FILED
United States Court of Appeals
Tenth Circuit

April 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD HENNIS,

Defendant - Appellant.

No. 23-1038
(D.C. Nos. 1:18-CV-00055-PAB &
1:16-CR-00119-PAB-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Richard Hennis, a federal inmate represented by counsel, seeks to appeal from the denial of his 28 U.S.C. § 2255 motion. He contends that the district court erred in denying him leave to amend his motion and striking his proposed amended claim concerning ineffective assistance for failing to move for suppression of evidence. He maintains that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") one-year limitation period related to this claim should be equitably tolled. We deny a certificate of appealability (COA) and dismiss the appeal.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Background

In 2017, Mr. Hennis pled guilty to one count of production of child pornography, 18 U.S.C. §2251(A), and one count of transportation of child pornography, 18 U.S.C. § 2252A(a)(1). The district court sentenced Mr. Hennis to 27 years' imprisonment and 10 years' supervised release. Upon motion of the government, this court dismissed his direct appeal given a broad appellate waiver[1] in the plea agreement and Mr. Hennis's concession of its applicability. United States v. Hennis, 706 F. App'x 486 (10th Cir. 2017) (per curiam) (unpublished).

In January 2018, Mr. Hennis filed a pro se 28 U.S.C. § 2255 motion, raising six claims of ineffective assistance of counsel including failure to investigate a possible diminished capacity defense and to present various mitigating factors at sentencing. Aplt. App. 30–40. After the government's response, Mr. Hennis filed a motion to stay and for leave to amend his § 2255 motion, asserting that his initial motion was filed prematurely and raising three additional claims. Aplt. App. 61–64. Mr. Hennis later retained counsel, who, in March 2021, moved to file an amended § 2255 motion proposing a new claim of ineffective assistance for failure to seek suppression of evidence based on a faulty search warrant. After briefing, the district court denied leave, finding Mr. Hennis's proposed amendments futile. United States v. Hennis, No. 16-cr-00119/18-cv-00055, 2022 WL 17536246, at **2–7 (D. Colo. Dec. 8, 2022). It also

[1] The appeal waiver encompassed "any collateral attack," except ones predicated on retroactive changes in the sentencing guidelines or statute, ineffective assistance of counsel, or prosecutorial misconduct. United States v. Hennis, No. 16-cr-00119/18-cv-00055, 2022 WL 17536246, at *4 (D. Colo. Dec. 8, 2022).

declined to consider the counseled claim of ineffective assistance of counsel because it differed significantly from those previously advanced. Id. at *7.

Discussion

In order to obtain a COA, Mr. Hennis must make "a substantial showing of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 483 (2000). To meet this threshold, Mr. Hennis must show that reasonable jurists would find the district court's ruling debatable or "that the issues presented were adequate to deserve encouragement to proceed further." See United States v. Christensen, 456 F.3d 1205, 1206 (10th Cir. 2006) (quoting Slack, 529 U.S. at 484). A certificate of appealability (COA) is a jurisdictional prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

According to Mr. Hennis, his motion for leave to amend was timely — time remained within the § 2255 limitations period to bring other amended § 2255 claims — and he "should not be penalized" for the district court's alleged delay. Aplt. Br. at 9. If the court had resolved his motion to amend within the § 2255 limitations period, he believes he could have presented the new ineffective assistance claim. Because, in his view, "[a]ny delay in presenting [his] claim is attributable to the district court[,]" he was entitled to equitable tolling so his proposed claim should have been considered. Id. at 10.

Mr. Hennis asserts that because the requirements for filing a successive § 2255 are stringent, leave to amend should be freely granted. Aplt. Br. at 9 (citing United States v. Roberts, 492 F. App'x 869, 872–73 (10th Cir. 2012)). In Roberts, however, we advised

that under Rule 15(a), a § 2255 movant should be given latitude to amend to conform his motion with procedural requirements, "even if he seeks to add a new claim[,]" if it is the first such amended motion and is filed before a response by the opposing party. 492 F. App'x at 872. We did not hold that a district court must resolve that claim without consideration of the law. Here, the district court considered Mr. Hennis's claims but determined that those concerning the voluntariness of his plea and his mental state were barred by the appeal waiver and his claim of ineffective assistance of counsel regarding these claims was belied by the plea colloquy. Hennis, 2022 WL 17536246, at *4–7. We see no error in the district court's consideration of the factors outlined in United States v. Viera, 674 F.3d 1214, 1217 (10th Cir. 2012), in arriving at these conclusions. See Hennis, 2022 WL 17536246, at *5. Mr. Hennis does not put forth adequate grounds or evidence to justify proceeding further.

Implicitly conceding that the new claim did not relate back to his original pro se § 2255 motion as required by Federal Rule of Civil Procedure 15(c), Mr. Hennis argues that his counseled ineffective assistance claim was not subject to this procedural requirement because he filed his pro se motion to amend within the one-year limitation period, § 2255(f)(1). Aplt. Br. at 9; see United States v. Espinoza-Saenz, 235 F.3d 501, 505 (10th Cir. 2000) (holding that under Rule 15(c), a district court may consider an untimely § 2255 motion which "clarifies or amplifies a claim or theory in the original motion") (quoting United States v. Thomas, 221 F.3d 430, 431 (3d Cir. 2000)) (emphasis added) (brackets omitted)). But a motion to amend cannot serve as a placeholder providing carte blanche to raise any subsequent claim which would otherwise be time-

barred (by nearly two years in this case).[2] Otherwise, as this court has acknowledged, the one-year limitation period under AEDPA would be meaningless. Espinoza-Saenz, 235 F.3d at 505. A claim based upon counsel's failure to seek suppression bears little relation to the three general categories of claims raised in Mr. Hennis's motion to amend: (1) involuntariness of his plea, (2) that he was unaware of the consequences of pleading guilty, and (3) that he is "adamant that he is not a producer nor a distributor" of child pornography. Aplt. App. 63. No reasonable jurist would contend that the district court impermissibly exercised its discretion in striking the new claim.

Mr. Hennis contends nonetheless that he would have been entitled to raise additional § 2255 claims had the district court resolved his motion for leave to amend within the § 2255 limitations period. Aplt. Br. at 9. Lacking any legal citation, this argument is likely waived. See Nelson v. City of Albuquerque, 921 F.3d 925, 931 (10th Cir. 2019). But even so, Mr. Hennis's claim is belied by the fact that, as he seems to concede, he could have brought any amended § 2255 claim consistent with Rule 15 within the one-year limitations period. Therefore, by Mr. Hennis's own admission, the court's silence provided no impediment to his timely submitting this additional claim.

Despite his delay, Mr. Hennis claims he was entitled to equitable tolling of the one-year AEDPA limitations period. This argument was raised for the first time in Mr. Hennis's reply brief in the district court, and the court expressed no opinion on it. We

[2] Having filed no petition for certiorari, Mr. Hennis had until March 19, 2019, to amend his § 2255 motion. See 28 U.S.C. § 2255(f)(1); United States v. Willis, 202 F.3d 1279, 1280 (10th Cir. 2000). The counseled, amended motion was filed on March 1, 2021. Aplt. App. 90–96.

thus decline to consider it. See Burdick v. Klinger, No. 98-6425, 1999 WL 495634, at *2 (10th Cir. July 14, 1999) (unpublished) (declining to consider state habeas petitioner's equal protection claim, which was raised for the first time in his reply to the state's response in the district court).

Mr. Hennis has failed to make a substantial showing that his constitutional rights were violated. We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge