

October 18, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

MELDON ALLEN,

Movant.

No. 10-5112

(D.C. Nos. 4:03-CV-00473-TCK-FHM
& 4:01-CR-00031-TCK-3)
(N.D. Okla.)

ORDER

Before **BRISCOE**, Chief Judge, **HARTZ** and **TYMKOVICH**, Circuit Judges.

Meldon Allen, a federal prisoner appearing pro se, has filed a motion seeking authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction and sentence. Before a federal prisoner may file a second or successive motion under § 2255, the prisoner must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

After being indicted on 153 counts of criminal acts related to the distribution of illegal narcotics, Mr. Allen pleaded guilty in 2002 to three counts: conspiracy to possess with intent to distribute cocaine in excess of five kilograms, maintaining a place where controlled substances are stored and controlled; and

investment of illegal drug profits. He was sentenced to 252 months' imprisonment.

This court affirmed Mr. Allen's conviction, rejecting his claim that the district court erred in denying his motion to withdraw his guilty plea. *United States v. Allen*, 65 F. App'x 695, 698 (10th Cir. 2003). Mr. Allen filed a § 2255 motion in July 2003, asserting numerous ineffective assistance of counsel claims; that he was coerced into pleading guilty; and that the district court erred at sentencing by enhancing his sentence for possession of a firearm, failing to apply the "safety valve" provision of the Sentencing Guidelines, and enhancing his sentence for his leadership role. The district court denied the motion, and this court denied Mr. Allen a certificate of appealability. *United States v. Allen*, 287 F. App'x 638, 641-44 (10th Cir. 2008).

Mr. Allen has now filed the present motion for authorization to file a second or successive § 2255 motion. To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," § 2255(h)(1), or rely upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2).

Mr. Allen seeks to present a claim that the district court erred in applying a sentence enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm during the commission of a drug trafficking conspiracy. He contends this claim is based on newly discovered evidence: affidavits from two of his co-defendants claiming they gave statements to the government prior to trial and sentencing indicating that Mr. Allen possessed a firearm and kept it under a couch, but did not tell the government that he possessed the firearm near any drugs or drug transactions. Mot. at 4; *id.* at Ex. A and B. This purported new evidence does not satisfy the new-evidence requirements of § 2255(h)(1) because it is not “new” evidence, nor, if proven by clear and convincing evidence and viewed in the light of all the evidence, would it establish that no reasonable factfinder would have found Mr. Allen guilty of the offense.

First, while the affidavits are new, the information contained in the affidavits is not. Mr. Allen admits that the co-defendants’ statements were made in 2001. Mot. at 4. He claims that prior to sentencing, the government only revealed to him the co-defendants’ statements that he possessed a firearm, and did not reveal the co-defendants’ statements that he did not possess the firearm in connection with any drug activity. Even if true (and there is no evidentiary support for this claim), Mr. Allen and his counsel could have questioned these co-defendants prior to or at sentencing about their knowledge of Mr. Allen’s firearm possession. Further, one of these co-defendants, Paul Brantley, provided

Mr. Allen with an affidavit in his first § 2255 motion (stating that Mr. Allen was not a leader in the drug conspiracy). *United States v. Allen*, No. 01-CR-031-TCK, Doc. No. 674 (Mot. to Supplement § 2255 Motion, dated April 18, 2007). Clearly Mr. Brantley could also have included his firearm-possession testimony in that same affidavit for use in Mr. Allen's first § 2255 motion. Thus, Mr. Allen had an opportunity to present this evidence in his first § 2255 motion.

Second, the information in the affidavits regarding a sentencing enhancement is not sufficient to demonstrate that Mr. Allen is not guilty of the “offense.” See § 2255(h)(1) (emphasis added). He pleaded guilty and, as we have previously noted, “[i]n his plea agreement and his plea allocution, [Mr. Allen] stated facts sufficient to support his conviction on each charge.” *Allen*, 65 F. App'x at 697. Moreover, even as to the § 2D1.1(b)(1) sentencing enhancement, the co-defendants' statements that *they* did not observe his possession of a firearm in connection with his drug activity does not demonstrate that Mr. Allen did not possess the firearm in connection with the drug trafficking offense. As the district court noted, Mr. Allen, at sentencing “failed to present any evidence or argument suggesting that the seized gun was unrelated to the offense of trafficking. He merely offered an excuse for why his firearm was found in his co-conspirator's bedroom.” *United States v. Allen*, No. 01-CR-031-TCK, 2008 WL 320155, at *7 (N.D. Okla. Feb. 4, 2008) (unpublished opinion and order denying Mr. Allen's § 2255 motion).

Thus, Mr. Allen's proposed claim fails to meet the new evidence requirements of § 2255(h)(1). Accordingly, his motion for authorization is DENIED. This denial of authorization is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in black ink, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk