FILED
United States Court of Appeals
Tenth Circuit

August 27, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TYRONE L. ANDREWS,

Defendant - Appellant.

No. 19-3125
(D.C. Nos. 6:17-CV-01169-JTM &
6:07-CR-10221-JTM-2)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **LUCERO**, and **PHILLIPS**, Circuit Judges.

Tyrone L. Andrews filed a motion in the district court invoking Federal Rule of Civil Procedure 59(e). The district court dismissed the motion as an unauthorized second or successive 28 U.S.C. § 2255 motion. Andrews seeks a certificate of appealability (COA) to appeal that dismissal. We deny a COA and dismiss this matter.

Background

In 2010, Andrews pleaded guilty to 86 counts of drug trafficking and related offenses. He was sentenced to 240 months (20 years) in prison. His plea agreement included a waiver of both his right to appeal and his right to collaterally attack his

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

conviction or sentence under § 2255. Nevertheless, Andrews filed a direct appeal, which was dismissed based on the waiver. *United States v. Andrews*, 421 F. App'x 819, 821-22 (10th Cir. 2010) (per curiam). In 2011, Andrews filed his first § 2255 motion to vacate his sentence alleging ineffective assistance of counsel, prosecutorial misconduct, and judicial misconduct. The district court denied the motion, in part based on the waiver in his plea agreement, and this court denied a COA. *See United States v. Andrews*, 471 F. App'x 824, 829 (10th Cir. 2012).

The government subsequently moved under Federal Rule of Criminal Procedure 35(b) for a reduction in Andrews' sentence based on substantial assistance. The district court granted the motion and reduced Andrews' sentence to 156 months (13 years) in prison. The court entered an amended judgment reflecting this sentence on October 11, 2012.[1]

In 2013, Andrews filed a motion in this court seeking authorization to file a second or successive § 2255 motion to assert the following claims: he improperly received a two-point enhancement even though he did not plead guilty to a gun charge; evidence from an illegal vehicle stop should be suppressed; the Speedy Trial Act was violated; the third superseding indictment was not proven to a grand jury; and all evidence from the "sneak and peek" should be suppressed. We denied authorization

[1] The amended judgment did not constitute a new, intervening judgment under the Supreme Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010), for purposes of determining whether a subsequent § 2255 motion is second or successive. *See United States v. Quary*, 881 F.3d 820, 822 (10th Cir. 2018) (per curiam) (distinguishing sentence reductions from resentencings and holding that "the former do not qualify as new, intervening judgments" under *Magwood*).

because Andrews had not presented either new law or new evidence required for authorization under 28 U.S.C. § 2255(h).

In 2017, Andrews filed another motion for authorization to file a second or successive § 2255 motion to assert a claim that the arresting officer did not read him his *Miranda* rights after an illegal vehicle stop that led to a two-point enhancement for having a gun in the trunk and a claim that he should have been sentenced at the low end of his Guidelines range. We denied authorization, again because Andrews had not presented either new law or new evidence.

Following this denial, Andrews returned to district court and filed a Federal Rule of Civil Procedure 60(b) "Motion to Void the Criminal Judgment" asserting numerous grounds for relief, including ineffective assistance of his trial counsel, selective prosecution, and prosecutorial and judicial misconduct. In particular, he argued that the district court lacked jurisdiction to hear his criminal case, the grand jury was invalid, the prosecution committed fraud on the court and concealed grand jury materials, the indictment was void, his plea was coerced, the trial judge intervened in the plea process and conspired with the government to violate his rights, the prosecution and court violated his right to a speedy trial, and the trial judge was not properly appointed. On June 9, 2017, the district court dismissed the motion as an unauthorized second or successive § 2255 motion. In doing so, the court explained to Andrews that "'a prisoner's post-judgment motion is treated like a second-or-successive § 2255 motion—and is therefore subject to the authorization requirements of § 2255(h)—if it asserts or reasserts claims of error in the prisoner's conviction.'" *United States v. Andrews*,

No. 07-10221-2-JTM, 2017 WL 7054080, at *1 (D. Kan. June 9, 2017) (unpublished) (brackets omitted) (quoting *United States v. Baker*, 718 F.3d 1204, 1206 (10th Cir. 2013)).

Just over a month later, Andrews filed another Rule 60(b) motion raising essentially the same arguments. The district court denied the motion as an unauthorized second or successive § 2255 motion for the same reasons articulated just a month earlier in its Order of June 9, 2017. This time, Andrews sought a COA from this court to appeal the district court's denial. But, because Andrews had not presented any argument challenging the district court's determination that his Rule 60(b) motion was an unauthorized second or successive § 2255 motion, and because reasonable jurists could not debate the correctness of that procedural ruling, we denied a COA. *United States v. Andrews*, 708 F. App'x 524, 526 (10th Cir. 2018).

Finally, Andrews filed the Rule 59(e) "Motion to Alter or Amend a Judgment," wherein he argued, again, that the prosecution committed fraud on the court, the indictment was invalid, his guilty plea was coerced, the vehicle stop was illegal and the evidence from it should have been suppressed, including the gun that led to a two-point enhancement, the prosecution and the court violated his right to a speedy trial, the trial judge committed fraud and was not properly appointed, and his trial counsel was ineffective for conspiring with the prosecution and the court. The district court summarily denied the motion as an unauthorized second or successive § 2255 motion for the reasons stated in its earlier orders. Andrews now seeks a COA to appeal the denial.

Discussion

To obtain a COA when the district court's ruling rests on procedural grounds, Andrews must show *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) (emphasis added). A COA may not issue unless he satisfies both parts of this burden.

As we explained to Andrews in denying a COA for his last attempted appeal, "[r]egardless of how a movant characterizes a post-judgment motion, it is treated as a § 2255 motion if it 'asserts or reasserts a federal basis for relief' from the movant's conviction or sentence." *Andrews*, 708 F. App'x at 526 (quoting *In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009) (per curiam)). Given the substance of the arguments raised in Andrews' Rule 59(e) motion, reasonable jurists could not debate the correctness of the district court's determination that it constituted an unauthorized second or successive § 2255 motion.[2] Accordingly, Andrews is not entitled to a COA.

Conclusion

We deny Andrews' application for a COA and dismiss this matter. We also note that, with this order, federal courts have now told Andrews five times in just over two years that he may not collaterally attack his conviction without prior authorization from

[2] Andrews has not even presented any argument contesting the correctness of the district court's ruling. His combined opening brief and application for a certificate of appealability consists of a single page containing his "Statement of the Case" and a copy of the Rule 59(e) motion he filed in the district court.

this court. We caution Andrews that future appeals involving the same or similar arguments may result in the imposition of appellate filing restrictions and/or sanctions.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk