

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 21, 2013

Elisabeth A. Shumaker
Clerk of Court

In re:

PAUL G. RAYFORD,

Movant.

No. 13-3099
(D.C. Nos. 2:11-CV-02477-CM &
2:09-CR-20143-CM-2)
(D. Kan.)

ORDER

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

Paul G. Rayford, a federal prisoner appearing pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

In 2010, Mr. Rayford pled guilty to attempted bank robbery and two firearms offenses, for which he was sentenced to 144 months' imprisonment. This court dismissed his appeal of his sentence as frivolous. *United States v. Rayford*, 434 F. App'x 721, 725 (10th Cir. 2011). In December 2011, Mr. Rayford filed a motion for relief under §2255, which the district court denied. On appeal, this court granted him a certificate of appealability and reversed and remanded for the district court to consider his claim that his trial counsel was constitutionally ineffective in failing to challenge the use of certain prior offenses in calculating his criminal history points. *United States v. Rayford*, 496 F. App'x 767, 770 (10th Cir. 2012).

During the proceedings on remand, which are still ongoing,¹ Mr. Rayford moved to amend his § 2255 motion to add two new claims: (1) that the government violated his Fourth Amendment rights when it trespassed on his property and placed a GPS tracking device on his vehicle without a warrant; and (2) that his counsel was ineffective for not discovering the use of the GPS tracking device and filing a motion to suppress based on the illegal search. The district court denied Mr. Rayford's motion to amend on several grounds, including that the claims were second or successive and Mr. Rayford had not received prior authorization from this court to file them. *See* 28 U.S.C. §§ 2244(b), 2255(h).

Mr. Rayford then filed a motion for authorization in this court. He argued that authorization was proper under § 2255(h)(2) because his claims relied on a new rule of constitutional law, namely the Supreme Court's recent holding that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (footnote omitted). We concluded that *Jones* did not announce a new rule of constitutional law. *See In re Rayford*, No. 13-3066, Order of Apr. 1, 2013, at 3-4 (10th Cir.).

¹ Mr. Rayford recently provided notice to this court that, following an evidentiary hearing, the district court determined that his counsel was constitutionally ineffective. The court ordered the government to prepare a new presentence report in anticipation of resentencing. The district court's docket shows that a new presentence report has been filed, but a new sentencing date has not yet been set.

Mr. Rayford also argued that authorization was proper under § 2255(h)(1) because he did not discover that the government had installed a GPS tracking device on his vehicle until he read the government's response to a co-defendant's §2255 motion. That response was filed on May 4, 2012, while Mr. Rayford's own § 2255 proceedings were pending on appeal.

In our order denying his motion for authorization, we noted that, to meet the requirements of § 2255(h)(1), Mr. Rayford had to show not only that he had newly discovered evidence, but that the newly discovered evidence “would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of” the offenses of conviction. *In re Rayford*, No. 13-3066, Order of Apr. 1, 2013, at 4 (internal quotation marks omitted). “This,” we said, “he does not attempt to demonstrate.” *Id.* Because Mr. Rayford failed to meet the standard for authorization under § 2255(h)(1) or (2), we denied his motion for authorization.

Mr. Rayford has now filed another motion for authorization to file the same two claims. This motion differs from the earlier one in that Mr. Rayford now recognizes that *Jones* does not announce a new rule of constitutional law, though he states that it “does clarify the wrongful act,” Mot. for Authorization at 5, and he now attempts to demonstrate that his newly discovered evidence does meet the requirements of § 2255(h)(1). Specifically, he states that had the government disclosed its use of the device and had his counsel learned of the device and filed a motion to suppress, all the evidence against him would have been suppressed and

there would not have been enough evidence for a reasonable factfinder to find him guilty.

Mr. Rayford overlooks a critical stumbling block: he pled guilty to the offenses of conviction. And he neither suggests that he was actually innocent of the offenses or that any of the newly discovered evidence would establish his innocence. But as this and other courts have recognized, “Congress . . . has restricted the availability of second or successive § 2255 motions to claims involving either newly discovered evidence *strongly suggestive of innocence* or new rules of constitutional law made retroactive by the Supreme Court.” *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011) (emphasis added); *see also Gilbert v. United States*, 640 F.3d 1293, 1318 (11th Cir. 2011) (describing § 2255(h)(1) as “an actual innocence exception” and stating it “is of no help” to the defendant, who pled guilty and “does not pretend to be innocent of the offense for which he was convicted”), *cert. denied*, 132 S. Ct. 1001 (2012); *United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011) (stating language of § 2255(h) shows “Congress’ clear intent” to limit authorization to those claims that “either rely on a new, retroactive rule of constitutional law or clearly and convincingly prove the prisoner’s innocence”); *In re Webster*, 605 F.3d 256, 257 (5th Cir. 2010) (holding that “a petitioner cannot bring a successive claim under § 2255(h)(1) where he does not assert that the newly discovered evidence would negate his guilt of the offense of which he was convicted”).

Accordingly, even if we assume that Mr. Rayford's proposed claims do rely on newly discovered evidence, he has not demonstrated that such evidence "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty," 28 U.S.C. § 2255(h)(1). The motion for authorization is therefore denied.

This denial of authorization "shall not be 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 cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light blue dotted grid background.

ELISABETH A. SHUMAKER, Clerk