FILED
United States Court of Appeals
Tenth Circuit

April 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAYMOND L. ROGERS,

Defendant - Appellant.

No. 19-3012
(D.C. Nos. 6:18-CV-01322-JWB &
6:10-CR-10186-JWB-1)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **HOLMES**, **KELLY**, and **PHILLIPS**, Circuit Judges.

Raymond L. Rogers, proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's order dismissing his 28 U.S.C. § 2255 motion as an unauthorized second or successive § 2255 motion and dismissing it for lack of jurisdiction. We deny a COA and dismiss this matter.

Mr. Rogers was convicted after a jury trial of (1) bank robbery, in violation of 18 U.S.C. § 2113(a); (2) brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced to 234 months' imprisonment. We

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

affirmed his convictions and sentence on direct appeal. *United States v. Rogers*, 520 F. App'x 727, 728 (10th Cir. 2013). In 2013, Mr. Rogers filed his first § 2255 motion based on ineffective assistance of counsel. The district court denied the motion, and we denied a COA. Mr. Rogers then filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), which the district court denied initially and on reconsideration. Mr. Rogers appealed that denial, and this court denied a COA. On November 19, 2018, he filed the underlying § 2255 motion in district court, arguing that his "Fifth and Sixth Amendment rights were violated because the original indictment on which he was tried was invalidated by the filing of a superseding indictment." R. at 358. The district court determined that the motion was an unauthorized second or successive § 2255 motion and dismissed it for lack of jurisdiction.

Mr. Rogers now seeks a COA under 28 U.S.C. § 2253(c) to appeal from that dismissal. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court dismissed his petition on procedural grounds, to obtain a COA Mr. Rogers must demonstrate *both* "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We need not reach the constitutional component of this standard since it is apparent Mr. Rogers cannot meet his burden on the procedural one. *See id.* at 485.

A prisoner may not file a second or successive § 2255 motion without authorization from this court. 28 U.S.C. § 2244(b)(3)(A); *id.* § 2255(h). The district court lacks jurisdiction to consider the merits of a second or successive § 2255 motion absent authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

In his motion filed in district court, Mr. Rogers sought vacatur of his convictions and sentence, arguing that the superseding indictment filed after the original indictment "effectively terminated the criminal case against [him]," making his convictions and sentence "an absolute nullity and void for want of indictment," R. at 348-49 (internal quotation marks and brackets omitted). He also argued his motion was not second or successive because the district court's ruling on his first § 2255 motion "was not an on the merits ruling, and [was] merely a ruling that [his] pleading was deficient," rendering 28 U.S.C. § 2255(h) inapplicable. R. at 346. The district court determined that the motion "is clearly a § 2255, as it seeks to vacate his conviction and sentence, and it is just as clearly a second or successive motion under § 2255." R. at 358. Because Mr. Rogers had not obtained the proper authorization from this court to file a second or successive § 2255 motion, the district court dismissed the motion for lack of jurisdiction and denied a COA.

In his COA application to this court, Mr. Rogers repeats his argument that the district court should not have deemed his filing a successive § 2255 motion because the district court's "denial ruling of [his first] § 2255 [motion] does not constitute an on the merits ruling," COA App. at 3. In support of his argument, Mr. Rogers cites *Sanders v. United States*, 373 U.S. 1, 10 (1963), for the proposition that "a [d]istrict [c]ourt's

determination that the claims in a Petition 'lack[] merit in fact' is not a ruling on the merits, and is simply a finding[] that the Petitioner's pleadings are deficient." COA App. at 3. But *Sanders* does not stand for that proposition, and the district court's well-reasoned 25-page order denying his first § 2255 motion undoubtedly reached the merits of his claims. Mr. Rogers concedes as much by stating that "[the district court] denied [his] first § 2255 [m]otion . . . after concluding that all his assignments of error[] are *without merit*," *id.* at 4 (emphasis added) (internal quotation marks and brackets omitted). We do not reach Mr. Rogers's merits argument that his Fifth and Sixth Amendment rights were violated by the filing of a superseding indictment because he has not shown that jurists of reason would find it debatable whether the district court's procedural ruling was correct. Accordingly, we deny a COA and dismiss this matter.

Mr. Rogers's motion to proceed without prepayment of costs or fees is granted. Nevertheless, he is required to pay all filing and docketing fees. Only prepayment of fees is waived, not the fees themselves. *See* 28 U.S.C. § 1915(a)(1). Payment shall be made to the Clerk of the District Court. Mr. Rogers's "Motion to Expand or Supplement COA Application and Combined Opening Appellate Brief" is also granted.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk