

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 11, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFRED JAMES PRINCE,

Defendant - Appellant.

No. 21-6032
(D.C. Nos. 5:20-CV-00342-PRW &
5:90-CR-00096-PRW-1)
(W.D. Okla.)

ORDER

Before **BACHARACH, MURPHY, and CARSON**, Circuit Judges.

Mr. Alfred J. Prince, appearing *pro se*, requests leave to proceed *in forma pauperis* and issuance of a certificate of appealability to appeal the denial of his 28 U.S.C. § 2255 motion. We grant leave to proceed *in forma pauperis*. But because the district court’s determination is not reasonably debatable, we deny a certificate of appealability and dismiss this matter.

Leave to Proceed *in Forma Pauperis*

Because Mr. Prince cannot afford to prepay the filing fee, we grant leave to proceed *in forma pauperis*.

Issuance of a Certificate of Appealability

I. We must apply the test for a certificate of appealability.

To appeal the denial of a motion under § 2255, Mr. Prince needs a certificate of appealability. *United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). We can grant this certificate only upon “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

For constitutional claims denied on the merits, the movant must show “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For claims denied on the basis of a procedural ruling, the movant must show that reasonable jurists could debate the validity of the underlying constitutional claim and the correctness of the district court’s procedural ruling. *Id.*

II. Mr. Prince seeks leave to appeal both the conviction and the sentence.

Mr. Prince was convicted of unlawfully using a firearm in connection with a “crime of violence.” At sentencing, the district court ordered his federal prison terms to run consecutively to a state sentence.

After unsuccessfully appealing, Mr. Prince has filed his second motion under 28 U.S.C. § 2255. We have allowed Mr. Prince to pursue a second motion under § 2255 to challenge the existence of a crime of violence.

The alleged crime of violence is armed bank robbery. The district court determined that armed bank robbery is a crime of violence, and Mr. Prince wants to appeal this determination. He also seeks to appeal the district court's decision to run his federal prison terms consecutively to a state sentence.

III. Armed bank robbery is a crime of violence.

Mr. Prince was convicted on two counts: (1) bank robbery involving the use of a dangerous weapon or device (18 U.S.C. § 2113(a) and (d)), and (2) use of a firearm in connection with a “crime of violence” (18 U.S.C. § 924(c)(1)).

“[T]he term ‘crime of violence’ means an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3)(A)–(B). Part (A) is commonly called the “elements” clause, and Part (B) is commonly called the “residual” clause. *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). The residual clause is unconstitutionally vague. *Id.* at 2336.

Mr. Prince argues that his conviction for armed bank robbery rested on the unconstitutional residual clause. The district court rejected this

argument, concluding that armed bank robbery satisfied the elements clause. This conclusion is not reasonably debatable.

Defendants commit armed bank robbery only if they assault someone or use a dangerous weapon or device to jeopardize another person's life. 18 U.S.C. § 2113(d). So guilt required a finding that Mr. Prince had used or threatened to use physical force. Given this requirement, the district court found that the elements of the underlying crime fit the elements clause by requiring "the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A).

Mr. Prince argues that the elements clause did not apply because he had not brandished or discharged a firearm. Even without a firearm, bank robbery categorically qualifies as a crime of violence under the sentencing guidelines. *United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018). Here, though, the conviction itself required a finding that Mr. Prince had assaulted someone or jeopardized someone's life by using a dangerous weapon or device. Regardless of whether an offender brandishes or discharges a firearm, the offender's robbery of a bank with a dangerous weapon or device would purposely instill "objectively reasonable fear (or expectation) of force or bodily injury." *Id.* So the commission of a bank robbery with a dangerous weapon or device would "necessarily threaten[] the use of . . . 'force capable of causing physical pain or injury to another

person.’” *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

Given the nature of that threat, no reasonable jurist could question the district court’s characterization of Mr. Prince’s earlier conviction of armed bank robbery as a crime of violence even if the offense had not required the offender to brandish or discharge a firearm. We thus decline to issue a certificate of appealability on this issue.

IV. Mr. Prince wasn’t authorized to argue that his terms of imprisonment should be altered.

The Tenth Circuit authorized Mr. Prince to file a second or successive § 2255 motion for a limited purpose: “challenging his § 924(c) conviction and sentence under *Davis*.” *In re Prince*, No. 20-6028, at 2 (10th Cir. March 10, 2020). But Mr. Prince also claimed that his state and federal terms of imprisonment should have run concurrently rather than consecutively. Because he was not authorized to make this challenge in a second motion under § 2255, the district court held that it lacked jurisdiction to address this claim. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (“A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization.”). We agree.

* * *

We deny Mr. Prince's application for a certificate of appealability.
Given our denial of a certificate of appealability, we dismiss this matter.

Entered for the Court

Robert E. Bacharach
Circuit Judge