

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 30, 2015

Elisabeth A. Shumaker
Clerk of Court

In re:

HARVEY L. ROSS,

Movant.

No. 15-3082
(D.C. No. 5:12-CV-03085-SAC)
(D. Kan.)

ORDER

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

Harvey L. Ross, a Kansas prisoner proceeding pro se, seeks authorization to file a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2254. We deny authorization.

Mr. Ross was convicted in Kansas state court of first-degree murder, attempted first-degree murder, and criminal possession of a firearm and sentenced to life imprisonment. The Kansas Supreme Court affirmed his convictions and sentences. *State v. Ross*, 127 P.3d 249, 256 (Kan.), *cert. denied*, 548 U.S. 912 (2006). In 2012, he sought § 2254 relief, asserting that his due process rights had been violated by the prosecutor's failure to turn over exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), namely statements from two witnesses indicating that he was not the shooter. The federal district court dismissed the habeas application as time-barred.

Thereafter, Mr. Ross sought authorization to file a second or successive § 2254 application to assert actual innocence based on the State's alleged withholding of exculpatory evidence. He admitted that he had raised the claim in his prior § 2254 application, but he asserted that he had new evidence to support his argument. We dismissed because the claim had been raised in the first § 2254 application. *In re Ross*, No. 13-3199, at 2 (10th Cir. Aug. 19, 2013) (unpublished order) (citing 28 U.S.C. § 2244(b)(1)). Also, we determined that the claim was not based on new law or facts and did not satisfy the requirements to file a second or successive application. *Id.* (citing 28 U.S.C. § 2244(b)(2)).

Thereafter, Mr. Ross filed a notice of appeal from the district court's dismissal of his first § 2254 application. We dismissed the appeal as untimely.

Mr. Ross again seeks authorization to file a second or successive § 2254 application to assert that (1) he is actually innocent and that the State withheld exculpatory evidence from two eyewitnesses and a crime stoppers tape of an unnamed woman indicating that he was not the shooter; (2) the State did not prove the elements of murder and attempted murder; (3) the State improperly introduced evidence at trial of his gang membership; (4) the jury instructions improperly defined witness certainty; and (5) the combination of trial errors denied him a fair trial. To support his arguments, he provides alleged new evidence consisting of 2007 affidavits from his trial counsel and state post-conviction law student intern, part of

his trial transcript, jury instructions, a transcript of the crime stoppers tape, and other documents.

As previously determined, Mr. Ross' claim of actual innocence based on allegedly withheld statements from two eyewitnesses must be dismissed because he raised a similar claim in his first § 2254 application. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

Mr. Ross bases his claims of actual innocence due to an allegedly withheld crime stoppers tape and denial of a fair trial due to combined errors on newly discovered evidence. By his own admission, the crime stoppers tape was available, but excluded, at trial. There is no indication that any of his other alleged new evidence is actually new. Even if Mr. Ross had presented new evidence, he has not made a prima facie showing "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of [any] underlying offense." *Id.* § 2244(b)(2)(B)(ii).

Lastly, Mr. Ross concedes that the other claims he seeks to obtain authorization to assert are not based on newly discovered evidence or a new rule of law. *See id.* § 2244(b)(2).

Accordingly, we deny authorization. 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). We warn Mr. Ross that any further effort by

him to begin a collateral attack on this conviction without satisfying the standards set forth in § 2244(b)(2) may lead to the imposition of sanctions.

Entered for the Court

A handwritten signature in black ink, reading "Elisabeth A. Shumaker", written over a light blue dotted line.

ELISABETH A. SHUMAKER, Clerk