

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 22, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LESLIE LYLE CAMICK,

Defendant - Appellant.

No. 17-3006
(D.C. Nos. 6:16-CV-01365-JTM and
6:13-CR-10042-JTM-1)
(D. Kan.)

ORDER*

Before **KELLY, MURPHY**, and **MATHESON**, Circuit Judges.

Leslie Lyle Camick, proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his motion for post-conviction

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this matter. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Camick is proceeding pro se, we construe his filings liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *see also United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (“[W]e must construe [a pro se litigant’s] arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.”).

relief under 28 U.S.C. § 2255.² We vacate the district court’s judgment and remand with instructions to dismiss for lack of jurisdiction.

I. BACKGROUND

In 2014, Mr. Camick was convicted of mail fraud, wire fraud, material false statement to the U.S. Patent Office, three counts of aggravated identity theft, and obstruction of justice. He was sentenced to 48 months in prison. On direct appeal, we affirmed the obstruction of justice conviction but reversed the other convictions. *United States v. Camick*, 796 F.3d 1206, 1210 (10th Cir. 2015). Following our decision, the district court entered an amended judgment on November 13, 2015, and sentenced Mr. Camick to time served plus one year of supervised release.

On March 23, 2016, Mr. Camick was removed to Canada for reasons unrelated to his conviction.³ The Department of Homeland Security (“DHS”) barred him from returning to the United States for ten years.

On September 22, 2016, while residing in Canada, he filed a motion under 28 U.S.C. § 2255 in the United States District Court for the District of Kansas

² A criminal defendant seeking to appeal the denial of a § 2255 motion must first obtain a certificate of appealability by making a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). We need not determine whether Mr. Camick has made such a showing, however, because we dismiss the appeal for lack of jurisdiction on other grounds. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (explaining that federal courts may “choose among threshold grounds for denying audience to a case on the merits”).

³ Mr. Camick was removed because he was “[i]nadmissible at time of entry” and because he entered the United States by “[f]raud or willful misrepresentation of a material fact.” App. at 121.

collaterally attacking the validity of his obstruction of justice conviction. When he filed his § 2255 motion, approximately seven weeks remained on his one-year term of supervised release.

On December 23, 2016, the district court denied his § 2255 motion as moot. *United States v. Camick*, No. 13-10042-JTM, 2016 WL 7425950, at *1 (D. Kan. Dec. 23, 2016). In declining to reach the merits, the court explained that because Mr. Camick would remain subject to DHS’s ten-year ban regardless of whether he prevailed on his motion to vacate his conviction, any collateral consequences for him were “wholly speculative.” *Id.* Thus, the court found that his challenge presented no existing case or controversy and was “effectively moot.” *Id.*

On January 13, 2017, Mr. Camick filed a timely notice of appeal. We have jurisdiction over the district court’s final order under 28 U.S.C. § 1291.

II. DISCUSSION

We conclude the district court lacked jurisdiction to hear this case. For the court to have jurisdiction, the § 2255 movant must be “in custody” when the motion is filed. *See United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994). The party claiming that the court has subject matter jurisdiction—here, Mr. Camick—has the “burden of persuading this court by a preponderance of the evidence that the court has jurisdiction.” *Id.* (citations omitted). The Supreme Court has defined the phrase “in custody” to include both physical detention and “other restraints on a man’s liberty, restraints not shared by the public generally.” *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

Mr. Camick ceased to be “in custody” once he was removed to Canada. *See Veltmann-Barragan v. Holder*, 717 F.3d 1086, 1088 (9th Cir. 2013) (holding habeas petitioner “ceased to be ‘in custody’” after being removed to Mexico); *Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011) (“[A]n alien who has been deported . . . is not ‘in custody’ for habeas purposes.”); *Kumarasamy v. Attorney General*, 453 F.3d 169, 173 (3d Cir. 2006); *Patel v. U.S. Attorney General*, 334 F.3d 1259, 1263 (11th Cir. 2003); *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001) (stating plain language of the “in custody” requirement prohibits federal courts from exercising jurisdiction over an individual who was deported before habeas petition was filed).⁴

The fact that time remained on Mr. Camick’s period of supervised release does not alter our conclusion. Individuals on supervised release are generally considered to be “in custody” for purposes of seeking post-conviction relief. *United States v. Cervini*, 379 F.3d 987, 989 n.1 (10th Cir. 2004); *see also Oyler v. Allenbrand*, 23 F.3d 292, 293-94 (10th Cir. 1992). Although the Supreme Court has said the “in custody” requirement should be “liberally construed,” *Maleng v. Cook*, 490 U.S. 488, 492 (1989), “[n]o one doubts that there must be some involvement of United States officials” to satisfy the custody requirement for post-conviction proceedings, *see Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 47 (D.D.C. 2004).

⁴ *See also Arthur v. DHS/ICE*, 713 F. Supp. 2d 179, 181 (W.D.N.Y. 2010); *So v. Reno*, 251 F. Supp. 2d 1112, 1120 (E.D.N.Y. 2003) (“The ‘in custody’ requirement is satisfied if the petitioner files the habeas petition *before* being deported.” (emphasis added)); *Macias v. Greene*, 28 F. Supp. 2d 635, 638-39 (D. Colo. 1998) (petitioner who filed § 2241 habeas petition three weeks after deportation was not “in custody”); *Willis-Gomez v. Meissner*, 879 F. Supp. 1120, 1123 (W.D. Okla. 1995) (holding that petitioner who had been deported was no longer in custody).

Though about seven weeks remained on Mr. Camick's term of supervised release when he filed his § 2255 motion, no evidence in the record shows that he was under active supervision following his removal to Canada. While outside the United States, Mr. Camick has no obligation to report to a probation officer and is not under the supervision or control of the United States Probation Office. *See Shishkin v. United States*, No. 10-CV-4201 CBA, 2013 WL 6859844, at *2 (E.D.N.Y. Dec. 30, 2013) (unpublished) (holding that defendant who was deported with time remaining on his term of supervised release was "living abroad without any accountability to or oversight by judicial officers of the United States, [and] therefore [wa]s not 'in custody' for purposes of a § 2255" motion).⁵ Mr. Camick has failed to establish subject matter jurisdiction. *See Bustillos*, 31 F.3d at 933.⁶

⁵ We cite unpublished cases in this order only for their persuasive value. *See* Fed. R. App. P. 32.1, 10th Cir. R. 32.1.

⁶ In response to this court's order of April 24, 2017, the parties filed supplemental briefs on the in-custody jurisdictional issue. Mr. Camick makes three arguments. First, he argues the proper filing date is actually January 20, 2016—when he applied for habeas relief under 28 U.S.C. § 2241—when he was in jail and still clearly in custody. He contends his § 2241 application conveyed his intent to challenge his conviction under § 2255, and that we should treat his § 2241 and § 2255 filings as one request for relief. His § 2241 application, however, did not convey his intent to seek relief under § 2255. Rather, he stated in his application that § 2255 was an "inadequate [and] ineffective" remedy because he was "no longer in B.O.P federal custody." Second, Mr. Camick relies on inapposite cases addressing mootness rather than the "in custody" requirement. Third, he argues we should not rely on the Government's proposed precedent, *United States v. Vera-Flores*, 496 F.3d 1177 (10th Cir. 2007), which involved a challenge to a sentence rather than an underlying conviction. We agree and do not rely on *Vera-Flores*.

III. CONCLUSION

When Mr. Camick filed his § 2255 motion, he had been deported to Canada and was no longer “in custody” for purposes of seeking post-conviction relief.

We therefore vacate the district court’s judgment and remand with instructions to dismiss for lack of jurisdiction.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge