FILED
United States Court of Appeals
Tenth Circuit

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK E. SELLS,

Defendant - Appellant.

No. 22-5114
(D.C. No. 4:04-CR-00057-TCK-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **TYMKOVICH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

Mark E. Sells, a pro se Oklahoma prisoner, seeks to challenge the dismissal of his motion to vacate his state conviction and sentence. He also seeks to appeal the denial of his motions for appointment of counsel and for "confession of judgement [sic] on his motion to vacate," R. at 168. To appeal, however, Sells must obtain a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"). Because reasonable jurists would not debate the district court's decision, we deny a COA and dismiss this matter.

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I

In 2004, police searched Sells' residence after receiving reports that someone fired shots into his parents' home. During the search, police found a pipe-bomb, firearms, and ammunition. Sells was charged in federal court with possession of an unregistered destructive device, and he moved to suppress evidence seized during the search. When the district court denied in part his motion to suppress, Sells entered a conditional guilty plea and was sentenced to 30 months in prison, followed by 3 years' supervised release, though he reserved his right to appeal the denial of his motion to suppress. *See United States v. Sells*, 463 F.3d 1148, 1153 (10th Cir. 2006). We affirmed. *See id.* at 1162.

Also in 2004, Sells was charged in Oklahoma state court with two counts of shooting with intent to kill. He was convicted by an Oklahoma jury on one count of shooting with intent to kill, for which he was sentenced to 35 years in prison, and one count of assault with a dangerous weapon, for which he was sentenced to a consecutive 8-year term. His state convictions and sentences were affirmed on direct appeal, and he did not seek certiorari review.

Sells completed his federal prison term in 2006, and his term of supervised release ended in 2009. He was transferred into state custody, and in 2020 filed a habeas petition under 28 U.S.C. § 2254. The district court denied the petition on timeliness grounds, and we denied a COA. *See Sells v. Crow*, 853 F. App'x 278, 281-83 (10th Cir. 2021). Shortly thereafter, Sells filed a 28 U.S.C. § 2255 motion. The district court granted the government's motion to dismiss the § 2255 motion after determining Mr. Sells was ineligible for § 2255 relief because he was no longer in federal custody and he had

waived his right to collaterally attack his conviction in his plea agreement. *See United States v. Sells*, No. 04-CR-57, 2021 WL 5496857, at *2-3 (N.D. Okla. Nov. 23, 2021).

Sells then filed a motion styled under 18 U.S.C. §§ 3145(b) & 3742(a)(3), urging the district court to vacate the Oklahoma trial court's criminal judgment for lack of subject matter jurisdiction.[1] He also moved for appointment of counsel and for "confession of judgement [sic] on his motion to vacate," R. at 168. The district court determined that Sells' attempt to vacate the state criminal judgment had to be brought via a § 2254 petition rather than in his federal criminal case. Alternatively, to the extent Sells sought relief under § 2255, the district court ruled it lacked jurisdiction to consider the motion because Sells was no longer in federal custody, he had already filed a § 2255 motion, and he did not obtain authorization from this court to bring a second or successive § 2255 motion. Accordingly, the district court dismissed his motion to vacate, denied his other motions as moot, and later denied a COA.

II

As an initial matter, Sells disputes the district court's characterization of his motion as seeking habeas relief. He says he styled his motion as one under §§ 3145(b) & 3742(a)(3) and the district court should have treated it as such. But "[i]t is the relief sought, not the pleading's title, that determines whether the pleading is [seeking habeas relief]." *In re Cline*, 531 F.3d 1249, 1253 (10th Cir. 2008) (brackets and internal

[1] 18 U.S.C. § 3145(b) governs review of federal detention orders, while 18 U.S.C. § 3742(a)(3) provides for review of federal sentences exceeding the applicable guideline range.

quotation marks omitted). Sells moved the district court "to vacate Washington County, Oklahoma's illegal Detention Order," which he asserted was "made without subject-matter jurisdiction." R. at 137. Citing *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), he claimed "Oklahoma's illegal prosecution, conviction, and illegal detention of [him was] without subject-matter jurisdiction" because he is an Indian and the events underlying his prosecution occurred on Indian lands. *See* R. at 139 (internal quotation marks omitted). He therefore sought "to be immediately released from the custody of the Oklahoma Department of Corrections." *Id.* at 152. These arguments are properly characterized as seeking habeas relief because Sells challenged his confinement and sought to be immediately released. *See Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) ("In this circuit, a prisoner who challenges the fact or duration of his confinement and seeks immediate release or a shortened period of confinement, must do so through an application for habeas corpus."). And, because his detention arises out of process issued by the state court, he is required to obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) (recognizing § 2253(c)(1)(A)'s COA requirement applies "to matters flowing from a state court detention order").[2]

III

To obtain a COA, Sells must "show[], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right

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[2] Sells' reliance on *Castro v. United States*, 540 U.S. 375 (2003), is misplaced because he had already filed a § 2254 petition. *See id.* at 383 (prohibiting courts from characterizing a pleading as a *first* § 2255 motion without warning the prisoner of the consequences of doing so and allowing the prisoner to withdraw or amend the pleading).

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). If reasonable jurists could not debate the district court's procedural ruling, there is no need to consider the constitutional question. *See id.* at 485.

The district court determined that to the extent Sells sought relief under § 2254, he could not proceed in his federal criminal case, but must instead initiate a new § 2254 proceeding and pay the required filing fee. Alternatively, to the extent he sought relief under § 2255, the district court ruled it lacked jurisdiction to adjudicate the motion because Sells was no longer in federal custody after having served his federal sentence and completing his term of supervised release. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994) (§ 2255 movant failed to satisfy in-custody requirement where he filed his motion after completing his prison term and period of supervised release expired). The district court also observed that Sells had already filed a § 2255 motion but he did not obtain circuit-court authorization to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2255(h). Because reasonable jurists could not debate these rulings, we deny a COA and dismiss this matter. All outstanding motions are denied as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk