for equitable tolling, nor has she alleged facts showing the presence of “some extraordinary circumstance [that] stood in [her] way.” Holland, 560 U.S. at 649. Because Buck’s purported pursuit of representation does not constitute a justifiable extraordinary circumstance precluding the timely filing of her § 2255 motion, Buck cannot benefit from equitable tolling here. All of Buck’s claims are time-barred.

Conclusion

For the foregoing reason, this Court should dismiss Buck’s § 2255 motion.

Respectfully submitted,

JILL E. STEINBERG
UNITED STATES ATTORNEY

/s/ Joshua Kyle Davis

Joshua Kyle Davis
Assistant United States Attorney
Georgia Bar No. 575970

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing (“NEF”) that was generated as a result of electronic filing in this Court. In addition, I mailed a paper copy via U.S. Postal Service to:

Dara Buck, Reg. No. 10895-510
FPC Alderson
Federal Prison Camp
Glen Ray Rd., Box A
Alderson, WV 24910

This June 5, 2024.

Respectfully submitted,

JILL E. STEINBERG
UNITED STATES ATTORNEY

/s/ Joshua Kyle Davis

Joshua Kyle Davis
Assistant United States Attorney
Georgia Bar No. 575970

Post Office Box 2017
Augusta, Georgia 30903
Telephone: (706) 724-0517