FILED
United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RAYVELL VANN, Defendant - Appellant.	No. 21-2065 (D.C. No. 1:12-CR-00966-PJK-SMV) (D. N.M.)
In re: RAYVELL VANN, Movant.	No. 21-2112 (D.C. Nos. 1:16-CV-01204-PJK-KRS & 1:12-CR-00966-PJK-SMV-1) (D. N.M.)

ORDER

Before **HARTZ**, **EID**, and **CARSON**, Circuit Judges.

Rayvell Vann, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order construing his motion for reconsideration as an unauthorized second or successive 28 U.S.C. § 2255 motion and dismissing it for lack of jurisdiction (case no. 21-2065). He also seeks authorization to file a second or successive § 2255 motion (case no. 21-2112). We deny both a COA and authorization.

I. Background

In 2013, Mr. Vann was convicted after a jury trial of possession with intent to distribute phencyclidine (PCP) and codeine. At sentencing, he excused his attorneys and proceeded pro se, and the district court ultimately sentenced him to fifteen years in prison. We affirmed his convictions and sentence on direct appeal.

In 2016, Mr. Vann filed a § 2255 motion. The district court denied the motion and we denied a COA.

Since 2019, Mr. Vann has filed at least seven motions that the district court has dismissed because they were unauthorized second or successive § 2255 motions, including the underlying motion in case no. 21-2065. In that motion, which Mr. Vann captioned as a motion for reconsideration, he argued that his sentence was improperly enhanced based on a state conviction that is not a serious drug offense. He now seeks a COA to appeal from the district court's dismissal order.

Mr. Vann also seeks authorization to file a second or successive § 2255 motion to challenge his sentence.

II. COA (case no. 21-2065)

To appeal the district court's dismissal of his motion as an unauthorized second or successive § 2255 motion, Mr. Vann must obtain a COA. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant 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). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *Id*. at 485.

A prisoner may not file a second or successive § 2255 motion unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A); *id*. § 2255(h). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

In his COA application, Mr. Vann does not explain how the district court erred in its procedural ruling dismissing his motion for reconsideration for lack of jurisdiction as an unauthorized second or successive § 2255 motion. Instead, he argues the merits of his underlying motion, asserting again that his sentence was improperly enhanced. Because Mr. Vann has not shown that jurists of reason would debate whether the district court's procedural ruling was correct, we deny a COA.

III. Authorization (case no. 21-2112)

Mr. Vann also seeks authorization to file a second or successive § 2255 motion to bring two new claims. His first proposed claim seeks to challenge his sentence enhancement. His second proposed claim contends there was a miscarriage of justice when the district court judge did not hold a hearing on the sentence-enhancement issue.

To receive authorization to file a second or successive § 2255 motion, Mr. Vann must show that his proposed new claims rely on:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

He asserts that his first claim relies on a new rule of law and cites to *Mathis v. United States*, 136 S. Ct. 2243 (2016), *United States v. Elder*, 900 F.3d 491, 501 (7th Cir. 2018), and *United States v. Ruth*, 966 F.3d 642, 650 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021). But Mr. Vann cannot rely on *Mathis* for authorization because he cannot show it was previously unavailable. The Supreme Court issued *Mathis* in June 2016 and he filed his first § 2255 motion in October 2016. *Mathis* was therefore available to him at the time he filed his first § 2255 motion. As for the Seventh Circuit's decisions in *Elder* and *Ruth*, Mr. Vann has not shown that those decisions have been "made retroactive to cases on collateral review *by the Supreme Court*," § 2255 (h)(1) (emphasis added), and so he cannot rely on them for authorization.

Mr. Vann concedes that his second claim does not rely on newly discovered evidence or a new rule of constitutional law, *see* Mot. for Auth. at 10; he has therefore failed to meet the requirements for authorization of that claim.

IV. Conclusion

In case no. 21-2065, we deny a COA and dismiss the matter. We grant Mr. Vann's motion to proceed without prepayment of costs or fees. In case no. 21-2112, we deny authorization. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk