

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

January 15, 2009

TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHNNY RAY BASHAM,

Defendant - Appellant.

No. 08-5143

(N.D. Oklahoma)

(D.C. No. CV-03-00141-TCK and
CR-00-00107-TCK)

**ORDER DENYING
CERTIFICATE OF APPEALABILITY***

Before **LUCERO, ANDERSON**, and **TYMKOVICH**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this proceeding. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Johnny Ray Basham was found guilty, following a jury trial, of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1)

*This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

and (b)(1)(C); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and possession of a firearm after former conviction of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). He was sentenced to a total term of 324 months' imprisonment. Basham timely appealed his conviction and sentence.

After Basham's notice of appeal and opening brief on appeal were filed, his counsel, Paul Brunton, left private practice and became the Federal Public Defender for the Northern and Eastern Districts of Oklahoma. Attorney R. Thomas Seymour entered his appearance in the Tenth Circuit and represented Basham at oral argument. This court affirmed Basham's conviction and sentence. United States v. Basham, 268 F.3d 1199 (10th Cir. 2001). The United States Supreme Court denied Basham's petition for a writ of certiorari. Basham v. United States, 535 U.S. 945 (2002).

On February 26, 2005, Basham filed the instant 28 U.S.C. § 2255 motion, alleging that he received ineffective assistance of counsel in various ways. The district court first held that it was not necessary to hold an evidentiary hearing, concluding that "the motion and files and records of the case conclusively show that the [movant] is entitled to no relief." Op. & Order at 3, R. Vol. 1 (quoting 28 U.S.C. § 2255(b)). The court then determined that Basham's § 2255 claims lacked merit, concluding, after examining each of his claims in detail, as follows:

In summary, the Court finds Basham has failed to satisfy the Strickland standard as to the assistance provided by his attorney at trial and on appeal. Basham's attorney did not perform deficiently at trial or on direct appeal because the underlying claims lack merit. Furthermore, nothing alleged by Basham convinces the Court that there is a reasonable probability that the outcome of the proceedings would have been different without the incidents of alleged deficient performance by counsel. Basham is not entitled to § 2255 relief on his ineffective assistance of trial and appellate counsel claims.

Id. at 10 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The district court subsequently denied Basham a certificate of appealability ("COA"). This *pro se* appeal followed.

Basham has filed a motion for a COA as well as a *pro se* appellate brief. We, therefore, must first address whether to grant Basham a COA to enable him to appeal the district court's denial of his § 2255 motion.

In order to obtain a COA, an appellant must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). In addressing this question, we review Basham's *pro se* filings with special solicitude. See Van Deelen v. Johnson, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007). Even according Basham's materials such a solicitous construction, we conclude, based upon our own review of the record in this case, and for substantially the same reasons given by the district court, that no reasonable jurist could debate the

correctness of the district court's ruling. Basham's request for a COA is therefore denied and this appeal is dismissed.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge