

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee.

v.

PAUL ANDREW LEE,

Defendant - Appellant.

No. 22-1410
(D.C. Nos. 1:22-CV-02837-CMA &
1:17-CR-00122-CMA-1)
(D. Colo.)

ORDER

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

This case grew out of a federal district court’s imposition of supervised release following a conviction for accessing child pornography with an intent to view it. 18 U.S.C. § 2252A(a)(5)(B), (b)(2). Roughly five years after the court had imposed supervised release, the defendant moved to vacate the sentence, contending that imposition of supervised release violated his constitutional protection against double jeopardy. The district court denied the motion as untimely.

The defendant disagrees with this ruling and wants to appeal. To appeal, however, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). We can grant a certificate only if the defendant’s

argument on timeliness is reasonably debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court treated the motion as one under 28 U.S.C. § 2255, which provides a one-year period of limitations. 28 U.S.C. § 2255(f). The defendant doesn't deny that a motion under § 2255 would be untimely. He argues, however, that he didn't intend to file a motion under § 2255. This argument isn't reasonably debatable. The title of the defendant's motion included an express invocation of § 2255: "Motion to Vacate or Set Aside Sentence Declaring Supervised Release Unconstitutional Pursuant to 28 U.S.C. § 2255/18 § 3553(e)." R. at 180. And in the body of the motion, the defendant requested "[the] court to vacate the supervised release term as being in violation of double jeopardy of the Fifth Amendment." R. at 184.¹ This request triggered § 2255, which provides a remedy for "motion[s] attacking sentence[s]." 28 U.S.C. § 2255 (heading). So the district court was indisputably correct in characterizing the filing as a § 2255 motion to vacate the sentence.

The defendant argues that he was actually intending to file a motion under 18 U.S.C. § 3583(e).² Section 3583(e) can be used to modify

¹ The heading for § 2255 identifies it as the source of "remedies on motion[s] attacking sentence[s]." 28 U.S.C. § 2255.

² The defendant also made this argument in a motion for reconsideration. The district court denied that motion. But the defendant

conditions of supervised release. Fed. R. Crim. P. 32.1(c); 18 U.S.C. § 3583(e). But the defendant isn't challenging particular conditions; he's arguing more broadly that the imposition of any conditions would constitute double jeopardy. The district court explained that § 2255 provides the only available remedy for this kind of challenge, and the defendant doesn't provide a meaningful reason to question this ruling.

Because the defendant's argument isn't reasonably debatable, we deny the request for a certificate of appealability and dismiss the appeal.³

Entered for the Court

Robert E. Bacharach
Circuit Judge

didn't file a notice of appeal after the denial of his motion for reconsideration. So we lack jurisdiction over the denial of reconsideration. *See* Fed. R. App. P. 4(a)(4)(B)(ii); *Anderson v. State Farm Mut. Auto Ins. Co.*, 416 F.3d 1143, 1147 (10th Cir. 2005).

³ Though we dismiss the appeal, we grant leave to proceed in forma pauperis.