

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 4, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: RISHEEN DANIEL ROBINSON,

Movant.

No. 17-3051
(D.C. Nos. 5:10-CR-40037-DDC-1 &
5:13-cv-04099-RDR)
(D. Kan.)

ORDER

Before **LUCERO**, **McHUGH**, and **MORITZ**, Circuit Judges.

Risheen Daniel Robinson, a federal prisoner proceeding without the assistance of counsel, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

Mr. Robinson was convicted of distributing crack cocaine in violation of 21 U.S.C. § 841(a)(1). At sentencing, based on various convictions he had accumulated since 1994, the district court found Mr. Robinson to be a “career offender” under U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm’n) (U.S.S.G.) and sentenced him to 262 months’ imprisonment. We affirmed on direct appeal. *See United States v. Robinson*, 437 F. App’x 733, 736 (10th Cir. 2011) (unpublished). Mr. Robinson unsuccessfully pursued relief under § 2255 in the district court; we dismissed his subsequent appeal for lack of prosecution. He therefore must obtain this court’s authorization before filing another § 2255 motion.

For authorization, Mr. Robinson must show that his claims rely on “(1) 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 of the offense” or “(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h).

Mr. Robinson points to a district court “Order Nunc Pro Tunc” dated February 3, 2017, in which the court granted Mr. Robinson’s request to correct a clerical error in the presentence report. Specifically, for one of Mr. Robinson’s prior convictions, the report incorrectly reflected a sentencing date of January 19, 2004, instead of January 19, 2005. The court ordered the Probation Office to amend the statement of reasons rather than the presentence report, as the latter should not be altered under Judiciary policy.

Mr. Robinson contends the distinction between 2004 and 2005 is one with a difference — what appeared to be prior sentences on different dates, thus constituting multiple sentences, now are prior sentences on the same date, to be counted as a single sentence for purposes of the career offender enhancement in Sentencing Guideline § 4B1.1. *See* U.S.S.G. § 4B1.2(c) (requiring prior convictions to be counted based on their sentences); *id.* § 4A1.2(a)(2) (counting prior sentences as a single sentence if “the sentences were imposed on the same day”). Thus, Mr. Robinson argues he is no longer a career offender.

Mr. Robinson alleges an error in his sentence, but the plain language of § 2255(h)(1) is directed toward a prisoner's conviction, not his sentence. Several circuits have concluded that § 2255(h)(1) does not extend to claims asserting sentencing error. *See In re Webster*, 605 F.3d 256, 257 (5th Cir. 2010); *In re Dean*, 341 F.3d 1247, 1248 (11th Cir. 2003) (per curiam); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997); *see also Greenawalt v. Stewart*, 105 F.3d 1287, 1288 (9th Cir. 1997) (per curiam) (indicating that § 2244(b)(2) does not allow a second or successive 28 U.S.C. § 2254 habeas application challenging a sentence instead of a conviction). We need not decide whether to join these circuits, however, because even assuming that Mr. Robinson could challenge his sentence under § 2255(h)(1), any error in the date of his prior sentences was readily ascertainable at the time of sentencing or when he filed his first § 2255 motion. Thus, though the district court's order is recent, the information it is based upon is not "newly discovered evidence" that would support a second or successive § 2255 motion. 28 U.S.C. § 2255(h)(1).

To the extent Mr. Robinson alleges a new legal argument based on the Guidelines, the district court's correction of a clerical error does not establish "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," as required by § 2255(h)(2). Moreover, there is no indication Mr. Robinson could not have brought this claim in his original § 2255 motion even without the district court's correction, meaning that his legal argument was not "previously unavailable." *Id.*

The motion for authorization is 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", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk