

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 25, 2023

Christopher M. Wolpert
Clerk of Court

DAVID J. RUDOMETKIN,

Petitioner - Appellant,

v.

KEVIN PAYNE;* CHRISTINE
WORMUTH,

Respondents - Appellees.

No. 22-3250
(D.C. No. 5:22-CV-03094-JWL)
(D. Kan.)

ORDER AND JUDGMENT**

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

David Rudometkin, a federal military prisoner proceeding pro se, appeals the district court’s order dismissing his 28 U.S.C. § 2241 petition as moot.² Because

* Pursuant to Fed. R. App. P. 43(c)(2), Colonel Kevin Payne is substituted for Colonel Michael Johnston as the respondent in this appeal.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

² We construe Rudometkin’s pro se filings liberally, “but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

Rudometkin has waived any challenge to the district court's mootness ruling, we affirm.

In 2018, a military judge sitting as a general court-martial tried and convicted Rudometkin of rape, aggravated sexual assault, assault consummated by battery, and conduct unbecoming of an officer. The military judge ultimately sentenced Rudometkin to 17 years' confinement. But on direct appeal, the U.S. Army Court of Criminal Appeals (ACCA) set aside the guilty findings and sentence. The U.S. Army Judge Advocate General then certified the case for review to the U.S. Court of Appeals for the Armed Forces (CAAF).

While the CAAF appeal was pending, Rudometkin filed the underlying § 2241 petition, challenging his continued confinement and seeking, in part, an order directing the Secretary of the Army to conduct a hearing on his continued confinement. In support, Rudometkin invoked a provision of the Uniform Code of Military Justice (UCMJ) allowing the Secretary to release a prisoner from confinement pending appeal. *See* 10 U.S.C. § 857(b)(5) ("In any case in which a court-martial sentences a person to confinement, but in which review of the case under [10 U.S.C. § 867(a)(2)] is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending."); *United States v. Katso*, 77 M.J. 247, 251 (C.A.A.F. 2018) (holding that this UCMJ language "is broad enough to permit [a continued-confinement] hearing so that the relevant secretary can determine whether to release the prisoner" pending appellate review). Additionally, in other filings, Rudometkin asked the district court to stay the CAAF

proceedings until the Secretary held a continued-confinement hearing—a request the district court summarily denied.

In the meantime, the CAAF reversed the ACCA’s decision and remanded the case for further review. *See United States v. Rudometkin*, 82 M.J. 396, 402 (C.A.A.F. 2022). Shortly thereafter, the district court dismissed the instant § 2241 petition, determining that Rudometkin’s challenge to his continued confinement was now moot because the CAAF had reversed the decision that set aside the guilty findings and sentence. *See, e.g., City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (noting that case becomes “moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome” (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979))). The district court also noted that a challenge to the validity of Rudometkin’s convictions would be premature because his convictions remained under review in the military courts.³

Rudometkin now appeals, arguing that the district court erred in refusing to require the Secretary to conduct a continued-confinement hearing and to stay the CAAF proceedings until the Secretary did so. But he does not address the district court’s reason for dismissing his petition: that the challenge to continued confinement and the assertion of a right to a continued-confinement hearing became moot when the CAAF reversed the ACCA decision that set aside the guilty findings and sentence. In fact, Rudometkin seems to concede mootness, at least in part, when

³ The district court also denied Rudometkin’s motion seeking “[a] permanent injunction to void or reset [the] CAAF’s decision.” R. 207.

he acknowledges that “an injunction is no longer available as a remedy” because the CAAF decision “has since been published.” Aplt. Br. 18. And although he vaguely contends that he nevertheless remains “entitled to a declaration of his legal rights,” *id.*, he fails to explain—as he must to overcome the district court’s mootness ruling—how such a declaration would settle “some dispute which affects the behavior of the defendant toward the plaintiff.” *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109–10 (10th Cir. 2010) (quoting *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994)).

Because Rudometkin fails to address the district court’s mootness ruling, he has waived any challenge to it. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) (noting that appellant must “explain what was wrong with the reasoning that the district court relied on in reaching its decision”); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (explaining that even pro se litigants must present “more than a generalized assertion of error” to avoid waiver through inadequate briefing (quoting *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001))). To be sure, “mootness is an issue of subject[-]matter jurisdiction” that “can be raised at any stage of the proceedings.” *Ind v. Colo. Dep’t of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015). But the “duty to consider unargued obstacles to subject[-]matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have supported such jurisdiction.” *Tompkins v. U.S. Dep’t of Veteran Affs.*, 16 F.4th 733, 735 n.1 (10th Cir. 2021) (quoting *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th

Cir. 1996)). So the jurisdictional nature of mootness does not require us to overlook Rudometkin's waiver.⁴

We therefore affirm the district court's order dismissing Rudometkin's petition as moot. As a final matter, we deny Rudometkin's motion to supplement his reply brief.

Entered for the Court

Nancy L. Moritz
Circuit Judge

⁴ Although Rudometkin's waiver means that we need not definitively opine on any of the arguments he *does* make, we briefly make two observations. First, federal courts must generally refrain from exercising their equitable powers to intervene in ongoing military-court proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 756–58 (1975) (explaining that because of comity and the specialized nature of military tradition, federal courts should usually abstain from intervening in ongoing court-martial proceedings). Second, the overall point of Rudometkin's desire for a continued-confinement hearing seems to be his belief that such a hearing would have “not only afforded [him] an official venue to provide reasons why he should [not be] confined pending a review of his case by the CAAF” but also would have “opened an opportunity for [him] to supplement the court-martial record with new evidence that should have been considered by the CAAF.” Aplt. Br. 5–6. But it seems doubtful that a continued-confinement hearing would have allowed Rudometkin to supplement the record because: (1) the CAAF's review was limited to the record developed below, *see Rudometkin*, 82 M.J. at 402; and (2) the only purpose of a continued-confinement hearing is for “the relevant secretary [to] determine whether to release [a] prisoner” pending appellate review, *Katso*, 77 M.J. at 251.