

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 24, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL DEWAYNE BELL,

Defendant - Appellant.

Nos. 23-5033 & 23-5050
(D.C. Nos. 4:20-CV-00343-GKF-JFJ &
4:06-CR-00140-GKF-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **HARTZ** and **MORITZ**, Circuit Judges.

Michael Dewayne Bell, a federal prisoner proceeding pro se, seeks to appeal the district court's rulings on two postjudgment motions. We deny a certificate of appealability (COA) and dismiss these matters.

I. Background

Mr. Bell was convicted in 2007 of aggravated bank robbery and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2113(a), (d), and 924(c)(1)(A)(ii). Applying 18 U.S.C. § 3559(c)(1)(A)(i), the district court imposed two consecutive life sentences. We affirmed Mr. Bell's conviction and sentence. He

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court denied relief, and this court denied his request for a COA.

After the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), we authorized Mr. Bell to file a second or successive § 2255 motion (Authorized Motion). In his Authorized Motion, he challenged his conviction under § 924(c) and his two life sentences under § 3559(c), arguing his due-process rights were violated by vagueness in the residual clauses of these statutes. The district court alternatively dismissed Mr. Bell's Authorized Motion and denied relief on the merits. As relevant to his current COA Application, the court first assumed that § 3559(c)'s residual clause was unconstitutional but denied relief because Mr. Bell did not show that it was more likely than not that he was sentenced under the residual clause. It also held that Mr. Bell's Authorized Motion was subject to dismissal because his claim regarding § 3359(c) was not based on a new rule of constitutional law, as required by § 2255(h)(2), since the Supreme Court had never declared that § 3559(c)'s residual clause was unconstitutional. We denied a COA.

Mr. Bell then filed the motion underlying Appeal No. 23-5033 (First Motion). He invoked Federal Rule of Civil Procedure 60(b)(4), contending that the district court's judgment on his Authorized Motion was void. Mr. Bell argued there was a defect in the integrity of the proceedings because the government failed to respond to his due-process claim. The district court construed this contention as cognizable under Rule 60(b). It denied Mr. Bell's First Motion, concluding that the government had responded to his

due-process argument regarding § 3559(c)'s residual clause, and the court had considered and rejected that claim.

Mr. Bell then filed the motion underlying Appeal No. 23-5050 (Second Motion), invoking Rule 60(b)(1). The district court construed this motion as seeking relief on two grounds: (1) the court erred in ruling on his Authorized Motion by concluding that his prior convictions satisfied § 3559(c)'s elements clause without “legally reviewing the process when it involves a sentencing record [that] is unclear or silent.” R., Vol. I at 801 (quoting Mr. Bell's Second Motion, Suppl. R. at 348); and (2) the court failed to address his due-process claim. The district court concluded that Mr. Bell's first contention, while framed as a procedural error, instead challenged the merits of its ruling on his Authorized Motion and was therefore properly construed as an unauthorized second or successive § 2255 motion. It dismissed that portion of Mr. Bell's Second Motion for lack of subject-matter jurisdiction. As for his other contention, the district court noted that in its order denying Mr. Bell's First Motion it had considered and rejected his argument that the court failed to address his due-process claim. The court therefore denied that portion of Mr. Bell's Second Motion.

II. Discussion

Mr. Bell must obtain a COA to pursue an appeal. *See Spitznas v. Boone*, 464 F.3d 1213, 1217-18 (10th Cir. 2006) (COA required to appeal from denial of Rule 60(b)

motion in habeas case); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (COA required to appeal dismissal of unauthorized second or successive § 2255 motion).

A. Denial of Rule 60(b) Motions

The district court construed Mr. Bell’s First Motion and a portion of his Second Motion as properly filed under Rule 60(b) to the extent he argued the government and the court had not addressed his due-process claim. *See Peach v. United States*, 468 F.3d 1269, 1271 (10th Cir. 2006) (district court’s failure to consider a claim in a § 2255 motion can be raised via Rule 60(b)). The court denied relief because, contrary to Mr. Bell’s assertion, the government had addressed his due-process claim regarding § 3559(c), and the court had considered and rejected it. To obtain a COA on these rulings, Mr. Bell “must demonstrate that reasonable jurists would find the district court’s assessment of [his] constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Before addressing his specific arguments, we note that his language is often quite obscure; but we have done our best to understand him, liberally construing his language to give him the benefit of every reasonable doubt.

In his COA Application, Mr. Bell contends the district court erred in failing to order the government to respond to his due-process claim. He also argues that the court treated his Second Motion as if it sought relief under Rule 60(b)(4) rather than Rule 60(b)(1). But he does not show that the district court’s assessment of his Rule 60(b) motions is debatable or wrong. We conclude that Mr. Bell fails to demonstrate that reasonable jurists would debate the district court’s conclusion, in denying his

First Motion and a portion of his Second Motion, that the government addressed and the district court considered and rejected his due-process claim regarding § 3559(c).

B. Dismissal of Unauthorized Second or Successive § 2255 Motion

The district court dismissed a portion of Mr. Bell’s Second Motion for lack of subject-matter jurisdiction to the extent that he challenged the merits of the court’s ruling on his Authorized Motion. To obtain a COA, he must show both “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484 (emphasis added).

Mr. Bell’s COA Application fails on the second prong. He contends the court erred by construing his Second Motion as raising two claims and by holding that only one claim was cognizable under Rule 60(b). But it is beyond debate that his Second Motion argued that the district court “has repeatedly failed to address the due process claim surrounding this matter.” Suppl. R. at 354. It is also not debatable that, because he otherwise “challenge[d] the merits of the district court’s resolution of his [Authorized Motion],” *Peach*, 468 F.3d at 1271, his Second Motion was subject to dismissal for lack of jurisdiction as an unauthorized second or successive § 2255 motion, *see In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

Regarding his other apparent contentions, the district court did not dismiss his Second Motion as untimely, and to the extent that the court dismissed that motion for lack of jurisdiction, it did not apply any merits-review standard. Further, although Mr. Bell argues the district court did not consider that a Rule 60(b) motion is proper

when the government fails to serve a response, he did not allege a failure of service by the government in either of his postjudgment motions.

Mr. Bell also contends that his Second Motion was not unauthorized because this court permitted him to supplement his proposed second or successive § 2255 motion while his motion for authorization was pending. But our authorization extended only to his Authorized Motion and not to postjudgment filings, like Mr. Bell's Second Motion, in which he sought § 2255 relief. *See United States v. Nelson*, 465 F.3d 1145, 1148-49 (10th Cir. 2006) (postjudgment motion seeking § 2255 relief was an unauthorized second or successive § 2255 motion).

Finally, Mr. Bell's COA Application challenges the merits of the district court's ruling on his Authorized Motion, but these contentions fail to demonstrate that reasonable jurists would debate whether that court correctly dismissed his Second Motion, in part, as an unauthorized second or successive § 2255 motion.

III. Conclusion

We deny a COA and dismiss these matters. We deny Mr. Bell's Motion for Leave to File a Supplemental Brief.

Entered for the Court

Harris L Hartz
Circuit Judge