FILED
United States Court of Appeals
Tenth Circuit

July 7, 2011

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:

ROBERT ESKRIDGE,

Movant.

No. 11-5082
(D.C. Nos. 4:04-CV-00156-TCK &
4:99-CR-00020-TCK-7)
(N.D. Okla.)

ORDER

Before **BRISCOE**, Chief Judge, **KELLY** and **MATHESON**, Circuit Judges.

Movant Robert Eskridge, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his drug conviction. Because Eskridge has not demonstrated that his proposed claims meet the authorization requirements under 28 U.S.C. § 2255(h), we deny authorization.

In 1999, Eskridge was convicted by a jury of conspiracy to distribute various controlled substances, in violation of 21 U.S.C. § 846, and of continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848. On remand after direct appeal, the district court vacated his CCE conviction. *See United States v. Eskridge*, 309 F. App'x 282, 283 (10th Cir. 2009) (describing his post-conviction history). He then filed a § 2255 motion to vacate, set aside, or correct his sentence. *See id.* The district court denied that motion and this court denied him a certificate of appealability (COA). *See id.* at 283-84. The district court recently entered an amended judgment clarifying that Eskridge's sentence on the conspiracy conviction is 420 months. *See United States v. Eskridge*, No. 99-CR-20-TCK, Doc. No. 857 (N.D. Okla. May 2, 2011) (unpublished order).

Authorization Requirements

Eskridge now seeks authorization to file a second or successive § 2255 motion. *See* 28 U.S.C. §§ 2255(h), 2244(b). "Second or successive § 2255 motions are restricted to claims involving either newly discovered evidence strongly suggestive of innocence or new rules of constitutional law made retroactive by the Supreme Court." *Brace v. United States*, 634 F.3d 1167, 1170 (10th Cir. 2011) (ellipsis and internal quotation marks omitted). Specifically, to obtain authorization under § 2255(h) to file a second or successive § 2255 motion, a movant must demonstrate that his proposed claim relies upon "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 the movant guilty of the offense," § 2255(h)(1), or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies [these] requirements." 28 U.S.C. § 2244(b)(3)(C); *see also* § 2255(h) (referring to § 2244).

All of Eskridge's proposed claims rely solely on the "newly discovered evidence" prong of § 2255(h)(1). He seeks to present a claim that his conviction should be vacated or he should receive a new trial based on newly-discovered evidence of subsequent criminal misconduct by some of the police officers who were involved in his prosecution. Eskridge asserts that four police officers involved in his prosecution are implicated in a current misconduct investigation, that there is new evidence a search warrant of his mother's residence was invalid and new evidence that officers took money during another search of his mother's residence.

As explained below, we conclude that the only newly-discovered evidence presented by Eskridge is that two officers who had some involvement in his prosecution and conviction were, more than a decade later, convicted of criminal activity related to their police duties, but that this new evidence is not sufficient to establish Eskridge's innocence, as he is required to show under § 2255(h)(1). Eskridge presents no evidence that any other officers involved in his prosecution ever committed, or are being investigated for, wrongdoing. Further, Eskridge presents no new evidence relating to the validity of the challenged search warrant or the alleged theft of money during a search.

New Evidence Relating to Gray and Wells

Eskridge first points to new evidence that two Tulsa, Oklahoma, police officers who had some involvement in his prosecution, Harold Wells and John K. Gray, have recently been convicted of criminal misconduct. Although Eskridge did not provide any evidentiary support for this assertion, we take judicial notice of the fact that Harold Wells was convicted on June 10, 2011, of possession of a firearm during and in relation to a drug trafficking crime; conspiracy to possess with intent to distribute and distribution of controlled substances; conspiracy to steal public funds; aiding and abetting the theft of public funds; and use of a communication facility to facilitate commission of a drug crime. *See United States v. Wells*, No. 4:10-CR-116-BDB-1, Doc. 242 (N.D. Okla. June 10, 2011) (jury verdict). The indictment charged Wells with misconduct as early as January 2006. *Id.*, Doc. 2 (indictment). We also take judicial notice that ATF agent John K. Gray pleaded guilty in June 2010, to theft of public money in May 2009. *See United States v. Gray*, No. 4:10-CR-74-BDB, Docs. 15 (plea agreement) and 26 (Tr. change of plea hr'g) (N.D. Okla. June 14, 2010). The documents in Wells' and Gray's criminal cases do not suggest that the incidents underlying Wells' conviction and Gray's guilty plea are in any way connected to Eskridge's prosecution and conviction.[1]

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1 Eskridge also asserts that "Gray has also admitted to falsifying search warrants in other criminal investigations he participated in, as a member of the
(continued...)

Eskridge seeks to present claims that both Gray and Wells provided false information that was used, in part, to obtain two search warrants of homes owned by his mother, Ruby Walker, at which evidence of drug dealing was discovered; that Wells was present during the execution of a search warrant when $8,000 allegedly disappeared from the home; and that Wells falsely testified at trial about the evidence he discovered during one arrest of Eskridge. He argues that the new evidence of Wells' and Gray's subsequent criminal misconduct demonstrates their propensity to commit criminal misconduct and is impeachment evidence that, if known to the jury, would have demonstrated that Wells and Gray were not credible witnesses.

To determine the possible significance of their testimony in his case, we first examine the information provided by Gray and Wells in Eskridge's prosecution which Eskridge now challenges in his motion for authorization. We then address whether this challenged evidence, if proven to be not credible, would demonstrate that no reasonable factfinder would have convicted Eskridge.

Search Warrant Affidavit for, and Execution of Search at, 3011 West 80th Street. Eskridge first points to the evidence that Wells and Gray provided some

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[1](...continued)
Tulsa Police Department Special Investigation Division (SID)." Mot. for Authorization, at 8(p). But Eskridge presents no evidentiary support for this allegation, newly discovered or otherwise, nor can we find evidence in support of this allegation in Gray's public criminal docket. *See United States v. Gray*, No. 4:10-CR-74-BDB.

information to Tulsa officer Dale Francetic which Francetic, in turn, included in his affidavit in support of a search warrant issued in 1999, for a residence owned by Eskridge's mother at 3011 West 80th Street, in Tulsa, Oklahoma.[2] In his affidavit in support of this search warrant, Francetic represented, as relevant to Mr. Eskridge, that:

• during a traffic stop in which police officers Miller and Whiteshirt discovered heroin in the driver's vehicle, the driver told these officers that he was fronted the heroin for sale by a black male he knew only as "Rob";

• Francetic knows "Rob's" real identity to be Robert Eskridge, who has been under investigation for drug trafficking for several months;

• police officer Claramunt received information from two confidential informants that Robert Eskridge was the main supplier of drugs in a large scale trafficking operation in Tulsa, lived in Gilcrease Hills, was selling large amounts of black tar heroin and methamphetamine, used to live in Stockton, California, which is where the heroin and methamphetamine were coming from, and lived with his mother at 2003 West Xyler Street in Tulsa, from which he operated his drug sales;

• police officer John Gray received information in late 1995 from a confidential informant unrelated to officer Claramunt's confidential informants that there was a black male named Robert Walker living in Gilcrease Hills who was dealing a large quantity of heroin;

• Francetic knows that Robert Eskridge's mother's name is Ruby Walker;

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[2] Throughout his motion, Eskridge identifies this residence as "3011 S. 33rd W. Ave." *See, e.g.*, Mot. for Authorization at 8(u). The search warrant that he attaches, however, gives the address as "3011 West 80th Street, Tulsa Oklahoma." *Id.*, Attach. B, at 1-4. The indictment against Eskridge also gives the address of this residence as "3011 West 80th Street, Tulsa Oklahoma." *United States v. McCalister*, No. 4:99-CR-00020-TCK-7, Doc. No. 147 (second superceding indictment), at 24. Thus, that is the address we use herein.

• A 1996 search of the 2003 West Xyler residence uncovered drug notations indicating sales in the thousands, as well as thousands of dollars in cash;

• an F.B.I. case agent had informed Francetic that Robert Walker also lived at another residence at 3011 West 80th Street, and that residents at that address had placed numerous calls to persons in Stockton, California, who were since indicted for drug conspiracy;

• Francetic stated the 3011 West 80th Street address is in the same area where an officer had made a controlled drug buy and is owned by Ruby Walker; and

• a controlled purchase of heroin was made in the last 72 hours near the 3011 West 80th Street address and the person who delivered the heroin was seen returning to that residence after the controlled buy.

Mot. for Authorization, Attach. B, at 1-4.

As evident from the foregoing, and as discussed below, Gray provided very little information for this search warrant. Francetic's affidavit also included information that Wells was in contact with a confidential informant who had purchased heroin on fifteen occasions from a man referred to as "Kool Aid." *Id*. at 3. "Kool Aid" does not refer to Robert Eskridge.

Eskridge also asserts that Wells was present during the execution of a search warrant, after which $8,000 was reported missing. It appears from Eskridge's motion that Wells' only connection to this alleged missing money is that he stopped by the residence at some point during the execution of the search.[3]

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[3] Eskridge states that he has new evidence relating to this missing money. He has attached a May 2011, affidavit from a relative, Angie Clark, stating that another now-deceased relative told her that officers Francetic and Wells counted (continued...)

April 1999 Arrest at Car Wash. Eskridge asserts that Wells was involved in his arrest at a car wash on April 5, 1999. It appears from his motion that Wells, along with officer Whiteshirt, arrested Eskridge and a co-defendant, during which they discovered balloons containing heroin in the area. Eskridge contends that Wells discovered this heroin in an area that had already been searched, and Wells testified falsely that there had been too much trash to see the balloons during the initial search. Eskridge cites to snippets of trial testimony, from which he argues Wells gave inconsistent or implausible explanations for this discovery.

Search of 249 E. 43rd St. Eskridge asserts that Wells supervised the June 1996, search of a residence belonging to Katherine Cooper at 249 E. 43rd St., in North Tulsa, Oklahoma, at which evidence was discovered that was used against him at trial.

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[3](...continued)
$8,000 from Eskridge's mother's home during their execution of a search warrant, and that the money was missing after the search. Mot. for Authorization, Attach. C, at 1. Eskridge admits in his motion, however, that he was aware of this allegation and potential evidence at the time of his trial. Mot. for Authorization, at 8(u) ("During trial proceedings, the Petitioner asked his attorney to question Corporal Dale Francetic about the $8,000 missing from his Mother's home. . . . When asked about the missing $8,000 Corporal Francetic stated that he did not recall any money being taken from the residence." (citing trial transcripts)). Because the substance of the allegation by Angie Clark was known to, and discoverable by, Eskridge at the time of trial, it does not constitute newly-discovered evidence. *Cf. United States v. Quintanilla*, 193 F.3d 1139, 1147 (10th Cir. 1999) (holding that substance of evidence that is known at trial is not newly discovered evidence for purposes of granting a new trial).

Search of 6101 North Xanthus. Eskridge asserts that Gray prepared the supporting affidavit for the February 1996, search warrant for a residence belonging to Shawn McCormick at 6101 North Xanthus Place, in Tulsa Oklahoma, at which evidence was discovered that was used against him at trial.

The Gray and Wells New Evidence Does Not Demonstrate Eskridge's Innocence. We conclude that the newly discovered evidence that Gray and Wells were convicted of criminal misconduct a decade after Eskridge's conviction is not sufficient to establish that no reasonable factfinder would have found Eskridge guilty. Even if we assume that Gray's and Wells' testimony and evidence at trial could be impeached based on their subsequent convictions, Eskridge still bears the "heavy statutory burden," *see LaFevers v. Gibson*, 238 F.3d 1263, 1266 (10th Cir. 2001), of proving by clear and convincing evidence that, but for Gray's and Wells' evidence and testimony, no reasonable juror would have found him guilty of drug conspiracy. Eskridge was charged with conspiracy to possess and distribute drugs in the Tulsa area from 1991 to 1999. *See United States v. Busby*, 16 F. App'x 817, 822 (10th Cir. 2001) (upholding Eskridge's conviction on direct appeal). Eskridge was convicted after a lengthy trial at which "[t]he government called some thirty one witnesses, which included co-conspirators, and some indicted co-conspirators, who directly implicated Eskridge in . . . a large scale poly drug conspiracy spanning several years." *Id*. (internal quotation marks omitted); *see also* Resp. at 2-3. We cannot independently assess the materiality of Gray's and Wells' evidence because Eskridge has not provided this court with a copy of the trial transcripts, though it is his burden to satisfy the statutory authorization requirements under § 2255(h).

This court has little or no basis to conclude that Gray's and Wells' testimony was so material that, if impeached, Eskridge would not have been found guilty. As evident from the description of Francetic's search warrant affidavit for 3011 W. 80th Street, the information supplied by Gray to Francetic is but one small bit of information used to demonstrate probable cause in support of the search warrant. Even if Eskridge had presented clear and convincing evidence that Gray's statement–that a confidential informant told Gray there was a black male named Robert Walker living in Gilcrease Hills who was dealing a large quantity of heroin–was, in fact false, (as opposed to his speculation that it is false based on Gray's subsequent conviction), such evidence is not sufficient to make a prima facie showing that no reasonable factfinder would have found Eskridge guilty of the drug conspiracy. Indeed, it would not even demonstrate a lack of probable cause to obtain the search warrant. Gray's information appears duplicative of Claramunt's information and, as noted, Francetic's affidavit included substantial other evidence that would support the issuance of the search warrant. The information that Wells provided to Francetic for this search warrant does not even appear relevant to Eskridge, but rather to a co-defendant referred to as "Kool Aid."

Although Eskridge asserts that Wells was present during a search in which he claims $8,000 disappeared, this allegation is not based on any new evidence. The evidence of Wells' subsequent conviction does not demonstrate, by clear and convincing evidence, that Wells stole money during this search or that, if he had, no reasonable factfinder would have found Eskridge not guilty.

Eskridge challenges Wells' heroin discovery during the April 1999, car wash arrest. It is evident from his motion that Eskridge already challenged Wells' credibility as to this discovery at the time of his trial. Even if we assume for argument's sake that Wells planted this heroin (as opposed to Eskridge's speculation that a juror would believe Wells planted it, given his conviction fifteen years later), we still are unable to make any assessment from Eskridge's motion as to how material this heroin discovery was to the government's case. It is Eskridge's burden to demonstrate its materiality, and he has not done so.

Finally, Eskridge does nothing more than speculate that Gray and Wells may have committed some misconduct in connection with their respective searches at 249 E. 43rd Street and 6101 North Xanthus Place, neither of which were his or his mother's residence. He provides no basis for this court to assess how the evidence found during these searches is in any way material or even relevant to his conviction. Eskridge simply speculates that some misconduct occurred or that the supporting affidavits were false. Again, however, the evidence of Gray's and Wells' convictions more than a decade after these searches does not demonstrate, by clear and convincing evidence, that they committed any misconduct in connection with these searches or that no reasonable factfinder would have found Eskridge guilty.

In summary, viewing Eskridge's allegations and proposed claims in isolation and cumulatively, we cannot conclude that he has met his burden of making a prima facie demonstration that the new evidence that Gray and Wells were subsequently convicted of criminal misconduct establishes that no reasonable factfinder would have found Eskridge guilty.

Proposed Claims Relating to Francetic, Claramunt and Peters

Eskridge asserts that Tulsa police officers Dale Francetic and Chris Claramunt, who were also involved in the prosecution of his case, are currently under investigation for criminal misconduct. Eskridge does not provide any evidence to this court that suggests these officers are being investigated for any misconduct, and the government states it is unaware of any such investigation. Resp. at 5, n.1. Eskridge's motion alleges that Francetic provided false information in support of search warrant affidavits, planted marked money during a search, took money during searches, and gave inconsistent testimony at trial. He also alleges that Claramunt gave false information in support of search warrants and gave false information at trial. It is clear from Eskridge's motion, however, that all of his allegations against Francetic and Claramunt are based on his trial transcripts and other evidence that was known to him and available at trial, when these witnesses were subject to cross-examination.

Eskridge also asserts that federal agent Chris Peters gave false or inconsistent testimony during a detention hearing and at Eskridge's trial. Eskridge does not allege that agent Peters is in any way connected to Tulsa police misconduct investigations, nor does he assert that he has any new evidence relating to any of agent Peters' conduct or testimony in his prosecution. Again, all of his allegations against Peters are based on his trial transcripts.

We conclude that Eskridge has not presented any newly-discovered evidence under § 2255(h)(1) relating to Francetic, Claramunt or Peters. All of the evidence underlying his proposed claims relating to these officers was known and available to Eskridge when he filed his direct appeal and his first § 2255 motion. The fact that a decade after his conviction, two police officers involved in his prosecution were convicted of misconduct does not provide any new evidence relating to the conduct or credibility of any other police officers involved in his prosecution. Accordingly, Eskridge has failed to demonstrate that his proposed claims of misconduct by any officers other than Wells and Gray are based on any newly discovered evidence.

With respect to a search warrant supervised by Francetic in 1996, for the search of Eskridge's mother's home at 2003 West Xyler, Eskridge presents a January 2011, letter from the Osage County Clerk's Office stating that it cannot locate a copy of the search warrant. As Eskridge notes in his motion, however, he challenged the validity of this search warrant at trial, pointing to evidence that the search warrant lacked identification numbers and was not timely returned to the issuing court as required by state law. Mot. for Authorization, at 8(e)-(f). A recent statement from the Osage County Clerk's office that it cannot locate a copy of the June 12, 1996, search warrant does not constitute newly discovered evidence because this information was discoverable through the exercise of due diligence at the time of trial. *Cf. Quintanilla*, 193 F.3d at 1147 (holding that a defendant requesting a new trial based on newly discovered evidence must show, among other things, that "the failure to learn of the evidence was not caused by [his] own lack of diligence").

In conclusion, the only newly-discovered evidence presented by Eskridge is the fact that two of the officers who had some role in his prosecution, Gray and Wells, were convicted of criminal misconduct in connection with their official police duties a decade later. Eskridge has not, however, made a prima facie showing that this new evidence, 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 Eskridge guilty of the offense, as he is required to show under § 2255(h)(1).

Accordingly, the motion for authorization is DENIED. Eskridge's requests for an evidentiary hearing and for appointment of counsel are DENIED.

This matter is terminated. 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).

Judge Briscoe DISSENTS and would grant the motion for authorization to file a second or successive § 2255 motion.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk