

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON/VALDOSTA DIVISION

THE UNITED STATES OF AMERICA, :

 Plaintiff, :

vs. :

BROOKS E. BLITCH, III, :

 Defendant. :

Case No.: 5:08-CR-40 (HL)

DEFENDANT’S MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE, OR CORRECT SENTENCE
AND SUPPORTING MEMORANDUM OF LAW

COMES NOW, the Defendant (hereinafter “Mr. Blich”), and files this his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence and Supporting Memorandum of Law and shows this Honorable Court as follows:

1.

Mr. Blich was convicted in the United States District Court for the Middle District of Georgia, Macon/Valdosta Division in case docket number 5:08-CR-40 (HL).

2.

Mr. Blich pled guilty on September 11, 2009, was sentenced on December 1, 2009, and the Judgment was filed on December 8, 2009.

3.

Mr. Blich was sentenced to a term of three (3) years probation and a \$100,000.00 fine.

4.

Mr. Blich pled guilty to Count 9 of the Indictment against him, which charged him and Mr. Hayward Collier with Honest Services Fraud Conspiracy in violation of Title 18 U.S.C. §§ 1341, 1343, 1346, 1349 and 2. Mr. Blich pled not guilty to the remaining counts of the indictment. Specifically, Mr. Blich pled not guilty to Count 1, charging him, Mr. Berrien Sutton, Mrs. Linda Sutton, and Mr. George Bessonette with honest services fraud conspiracy in violation of 18 U.S.C. §§ 1341, 1343, and 1346 i/c/w 1349. Mr. Blich pled not guilty to Count 2 that charged him, Mrs. Lisa Sutton, and Mr. Berrien Sutton with mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2. Mr. Blich pled not guilty to Counts 3 through 8 that charged him, Mrs. Lisa Sutton, and Mr. Berrien Sutton with mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2. Mr. Blich pled not guilty to Counts 10 and 19 charging him with extortion by a public official in violation of 18 U.S.C. §§ 1951 and 2. Mr. Blich plead guilty to Count 11 charging him and Mr. Berrien Sutton with conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 1349. Mr. Blich plead not guilty to Counts 13 and 14 charging him with retaliation against a witness in violation of 18 U.S.C. § 1513. Mr. Blich pled not

guilty to Count 17 charging him with false statements in violation of 18 U.S.C. §1001. Mr. Blich pled not guilty to Count 18 charging him with aiding and abetting possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922 and 2. The charges as to retaliation against a witness were dismissed by Order of the Court and the remaining charges were dismissed on the Government's motion.

5.

Mr. Blich did not have a trial and pled guilty to Count 9 of the Indictment charging him with Honest Services Fraud Conspiracy and pled not guilty to all other counts of the indictment. At Mr. Blich's change of plea hearing, the Government stated that "some of the charges have been removed and some portions of the charges, like in Count Nine, we had originally charged as a property theory along with the honest services fraud theory". (Plea Transcript, page 4). The Government distinguished Mr. Blich's case from that of his codefendant, Mr. Berrien Sutton, who "received money to which he was not entitled based on that fraud and that is somewhat different from the factual scenario that's presented in Count Nine, Mr. Blich's case that we're here to plead today". (Plea Transcript, page 11). The Government's stipulation of facts was stated at that hearing as follows:

The defendant was elected superior court judge for the Alapaha Judicial Circuit in 1980 and at all times relevant to Count Nine served as the chief judge for that circuit. As superior court judge the defendant's responsibilities included:

(a) Supervising grand jury, presiding over criminal trials, pleas of guilty, sentencing, bond, and probation revocation and related matters.

(b) Presiding over civil lawsuits and related matters.

(c) Appointing judges and magistrates to juvenile and magistrate court.

And, (d) Collecting and remitting to the various county commissions monies collected through fines, restitutions, fees, and surcharges, in criminal and civil cases, Official Code of Georgia, Section 15-6-8.

The defendant admits that he was bound by the Georgia Code of Judicial Conduct in particular the following cannons: 1, 2A, 2B, 3B 7, 3B 11, 3C4, 3E1C, 3E2, and 5C4.

In furtherance of the conspiracy charged in Count Nine of the indictment the defendant admits that he did engage in a scheme and

artifice to defraud the State of Georgia of the intangible right to his honest services in that the defendant did:

(a) Engage with ex parte communication regarding pending cases with attorneys, litigants, friends and family members of litigants, and other persons in violation of the Georgia Code of Judicial Conduct.

(b) Enter judicial orders and take other official action based on his authority as a superior court judge in violation of Georgia laws, his oath of office, and the ethical rules and regulations governing the courts of the State of Georgia, including, but not limited to reducing sentences he had previously imposed as well as sentences imposed by other judges without holding a hearing or providing notice as required by law, reducing bond or otherwise authorizing release of persons incarcerated without holding a hearing, engaging in plea negotiations or stating in ex parte communications what ultimate outcome he intended to cause in a case.

The defendant further admits that the following specific acts among others were committed as a part of the defendant's course of conduct.

On or about January 19, 2006 co-conspirator Haywood Collier contacted defendant on behalf of DJM, an individual who was then

incarcerated in the Berrien County jail on drug-related charges. Collier asked the defendant to release DJM from jail. DJM was released on bond after this contact. The district attorney was not made aware of the ex parte communication between the defendant and Collier.

On or about February 10, 2006 co-conspirator Haywood Collier contacted defendant on behalf of MAH who was charged with violation of probation. The defendant had a discussion with the probation officer and dismissed the warrant pending against MAH without any hearing and without notice to the district attorney.

On or about April 24, 2007, CB telephoned defendant on behalf of MB who was incarcerated for aggravated assault. CB requested that MB be released on bond. Defendant later released MB after calling his probation officer. The release of MB occurred without a hearing and without notice to the district attorney.

The telephone calls made by the defendant were transmitted in interstate commerce as part of the scheme and artifice to defraud.

The defendant admits that the foregoing conduct had the effect of depriving the State of Georgia of the intangible right to the honest services of the defendant. As part of that foregoing conduct, the

defendant did make and receive telephone calls, which were transmitted in interstate commerce.

The defendant admits and acknowledges that the evidence is sufficient to prove the defendant's guilt as to Count Nine beyond a reasonable doubt.

(Plea Transcript, pages 31-33 and Plea Agreement, pages 9-12).

This Court ultimately accepted Mr. Blich's guilty plea and found that there was an adequate factual basis for same. (Plea Transcript, page 36). The Government, at the plea hearing, also conceded that there would be no restitution involved in Mr. Blich's sentence. (Plea Transcript, page 3).

6.

Mr. Blich did not testify at a pretrial, trial, or post-trial hearing. Mr. Blich did testify at his guilty plea hearing on September 11, 2009.

7.

Mr. Blich did not pursue a direct appeal after his conviction.

8.

Mr. Blich has not sought a Petition for Certiorari with the United States Supreme Court.

9.

Mr. Blich has not filed any other motions, petitions, or applications directly concerning this judgment of conviction in any other court. However, prior to Mr. Blich resigning as judge, there was an investigation done by the Judicial Qualifications Commission of Georgia. Also, as a result of the charges, disciplinary proceedings were conducted by the State Bar of Georgia resulting in Mr. Blich's disbarment. See, In Re: Blich, 288 Ga. 690 (2011)

10.

Mr. Blich asks this Court to vacate his conviction for the following reasons. On June 24, 2010, the United States Supreme Court issued its opinion in the case of Skilling v. United States, 561 U.S. ---, 130 S.Ct. 2896 (June 24, 2010). That decision held that the honest services statute could only cover schemes in which there was bribery or a kickback. The defendant in Skilling was ultimately found not to have committed honest services fraud by misrepresenting his company's financial health to inflate the company's stock price because there was no allegation that the defendant accepted payments in exchange for misrepresenting the company's health. Id., 130 S.Ct. at 2928 and 2931. The Court found that "reading the [honest services] statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine". Id. at 2931. A kickback was then defined by the Court as

“any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]”. Id. at 2934.

Recently, the Eleventh Circuit Court of Appeals relied on the holding in Skilling when vacating a conviction for honest services fraud in the case of United States v. Siegelman, --- F.3d ---, 2011 WL 1753789 (11th Cir., May 10, 2011). The Court found the evidence insufficient to support the conviction for the defendant where the alleged fraud was based on his supposed knowledge of a second defendant’s bribery. The Court stated that the defendant “may be held criminally liable for [the codefendant’s] conduct on the Board only if he was a knowing party to a scheme that included conduct”. Id., *citing*, United States v. Toney, 598 F.2d 1349, 1355 (5th Cir. 1979). Ultimately, in Siegelman, the Court of Appeals found that the evidence did not show that Siegelman knowingly participated in his codefendant’s self-dealing scheme.

In this instance, it is without dispute that Mr. Blich did not receive any sort of bribe, personal benefit, or kickback in relation to Count 9. As such, his conviction for honest services fraud must be vacated and set aside pursuant to 18 U.S.C. § 2255. Decisions of the Supreme Court that construe substantive federal criminal statutes must be given retroactive effect. United States v. Peter, 310 F.3d

709 (11th Cir. 2002); Bousley v. United States, 523 U.S. 614, 620-21 (1998). It is well settled that this Court is without jurisdiction to accept a guilty plea to a “non-offense” as was the case here. Peter, 310 F.3d at 713, *citing*, United States v. Meacham, 626 F.2d 502 (5th Cir. 1980). Here, Mr. Blich pled guilty to a “non-offense” given the decision in Skilling and, consequently, this Court was without jurisdiction to entertain the plea. Thus, 18 U.S.C. § 2255 operates to vacate and set aside this sentence as it was without a jurisdictional basis.

Also, 18 U.S.C. § 2255 operates to vacate the sentence as the crime was deemed unconstitutional in the Skilling decision, thus Mr. Blich’s conviction and sentence are unconstitutional. Stayton v. United States, --- F.Supp.2d ---, 2011 WL 691238 (M.D. Ala., Feb. 28, 2011). Likewise, Mr. Blich shows that his guilty plea was not voluntary as he was not advised of the true nature of the offense to which he pled guilty. United States v. Brown, 117 F.3d 471 (11th Cir. 1997).

Mr. Blich shows that his motion to vacate is timely as it is filed within one year of the date on which the right asserted was recognized by the Supreme Court in the decision in Skilling. Stayton v. United States, --- F.Supp.2d ---, 2011 WL 691238 (M.D. Ala., Feb. 28, 2011); United States v. Cabrera, 2011 WL 1057075 (11th Cir., Mar. 24, 2011). Mr. Blich also shows that, because he is presently serving a probationary sentence, this supervised release satisfies the custody

requirement of 18 U.S.C. § 2255. Coronado v. U.S. Bd. Of Parole, 540 F.2d 216, 217 (5th Cir. 1976).

If, for any reason, 18 U.S.C. § 2255 is inadequate to provide the relief Mr. Blich seeks, he respectfully requests that his petition be considered pursuant to 28 U.S.C. § 2241; 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 1361 (Mandamus); or Rules 33 and 34 of the Federal Rules of Criminal Procedure.

11.

Mr. Blich has not previously presented his defenses under Skilling as that case had not been decided at the time he was convicted. He did not pursue a direct appeal because the Skilling decision was rendered after the expiration of the time in which he could file an appeal.

12.

Mr. Blich does not have any motion, petition, or appeal now pending in any court for this judgment.

13.

The following attorneys represented Mr. Blich:

At throughout his criminal case, plea, and sentencing, Mr. Blich was represented by the following. Mr. L. E. Hutton, Willis, Ferebee, & Hutton, 503 E Monroe Street, Jacksonville, FL, 32202, phone: 904-356-0990, email: lehlaw@hotmail.com. Mr. Robert Willis, Willis, Ferebee, & Hutton, 503 E

Monroe Street, Jacksonville, FL 32202, phone: 904-356-0990, email: rwillislaw@aol.com. Mr. John J. Ossick, Jr., Attorney at Law, P.O. Box 1087, Kingsland, GA, 31548, phone: 912-729-5864, fax: 912-729-2230, email: ossick@tds.net.

Initially, Mr. Donnie Dixon, 24 Drayton Street, Suite 1000, Savannah, GA, 31401, phone: 912-443-4070; fax: 912-644-6702, email: ddixon@donniedixonlaw.com, was retained to represent Mr. Blich at his bond hearing, but his representation was concluded after that hearing and he was replaced by trial counsel named above.

Throughout the proceedings involving the Judicial Qualifications Commission of Georgia, Mr. Blich was represented by Mr. Roy E. Barnes and Mr. John F. Salter, The Barnes Law Group, LLC, Attorneys at Law, 31 Atlanta Street, Marietta, Georgia, 30060, phone 770-227-6375, fax: 770-227-6373.

With regards to the proceedings pending before the State Bar of Georgia, Mr. Blich was represented by Mr. John S. Sims, Sims, Fleming, Benson & Hudson, Attorneys at Law, P.O. Box 1165, Tifton, GA, 31793, phone: 229-386-0964, fax: 229-386-1452.

14.

Mr. Blich was not sentenced on more than one count of an indictment, or on more than one indictment, in the same court at the same time.

15.

Mr. Blich does not have any future sentence to serve after he completes the conviction that he is now challenging.

16.

Mr. Blich shows that this Motion is filed within a year of the Supreme Court's opinion in Skilling, which was decided on June 24, 2010. See, 18 U.S.C. § 2255.

WHEREFORE, Mr. Blich respectfully asks that this Court vacate his conviction, guilty plea, and sentence and grant any further relief this Court deems just and proper.

Respectfully submitted, this the 10th day of June, 2011.

/s/ John Gee Edwards
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the following: Hon. Leah McEwan, Assistant United States Attorney, United States Attorney's Office for the Middle District of Georgia, Hon. James N. Crane, Assistant United States Attorney, United States Attorney's Office for the Middle District of Georgia; Hon. Graham A. Thorpe, Assistant United States Attorney, United States Attorney's Office for the Middle District of Georgia.

Respectfully submitted this the 10th day of June, 2011.

/s/ John Gee Edwards

John Gee Edwards

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