FILED
United States Court of Appeals
Tenth Circuit

May 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALVIN PARKER,

Petitioner - Appellant,

v.

TERRY MARTIN, Warden,

Respondent - Appellee.

No. 23-6033
(D.C. No. 5:13-CV-01365-D)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Petitioner-Appellant Alvin Parker, a state prisoner appearing pro se, seeks to appeal from the district court's denial of his motion to vacate the judgment for fraud on the court. Parker v. Martin, No. CIV-13-1365, 2023 WL 2024288 (W.D. Okla. Feb. 15, 2023). The judgment he attempts to vacate is the order and judgment entered by the district court on May 8, 2014, dismissing his authorized successive habeas petition under 28 U.S.C. § 2254 for lack of jurisdiction. Parker v. Martin, No. CIV-13-1365, 2014 WL 1873270 (W.D. Okla. May 8, 2014), aff'd 589 F. App'x 866 (10th Cir. 2014) (unpublished). He argues that in denying his motion to vacate, the district court did not

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

consider his argument under Federal Rule of Civil Procedure 60(d)(3). A COA is a jurisdictional prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003). We deny a certificate of appealability (COA) and dismiss the appeal.

Background

In May 1990, Mr. Parker was convicted in state court of second-degree murder and sentenced to 199 years. R. 7. He filed numerous state and federal habeas petitions that were each denied. In 2014, the Tenth Circuit granted leave to file a successive habeas petition based on the recantation of a witness. The district court adopted the magistrate judge's report and recommendation and dismissed the petition, finding it did not link the recantation of a witness to a constitutional violation and there was no support the prosecution knowingly offered perjured testimony, thus it did not satisfy the jurisdictional gate in 28 U.S.C. § 2244(b)(2)(B)(ii). Parker, 2014 WL 1873270 at *2. The Tenth Circuit affirmed the denial of a COA on appeal. Parker, 589 F. App'x 866.

Mr. Parker previously sought to vacate the district court's 2014 judgment under Rule 60(b)(4), which the district court construed as an unauthorized successive habeas petition, dismissed, and denied a COA. Parker v. Martin, No. CIV-13-1365, 2022 WL 1274417 (W.D. Okla. Apr. 28, 2022); Parker v. Martin, No. CIV-13-1365, 2022 WL 2062165 (W.D. Okla. May 9, 2022) (denying motion to amend and denying COA), aff'd No. 22-6091, 2022 WL 3589067 (10th Cir. Aug. 23, 2022).

Mr. Parker now seeks a COA from the district court's February 15, 2023, dismissal of his motion to vacate (for fraud on the court) the judgment dismissing his 2014 habeas petition.[1]

Discussion

We construe pro se filings liberally, though we may not act as an advocate for those claims. United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009). Here, the district court found the instant motion was untimely as a Rule 60 motion and did not construe it as an unauthorized successive habeas petition. Parker, 2023 WL 2024288 at *1; cf. United States v. Baker, 718 F.3d 1204, 1207 (10th Cir. 2013). A COA is a prerequisite to appeal of a denial of a Rule 60 motion. Spitznas v. Boone, 464 F.3d 1213, 1218–19 (10th Cir. 2006). To obtain a COA, Mr. Parker must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He must show "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues were adequate to deserve encouragement to continue. Slack v. McDaniel, 529 U.S. 473, 484 (2000). When a district court denies relief on procedural grounds, a petitioner must show that it is reasonably debatable that the petition states a valid claim of a denial of a constitutional right and also that the district court's procedural ruling is reasonably debatable. Id.

[1] After the district court dismissed Mr. Parker's motion to vacate, Mr. Parker filed two motions to reconsider. The district court denied each. R. 291–92 (Parker v. Martin, No. CIV-13-1365 (W.D. Okla. Feb. 27, 2023)); R. 297 (Parker v. Martin, No. CIV-13-1365 (W.D. Okla. Mar. 7, 2023)). Neither is at issue here.

Mr. Parker contends the district court erroneously dismissed his motion as untimely because motions under Rule 60(d)(3) are not time-barred, unlike Rule 60(b) motions. Aplt. Br. at 3. There is a one-year time bar for Rule 60(b) motions. To the extent his motion was under Rule 60(b), the district court's procedural ruling is not debatable because the motion was made eight years after entry of judgment. Fed. R. Civ. P. 60(c)(1). However, there is no time bar for Rule 60(d)(3) motions. United States v. Buck, 281 F.3d 1336, 1341–42 (10th Cir. 2002). Even if the district court's procedural ruling was not clear on this point, the district court also held the motion to vacate was "without merit." Parker, 2021 WL 2024288 at *1 (citing Buck, 281 F.3d at 1341).

In his motion to vacate, Mr. Parker asserted the government "presented false evidence and made false statements during the § 2254 proceedings," referring to his 2014 habeas petition. R. 281. The allegedly false statement is in the government's motion to dismiss his 2014 habeas petition: "[W]hy would the prosecutor have any reason to think [the witness's] testimony implicating petitioner was false when this testimony was the only version of the story corroborated by the physical evidence, including petitioner's demonstrable possession of the slain officer's service weapon in the hours and days following the shooting." R. 281. In his motion to vacate, he also provided a list of physical evidence presented at trial that he contends supports the conclusion that this statement is false. He asserts the district court relied on the government's false statement to deny his 2014 petition. Aplt. Br. at 3a.

Generally, "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is

implicated" rises to fraud on the court. Buck, 281 F.3d at 1342 (quoting Weese v. Schukman, 98 F.3d 542, 552–53 (10th Cir. 1996)). Fraud on the court is directed at the "judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements, or perjury." Id. (quoting Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc)).

Thus, possible witness perjury alone does not amount to a claim of fraud on the court. Mr. Parker's assertion of fraud is in the government's use of "the only version," because he asserts the evidence supported his version of the story (his innocence) as well. According to Mr. Parker, this should have led the prosecutor to know the witness was lying. Disagreement with the government's advocacy does not rise to fraud on the court merely because a defendant disagrees with the government's characterization. Reasonable jurists would not debate this point.

We DENY a COA, DENY IFP status, and DISMISS the appeal. All pending motions are denied.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge