

APPENDIX A

Unpublished Opinion
United States Court of Appeals for the Eleventh
Circuit entered on May 22, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10945-D

GIEZI MAGNO ZAMORA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Giezi Magno Zamora is a federal prisoner serving a 120-month total sentence after pleading guilty to conspiracy to possess with intent to distribute, and possession with intent to distribute, 5 kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States. Judgment was entered against Zamora on July 8, 2015. Zamora filed a direct appeal, and this Court affirmed his conviction and sentence on September 9, 2016. Zamora did not file a petition for a writ of *certiorari* from the United States Supreme Court. On January 3, 2018, Zamora mailed the instant § 2255 motion to vacate his sentence. Zamora asserted that his § 2255 motion was timely because he had just found new evidence to support his argument that the district court lacked jurisdiction to convict him. The district court dismissed Zamora's § 2255 motion as untimely. Zamora has now appealed the district court's

dismissal of his § 2255 motion and seeks a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP").

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion that begins to run from the latest of four possible events:

- (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). A conviction ordinarily becomes final when the Supreme Court denies *certiorari* or when the 90-day period for filing a petition for *certiorari* expires. *Close v. United States*, 336 F.3d 1283, 1284-85 (11th Cir. 2003).

The AEDPA's limitation period may be equitably tolled, but the petitioner must show "(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)

(quotation omitted). Additionally, the Supreme Court has held that “actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations.” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). For purposes of this exception, “actual innocence” means factual innocence, not mere legal insufficiency. *McKay v. United States*, 657 F.3d 1190, 1197 (11th Cir. 2011).

Here, reasonable jurists would not debate the district court’s dismissal of Zamora’s § 2255 motion as untimely. Zamora did not file a petition for a writ of *certiorari*. Thus, his conviction became final on December 8, 2016, 90 days after this Court affirmed his conviction on September 9, 2016. *Close*, 336 F.3d at 1284-85. Because Zamora cannot show another triggering event for the AEDPA’s statute of limitations, his statute of limitations for filing a § 2255 motion expired one year later, on December 8, 2017. 28 U.S.C. § 2255(f)(1). Zamora’s § 2255 motion was not filed until January 2018 and, thus, was untimely. Furthermore, he has not shown that any extraordinary circumstance prevented him from timely filing, such that he could be entitled to equitable tolling. *See Holland*, 560 U.S. at 649. Finally, he cannot avail himself of the actual-innocence exception because he has alleged mere legal, rather than factual, innocence. *See McQuiggin*, 569 U.S. at 386; *McKay*, 657 F.3d at 1197. As Zamora has not shown that reasonable jurists would find debatable the dismissal of his § 2255 motion as untimely, his motion for a COA is DENIED and his motion for leave to proceed on appeal IFP is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GIEZE MAGNO ZAMORA,

v.

Case No. 8:14-cr-462-T-33AEP
8:18-cv-62-T-33AEP

UNITED STATES OF AMERICA.
_____ /

ORDER

This cause is before the Court on Giezi Magno Zamora's 28 U.S.C. § 2255 motion to vacate, set aside, or correct an illegal sentence (hereinafter "motion to vacate" or "motion"). (Doc. cv-1; Doc. cr-242). The § 2255 motion is untimely.

BACKGROUND

Magno Zamora challenges the validity of his plea-based conviction for conspiracy to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1), 70506(a) and (b); 21 U.S.C. § 960(b)(B)(ii) (Count One); and possession with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction for the United States, in violation of 46 U.S.C. §§ 70503(a), 70506(a), 18 U.S.C. § 2; and 21 U.S.C. 960(b)(1)(B)(ii) (Count Two).

On July 8, 2015, the Court sentenced Magno Zamora to one hundred twenty months as to each of Counts One and Two, with the terms of imprisonment to run concurrently. Even though Magno Zamora's plea agreement included a waiver of the right to appeal his sentence (Doc. cr-51, p.7), he filed a notice of appeal on July 14, 2015.

On September 9, 2016, the Eleventh Circuit affirmed Magno Zamora's judgment and sentence. Magno Zamora did not file a petition for certiorari in the United States Supreme Court. Instead, he filed the present § 2255 motion to vacate on January 9, 2018.

DISCUSSION

Rule 4, Rules Governing Section 2255 Cases, requires both a preliminary review of the motion to vacate and a summary dismissal “[i]f it plainly appears from the face of the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief” *Accord Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) (The summary dismissal of a Section 2255 motion was proper “[b]ecause in this case the record, uncontradicted by [defendant], shows that he is not entitled to relief.”); *Hart v. United States*, 565 F.2d 360, 361 (5th Cir. 1978) (“Rule 4(b) of § 2255 allows the district court to summarily dismiss the motion and notify the movant if ‘it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief.’”).

The Anti-Terrorism and Effective Death Penalty Act creates a limitation for a motion to vacate. “A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of . . . the date on which the judgment of conviction becomes final” 28 U.S.C. § 2255(f)(1).

CALCULATION OF TIMELINESS

The Eleventh Circuit affirmed Magno Zamora judgment and sentence on September 9, 2016, (Doc. cr-199). Although Magno Zamora did not file a petition for certiorari, he is

allowed the 90 days for filing the petition when calculating the timeliness of his § 2255 motion to vacate. *Clay v. United States*, 537 U.S. 522, 527 (2003) (Federal criminal conviction becomes final, for purpose of calculating one-year period in which defendant may move to vacate, when time expires for filing petition for certiorari contesting appellate court's affirmation of conviction.). The 90-day time for filing the petition for certiorari runs from the "date of entry of judgment or order sought to be reviewed, and not from issuance date of mandate." *Clay*, 537 U.S. at 528; *Close v. United States*, 336 F.3d 1283, 1285 (11th Cir. 2003) (citing United States Supreme Court Rule 13(3)).

Consequently, for calculating the one-year AEDPA period, Magno Zamora's one-year period began 90 days after the Eleventh Circuit issued its opinion on September 9, 2016. That date is December 12, 2016. Magno Zamora had one-year from December 12, 2016, or until Monday, December 12, 2017, to file a timely § 2255 motion to vacate. Magno Zamora did not file his § 2255 motion until January 3, 2018, and the § 2255 motion to vacate is untimely. Magno Zamora does not allege and demonstrate that the motion is timely under any § 2255(f) exception.

Alleged Newly Discovered Evidence of Actual Innocence

Magno Zamora alleges that he has new evidence that "could change the outcome of his case." He claims that he is actually innocent of the crime with which he was charged because the Coast Guard resigned jurisdiction over him when the Coast Guard temporarily turned him over to Panamanian authorities. Magno Zamora cannot use that argument to pass through the actual innocence gateway because the argument is one of "legal

insufficiency,” not “factual innocence.” See *Bousley v. United States*, 523 U.S. 614, 624 (1998) (“ . . . actual innocence means factual innocence, not mere legal insufficiency.”).

Magno Zamora knew, when he entered his plea, that he had been previously detained by Panamanian authorities, yet he initialed every page of the following plea agreement and signed the plea agreement without mentioning that fact:

FACTS

In September 2014, the defendant and his six co-defendants were knowing and willing participants in a multi-stage, multi-vessel maritime cocaine smuggling venture. The illegal venture involved the smuggling of approximately 440 kilograms of cocaine using multiple small vessels known as pangas.

On September 11, 2014, the crew of a United States maritime patrol aircraft (MPA) detected three pangas (two of which were later identified as YENY ARG and LA GALOSA) approximately 140 nautical miles southwest of the Guatemalan/El Salvador border, on the high seas in international waters. The MPA crew observed that YENY ARG had packages of cocaine on deck, and was near an abandoned panga. The MPA crew observed YENY ARG come alongside LA GALOSA and transfer people and packages containing cocaine.

Later on September 11, Coast Guard Cutter ALERT's boarding team stopped and boarded YENY ARG. ALERT's boarding team found four of the defendants on board (HECTOR CASTILLO, GIEZI MAGNO ZAMORA, JHONNY ENRIQUE ARCENTALES MERO, and CARLOS FRANCO). The master of the vessel claimed Guatemalan nationality for YENY ARG. The Government of Guatemala consented to a boarding and ultimately to the exercise of jurisdiction over the vessel by the United States. There was no contraband on board YENY ARG.

Meanwhile, Coast Guard Cutter BOUTWELL's helicopter pursued LA GALOSA. The helicopter crew observed persons embarked in LA GALOSA jettisoning packages of cocaine. BOUTWELL's crew ultimately recovered eight bales containing a total of approximately 440 kilograms of cocaine. The helicopter crew stopped LA GALOSA with disabling fire.

BOUTWELL's boarding team found three of the defendants embarked in LA GOLOSA (ERNESTO ESTRADA, FABIAN ESTRADA , and JAIR GUEVARA PAYAN). The master of the vessel claimed Guatemalan nationality for LA GOLOSA. The Government of Guatemala consented to a boarding and ultimately to the exercise of jurisdiction over the vessel by the United States.

The seven defendants were subsequently flown to the United States, first arriving at a place in the Middle District of Florida.

(Doc. cr-15, pp. 15-18).

No New Evidence

Magno Zamora does not offer any new evidence to show that he is factually innocent of the crime to which he pled guilty, and he cannot pass his § 2255 claims through the narrow gateway of actual innocence to overcome the time-bar. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

Because Magno Zamora has not made a showing of actual innocence and does not argue that extraordinary circumstances prevented his timely filing a § 2255 motion, his § 2255 motion is untimely and must be denied.

Accordingly, the Court orders:

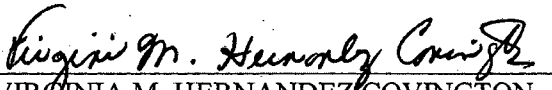
1. That Magno Zamora's 28 U.S.C. § 2255 motion to vacate, set aside or correct an illegal sentence (Doc. cv-1; cr-242) is denied. The Clerk is directed to close this case.
2. That, within 30 days of the date of this Order, the Court will entertain a motion to reopen this case if Magno Zamora can show, with record evidence and supporting case law, that he is entitled to proceed on his time-barred § 2255 motion to vacate.

CERTIFICATE OF APPEALABILITY AND

LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

The Court declines to issue a certificate of appealability because Defendant has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Nor will the Court authorize the Defendant to proceed on appeal in forma pauperis because such an appeal would not be taken in good faith. See 28 U.S.C. § 1915(a)(3). Defendant shall be required to pay the full amount of the appellate filing fee pursuant to § 1915(b)(1) and (2).

ORDERED at Tampa, Florida, on January 15, 2018.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Gieze Magno Zamora