

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 8, 2015

Elisabeth A. Shumaker
Clerk of Court

In re:

GIOVANNI MARTINEZ,

Movant.

No. 15-7019
(D.C. Nos. 6:11-CV-00056-RAW &
6:09-CR-00030-RAW-1)
(E.D. Okla.)

ORDER

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

Giovanni Martinez, proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. To obtain authorization, he must show either that he has “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” or that there is “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* § 2255(h)(1), (2). Because Mr. Martinez has failed to show either one, we deny authorization.

In May 2009, Mr. Martinez pleaded guilty, pursuant to a plea agreement, to possession with intent to distribute cocaine and being a felon in possession of a firearm. The plea agreement included a stipulation that he was a career offender

under the guidelines. Taking into account the career offender enhancement, the district court sentenced Mr. Martinez to 188 months in prison. Although he did not appeal, he filed a § 2255 motion arguing that (1) the government breached the plea agreement by obtaining a revision to the pre-sentence report reflecting that the cocaine was cocaine base, thereby changing the guidelines calculation; (2) his counsel was ineffective for not objecting to the revision, not moving to withdraw the plea agreement, and not asserting breach of the plea agreement in an appeal; and (3) after the change in his sentence caused by the revision, his plea was not voluntary. The district court denied § 2255 relief, finding that (1) Mr. Martinez did not establish that his counsel was ineffective; (2) due to the career-offender stipulation, he was subject to the same guidelines sentence regardless of whether the drug was cocaine or cocaine base; and (3) he knowingly and voluntarily entered into the plea agreement. We denied a certificate of appealability. *United States v. Martinez*, 485 F. App'x 334, 335 (10th Cir. 2012).

Mr. Martinez now seeks our authorization to assert claims that (1) his plea colloquy was not knowing and voluntary because the district court did not make sure that he was competent, that his plea was voluntary, or that he understood the rights he was waiving, the nature of the charges against him, the possibility that his statements under oath could form the basis for a perjury charge, and that his conviction could be used to enhance penalties in subsequent proceedings; (2) a prior drug conviction did not meet the definition of a serious drug offense and therefore did not qualify as a

predicate offense for a career-offender enhancement; and (3) counsel was ineffective for failing to object to the career-offender enhancement, despite knowing that one drug conviction did not qualify as a career-offender predicate.

We conclude that none of these three assertions meets the requirements for authorization under § 2255(h). The challenge to the plea colloquy is not based on any newly discovered evidence and the case Mr. Martinez cites to support his assertions, *Boykin v. Alabama*, 395 U.S. 238 (1969), is clearly not new law.

Mr. Martinez's challenge to the career-offender enhancement is a challenge to his sentence. We have not resolved whether in the career-offender context a prisoner may claim actual innocence of his sentence. *See Abernathy v. Wanders*, 713 F.3d 538, 545 n.6 (10th Cir. 2013) (citing cases), *cert. denied*, 134 S. Ct. 1874 (2014). And we need not do so in this case, because Mr. Martinez has not presented any evidence indicating that the prior drug offense was not a proper predicate offense. At most, he makes an unsupported assertion. Furthermore, the cases he cites to support the career-offender argument, *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), are not new law as both were available at the time of his conviction. For similar reasons, the ineffective-assistance-of-counsel argument does not warrant authorization.

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).

Entered for the Court

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

ELISABETH A. SHUMAKER, Clerk