

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3007

September Term, 2017

FILED ON: APRIL 3, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

ANTHONY RICE, ALSO KNOWN AS TWIN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cr-00441-8)

Before: TATEL, MILLETT and KATSAS, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. See FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's judgment is affirmed.

Anthony Andrew Rice moved under 28 U.S.C. § 2255 to vacate his sentence on the ground that he was denied his Sixth Amendment right to effective counsel. Specifically, Rice argues that his trial attorney failed to advise him during plea negotiations that, under the plain statutory language of the drug trafficking statute, he was facing a mandatory sentence of life without parole if found guilty at trial. 21 U.S.C. § 841(b)(1)(A). Because Rice's court-appointed attorney at the post-conviction review stage filed Rice's Section 2255 motion eighteen days after the statute of limitations had expired, the district court dismissed the motion as untimely, without reaching the merits of his ineffective assistance of counsel claim. The district court also ruled that equitable tolling was not warranted because the late filing was attributed to the attorney's miscalculation. We affirm.

In October 2003, a grand jury indicted Rice, along with eighteen others, for participating in a drug trafficking conspiracy. [J.A. 167]. Of the ten counts set forth in the indictment, only two

applied to Rice—conspiracy to import heroin and cocaine in violation of 21 U.S.C. § 963, and conspiracy to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 846 (criminalizes conspiracy); 841(a)(1) (criminalizes distribution of controlled substances), 841(b)(1)(A)(iii) (provides penalties based on substance type and quantity). A conviction under Section 841 mandates a sentence of life without parole if the defendant has previously been convicted of two felony drug offenses. 21 U.S.C. § 841(b)(1)(A) (“If any person commits a violation of this [statute] * * * after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release[.]”). As it turns out, Rice had been convicted of two qualifying felonies three decades earlier. Consequently, if Rice were convicted of conspiracy to distribute more than a kilogram of heroin or more than five kilograms of a mixture containing cocaine, the court would have no option but to impose a mandatory life sentence.

According to the allegations of Rice’s Section 2255 motion, Grandison Hill, the attorney appointed by the district court to represent Rice at his criminal trial, was aware that Rice had been convicted of two prior felonies, but did not tell Rice that he was facing a statutorily mandated life sentence. Instead, prior to trial and during plea discussions with the government, Hill wrongly told Rice that the two prior convictions were too old to support an increased sentence. The statute, however, contains no such expiration date for counting prior felonies. Based on that error, Hill advised Rice that he was facing a maximum sentence of only 17.5 years if convicted.

More than eight months before trial, the government offered Rice a plea bargain under which he would serve only 17 years in prison. Relying on Hill’s advice that he faced at most 17.5 years in prison if he went to trial, Rice rejected that plea offer. Shortly before trial, the government offered Rice an even better plea bargain in which he would face only a 15-year sentence, but that too was rejected, and he and Bailey went to trial. The seventeen other indicted defendants either had their charges dismissed or entered guilty pleas with sentences ranging from time served to a maximum of 10 years in prison.

At trial, Rice was represented by Hill; Bailey was represented by Jenifer Wicks. Rice was found guilty on both counts. After trial, Rice filed a *pro se* motion for appointment of new counsel. The district court granted the motion and appointed Veta Carney to represent Rice during the sentencing stage. At the sentencing hearing, Carney alerted the court to Hill’s failure to inform Rice at any time that he was actually facing a mandatory life sentence. The district court declined to rule on the ineffectiveness of trial counsel, recommending to Rice that he raise the issue in a Section 2255 motion after his criminal proceedings concluded. Nov. 7, 2006 Sentencing Hr’g Tr. 20:2–8 (“[The Court:] [I]t seems to me that that necessarily then raises a claim of ineffective assistance of counsel * * *. And I just don’t see at this point why I should afford the remedy that you are talking about. It seems to me we go to sentencing and then he files—if he wants to—his 2255 alleging ineffective assistance.”); *id.* at 37:18–20 (“The Court: Counsel, if you desire to file something on his behalf in reference to a 2255, obviously, you have a right to do that.”). The district court then sentenced Rice to 20 years of imprisonment for the violation of 21 U.S.C. § 963, and to life imprisonment with no possibility of parole for the violation of 21 U.S.C. § 841.

Rice’s family retained attorney, James W. Beane, Jr., to represent Rice in his direct appeal of his criminal conviction. Because that attorney had multiple complaints against him pending before

the D.C. Bar Association and because he failed to communicate with Rice for more than eight months, Rice moved this court *pro se* for the appointment of a new attorney. This court appointed Wicks, who had represented Rice's co-defendant Bailey at trial, to be Rice's appellate attorney. Rice had waived conflicts arising from Wicks' former representation of Bailey, but only for purposes of appeal. Notice filed by Anthony Rice of Waiver (June 29, 2010). Rice discussed with Wicks raising the argument that his trial counsel, Hill, had been constitutionally ineffective. But Wicks advised Rice to "wait for the 2255" to raise his ineffective assistance claim and to focus on other issues for his direct appeal. J.A. 591. Although she did not obtain a conflict waiver for any post-appeal proceedings, Wicks promised to file a Section 2255 motion for Rice if the direct appeal proved unsuccessful.

This court subsequently rejected all of the claims that Wicks raised on appeal and affirmed Rice's conviction. *United States v. Rice*, 746 F.3d 1074 (D.C. Cir. 2014). The Supreme Court denied Rice's petition for a writ of certiorari on November 10, 2014. *Rice v. United States*, 135 S. Ct. 493 (2014). Under 28 U.S.C. § 2255(f), any motion for post-conviction federal habeas relief had to be filed within one year of the Supreme Court's denial of certiorari—that is, November 10, 2015. Failure to meet that statutory deadline would close the courthouse doors to the Section 2255 motion, absent exceptional circumstances. See *United States v. McDade*, 699 F.3d 499, 504 (D.C. Cir. 2012).

After certiorari was denied, Rice "continued to follow up with" Wicks about his enduring desire to file a Section 2255 motion on the ground that his trial counsel was constitutionally ineffective. J.A. 591. Rice specifically "asked [Wicks] when the 2255 would be due." J.A. 591. Wicks wrongly told Rice that the deadline for filing was December 1, 2015, and Rice relied on "[Wicks'] judgment as to the deadline." J.A. 592. Rice completed his affidavit in support of his Section 2255 motion weeks before that filing deadline and had it ready when Wicks visited him in prison in the Fall of 2015 to finalize it for filing. During that same prison visit, just a few weeks before the filing deadline for the Section 2255 motion, Wicks for the first time advised Rice she would not be able to continue representing him due to what she apparently thought was an unwaivable conflict of interest on the ground that she was "a possible witness for him" and there were unspecified "issues related to [her] prior representation of Mr. Bailey." J.A. 592.

Wicks then filed Rice's Section 2255 motion on November 28, 2015—eighteen days after the statutory deadline. According to Wicks, at the time she both missed his filing deadline and raised the ineffective assistance of counsel claim in Rice's Section 2255 motion, she "[wa]s conflicted," Mot. for Appointment of Counsel, ECF No. 942. See J.A. 43 (seeking "appointment of new conflict free counsel").

When informed of Wicks' conflict of interest, the district court appointed Peter Cooper under the Criminal Justice Act, 18 U.S.C. § 3006A, to represent Rice on his Section 2255 motion. The government then moved to dismiss Rice's motion as time barred. In a three-page motion, Cooper asked the court to equitably toll the statute of limitations.¹ The district court denied the request

¹ On appeal, Rice alleges that Cooper did not interview him to learn what happened between the denial of certiorari and the filing of the Section 2255 motion and thus failed to fully present the equitable tolling

and dismissed Rice's Section 2255 motion. Rice appealed, and this court granted a certificate of appealability.

There is no dispute that, when Wicks filed Rice's Section 2255 motion, it was 18 days late. Nor could there be. The Supreme Court ruled more than a decade ago that Section 2255's one-year statute of limitation starts running from "the date on which the judgment of conviction becomes final," 28 U.S.C. § 2255(f)(1), which means the later of when (i) the Supreme Court has denied certiorari, (ii) the Supreme Court has decided the case on the merits, or (iii) the time for seeking Supreme Court review has expired. *Clay v. United States*, 537 U.S. 522, 527–528 (2003).

The Supreme Court has held that habeas filing deadlines can be equitably tolled if the prisoner demonstrates both "(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) (holding that equitable tolling can apply to habeas petitions from state prisoners); see also *McDade*, 699 F.3d at 504 (holding that equitable tolling can apply to habeas motions from federal prisoners).

To satisfy the first prong, a prisoner must demonstrate not some "unusual level of diligence," *McDade*, 699 F.3d at 505, or "maximum feasible diligence," *Holland*, 560 U.S. at 652, but just "reasonable diligence," *id.* In this case, Rice raised the issue of his trial attorney's wrong and materially misleading advice as early as his sentencing. He asked counsel about raising it on direct appeal, and again asked counsel to timely file a Section 2255 motion raising the claim. Rice also followed up with his attorney to confirm the due date for his Section 2255 motion and its inclusion of the ineffectiveness claim, and prepared his affidavit and reviewed the draft Section 2255 motion in advance of the deadline.

Assuming those measures satisfy the reasonable-diligence component of equitable tolling, Rice still must establish that extraordinary circumstances impeded his timely filing. But all Rice's attorney has argued on appeal is that Wicks "miscalculated the pertinent period and filed late." J.A. 588. That is of no help to Rice because case law from the Supreme Court and this court holds that ordinary timing errors do not constitute an "extraordinary circumstance." See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling[.]"); *McDade*, 699 F.3d at 505 ("[A]ttorney error alone in calculating a filing deadline generally does not amount to extraordinary circumstances.").

Rice also argues on appeal that a line of precedent excepting ineffective assistance claims from procedural default in habeas proceedings arising out of state court convictions should apply to Section 2255 motions. See *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); see also *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). In those cases, the Supreme Court held that when a post-conviction attorney's significant error meant that an ineffective-assistance-of-trial-counsel claim could not be

argument, did not visit him even once during his representation, and did not keep Rice apprised of the status of the district court proceedings. Appellant's Br. 26 n.16. Those allegations of ineffectiveness are for the district court to address as warranted in the first instance. See generally *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012).

heard at all in an initial collateral-review proceeding, that misstep could establish cause for excusing the procedural default. See *Trevino*, 569 U.S. at 429; *Martinez*, 566 U.S. at 14 (holding attorney error establishes cause when ineffectiveness claim could only be raised in collateral proceeding). The *Martinez* Court explained that “[a] prisoner’s inability to present a claim of [ineffective assistance of counsel] is of particular concern” because the right to counsel is “a bedrock principle in our justice system[,]” and is often better suited to collateral review as it often “depends on evidence outside the trial record.” 566 U.S. at 12–13 (citing *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

Because this argument was not presented to the district court below, it is forfeited for this appeal, and we will not consider it. See *Chichakli v. Tillerson*, 882 F.3d 229 (D.C. Cir. 2018) (argument not raised below was forfeited for purposes of appeal); *Shea v. Kerry*, 796 F.3d 42, 54 (D.C. Cir. 2015) (“[F]orfeiture principles apply to new arguments raised for the first time on appeal.”).²

At oral argument, Rice’s attorney advised that a motion for relief from final judgment under Federal Rule of Civil Procedure 60(b) is currently pending in the district court. That motion raises new evidence of Wicks’ never-waived conflict of interest and its existence at the time she missed the filing deadline for Rice’s Section 2255 motion. We leave it for the district court to address in the first instance the significance of that new evidence of a never-waived conflict as warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the resolution of any timely petition for rehearing or petition for rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

² Because a Rule 60(b) motion is pending in district court in this case raising the procedural default argument, we leave for the district court to decide in the first instance the relevance, if any, of this new argument. Cf. *United States v. Fennell*, 53 F.3d 1296, 1304 (D.C. Cir. 1995), *on reh’g*, 77 F.3d 510 (D.C. Cir. 1996).