UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4285

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFRED DOMENICK WRIGHT,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Margaret B. Seymour, Senior District Judge. (3:07-cr-01012-MGL-1)

Submitted: June 20, 2019 Decided: July 30, 2019

Before DIAZ and FLOYD, Circuit Judges, HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Leslie Therese Sarji, SARJI LAW FIRM, LLC, Charleston, South Carolina, for Appellant. John David Rowell, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alfred Dominick Wright pled guilty to using and carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1), and distributing five grams or more of cocaine base and a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), (C). Wright was sentenced to a 70-month sentence for the drug offense and a consecutive 60-month sentence for the firearm offense. Following a series of post-trial motions, his sentence for the drug offense was eventually reduced to 18 months' imprisonment. Wright was released from custody and is currently on supervised release.[1] Wright's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that there are no meritorious grounds for appeal, but raising for the court's consideration the following issues: (1) whether the guilty pleas were knowing and voluntary; (2) whether the district court erred in the sentence reduction it gave in October 2014; and (3) whether Wright received ineffective assistance of counsel when he entered his guilty plea. Wright filed a pro se supplemental brief, expanding on the issues raised by counsel and raising additional issues. The Government did not file a brief.[2] We affirm.

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[1] Although Wright has completed his period of incarceration, he remains on supervised release, and there may be collateral consequences. Thus, an appeal challenging the convictions and sentence is not moot. *See Sibron v. New York*, 392 U.S. 40, 55 (1968) (holding that appeal from conviction after service of sentence not moot if there may be collateral consequences); *United States v. Ketter*, 908 F.3d 61, 65 (4th Cir. 2018) (holding that appeal of sentence after release from custody not moot because incarceration and supervised release are part of a unitary sentence).

[2] Because the Government did not move to dismiss the appeal, Wright's failure to file a timely notice of appeal does not deprive this court of jurisdiction. *See United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009). Furthermore, we will not invoke our authority (Continued)

Our review of Wright's plea hearing shows that he knowingly and voluntarily pled guilty to his offenses and that the proceeding was conducted substantially in compliance with Fed. R. Crim. P. 11. Despite Wright's claims to the contrary, we find no reversible error. *See United States v. Martinez,* 277 F.3d 517, 525 (4th Cir.2002) (noting that when defendant does not seek to withdraw his guilty plea or otherwise preserve any allegation of Rule 11 error, review is for plain error). Accordingly, we affirm his convictions.

Wright's claim of ineffective assistance of counsel is not reviewable on direct appeal because counsel's ineffectiveness does not conclusively appear on the face of the record. *United States v. Benton*, 523 F.3d 424, 435 (4th Cir. 2008). Such claims should be raised in a 28 U.S.C. § 2255 (2012) motion, in order to permit sufficient development of the record. *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010). Wright's challenges to the traffic stop that led to the seizure of a firearm and drugs is waived by virtue of Wright's knowing and voluntary unconditional guilty pleas. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Fitzgerald*, 820 F.3d 107, 110 (4th Cir. 2016).

Review of Wright's sentencing hearing also reveals no reversible error. Wright received the statutory minimum sentence for the firearm conviction. *See* 18 U.S.C. § 924(c). Additionally, we discern no procedural or substantive error in the district court's sentence for drug offense, or the later sentence reduction entered in October 2014. *See*

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to sua sponte dismiss the appeal. *See United States v. Oliver*, 878 F.3d 120, 124-29 (4th Cir. 2017).

Gall v. United States, 552 U.S. 38, 51 (2007) (discussing appellate reasonableness review of sentences for an abuse-of-discretion standard).

We have examined the entire record in accordance with the requirements of *Anders* and have found no meritorious issues for appeal. Accordingly, we affirm. This court requires that counsel inform Wright, in writing, of the right to petition the Supreme Court of the United States for further review. If Wright requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Wright. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Alfred Dominick Wright, Movant, vs. United States of America, Respondent.	)	Cr. No. 3:07-1012 **ORDER AND OPINION**

This matter is before the court on motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence filed by Movant Alfred Dominick Wright on May 2, 2018. Movant contends he received ineffective assistance of counsel and that he was subjected to an unconstitutional search and seizure. Movant seeks to have his conviction vacated and to be given time credit toward any other possible conviction. Respondent United States of America filed a motion to dismiss on June 7, 2018. Also on June 7, 2018, the court issued an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), informing Movant of the dismissal procedures and the consequences of not responding adequately. Movant filed responses on August 8, 2018 and August 13, 2018.

I. FACTS AND PROCEDURAL HISTORY

Movant pleaded guilty on November 27, 2007 to knowingly using and carrying a firearm during and in relation to, and possessing the firearm in furtherance of, a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 1); and possession with intent to distribute 5 grams or more of cocaine base and a quantity of cocaine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(B), and 841(b)(1)(C). On April 15, 2008, Movant was sentenced to incarceration for a period of 130 months, consisting of 70 months as to Count 4 and 60 months as to Count 1, to run consecutively,

to be followed by a term of supervised release for 4 years as to each Count, to be served concurrently. On December 5, 2008, an amended judgment was issued pursuant 18 U.S.C. § 3582(c)(2) that reduced Movant's term of incarceration to 117 months, consisting of 57 months as to Count 4 and 60 months as to Count 1, to run consecutively. On February 15, 2012, a second amended judgment was entered pursuant to Fed. R. Crim. P. 35(b) that reduced Movant's sentence to 97 months, consisting of 37 months as to Count 4 and 60 months as to Count 1, to run consecutively. On October 30, 2014, a third amended judgment was entered pursuant to 18 U.S.C. § 3582(c)(2) that reduced Movant's sentence to 78 months, consisting of 18 months as to Count 4 and 60 months as to Count 1, to run consecutively.

Movant was released to supervision on or about November 4, 2014. On December 7, 2017, a warrant was issued for Movant's arrest based on new criminal conduct that would constitute a violation of Movant's supervised release. The new criminal conduct resulted in a federal indictment. See United States v. Wright, Cr. No. 3:17-1202. Movant currently is in custody awaiting sentencing and revocation hearings.

II. DISCUSSION

Respondent contends that Movant's § 2255 motion is untimely under § 2255(f), which provides:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–
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> (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
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> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Movant did not file an appeal of his conviction or sentence. Thus, Movant's judgment became final on or about May 1, 2008, ten days after entry of judgment.[1] See United States v. Osborne, 452 F. App'x 294, 295 (4th Cir. 2011) (citing Clay v. United States, 537 U.S. 522, 532 (2003) (holding that § 2255 motion must be filed within one year from the date on which the criminal judgment becomes final by the conclusion of direct review or expiration of the time for seeking such review)). Movant's limitations period under § 2255(f)(1) expired on May 1, 2009. Movant's § 2255 motion was not filed until May 2, 2018, approximately nine years later.

Movant contends that his limitations period commenced on October 30, 2014, upon entry of an amended judgment under 18 U.S.C. § 3582(c)(2). Even applying the October 30, 2014 date, the time for filing Movant's § 2255 motion expired on November 13, 2015. Thus, unless one of the dates set forth in § 2255(f)(2)-(4) applies, Movant's § 2255 motion is untimely.

Movant contends that he has newly discovered evidence to establish his claims of ineffective assistance of counsel and an illegal search and seizure: first, that his trial counsel has been disbarred after being arrested; and second, that the officer who arrested Movant was himself arrested on criminal charges. Movant indicates that he received this information on March 10, 2018.[2]

Whether a petitioner has exercised due diligence to warrant a belated commencement

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[1] Ten days excluding weekends and holidays. See Fed. R. App. P. 26(a)(2). The time for filing an appeal was changed to fourteen days in 2009. See Fed. R. Crim. P. 4(b)(1)(A).

[2] The court notes that the events identified by Movant occurred in 2013 and 2011, respectively.

> of the limitation period pursuant to 28 U.S.C. § 2255(f)(4) is a fact-specific inquiry unique to each case. See Wims v. United States, 225 F.3d 186, 190–91 (2d Cir. 2000). A petitioner bears the burden to prove that he or she exercised due diligence. DiCenzi v. Rose, 452 F.3d 465, 471 (6th Cir. 2006). Due diligence "at least require[s] that a prisoner make reasonable efforts to discover the facts supporting his claims." Anjulo–Lopez v. United States, 541 F.3d 814, 818 (8th Cir. 2008) (citing Aron v. United States, 291 F.3d 708, 712 (11th Cir. 2002)). A habeas applicant who "merely alleges that [he or she] did not actually know the facts underlying his or her claim does not" thereby demonstrate due diligence. In re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997). Rather, to obtain a belated commencement of the limitation period, the applicant must explain why a reasonable investigation would not have unearthed the facts prior to the date on which his conviction became final. See id. at 1540–41 (rejecting petitioner's assertion that he could not have discovered his new Brady claim prior to filing his first § 2254 petition). Moreover, in evaluating a petitioner's diligence, the Court must be mindful that the "statute's clear policy calls for promptness." Johnson v. United States, 544 U.S. 295, 311 (2005).

United States v. Smith, No. 3:10CR210-HEH, 2017 WL 4249632, at *3 (E.D. Va. Sept. 25, 2017).

In this case, Movant's "newly discovered evidence" related to events that occurred years after Movant's criminal proceeding. The court is not inclined to find such events should retroactively apply to extend the limitations period under § 2255(f)(4). Movant's § 2255 motion is untimely.

III. CONCLUSION

For the reasons stated, Respondent's motion to dismiss (ECF No. 122) is **granted**. Movant's § 2255 motion is **denied and dismissed** without prejudice as untimely.

IV. CERTIFICATE OF APPEALABILITY

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Rose v. Lee, 252 F.3d 676, 683-84

(4th Cir. 2001). The court concludes that Movant has not made the requisite showing for the reasons set forth hereinabove. Accordingly, the court **denies** a certificate of appealability.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

October 28, 2019