

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RODNEY JAMES PALMER,

Defendant - Appellant.

No. 23-4012
(D.C. No. 2:12-CR-00663-RJS-1)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **KELLY**, and **EID**, Circuit Judges.

Rodney James Palmer, proceeding pro se,¹ seeks a certificate of appealability (COA) to appeal from the district court's decision construing his motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure as an unauthorized second or successive 28 U.S.C. § 2255 motion that it lacked jurisdiction to consider. We deny a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 “[B]ecause [Mr. Palmer] appears pro se, we must construe his arguments liberally,” but we may not serve as his advocate. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

I. Background

Mr. Palmer pleaded guilty to one count of producing child pornography, but then later moved to withdraw his guilty plea. The district court denied the motion to withdraw and sentenced Mr. Palmer to 210 months in prison. On appeal, this court affirmed the district court's denial of the motion to withdraw. *See United States v. Palmer*, 630 F. App'x 795, 796 (10th Cir. 2015). Mr. Palmer next filed a § 2255 motion, which the district court denied, and this court denied a COA. *United States v. Palmer*, 699 F. App'x 836, 836 (10th Cir. 2017). Since that time, Mr. Palmer has filed several unsuccessful motions seeking relief from his conviction and sentence.

Most recently, Mr. Palmer filed the Rule 60(b)(4) motion that is the subject of this proceeding. In the motion, he argued that the district court lacked jurisdiction over his criminal case and therefore it was void. He requested vacatur of his criminal case and immediate release from prison.

The district court determined that Mr. Palmer's Rule 60(b)(4) motion should be construed as a second or successive § 2255 motion. But because Mr. Palmer did not have circuit-court authorization to file a successive § 2255 motion, the district court concluded it lacked jurisdiction to consider the motion. Mr. Palmer now seeks a COA to appeal the district court's decision.

To obtain a COA to challenge the district court's procedural ruling, Mr. Palmer must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court’s resolution of the procedural one. *Id.* at 485.

A prisoner may not file a second or successive § 2255 motion unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A); *id.* § 2255(h). Absent circuit-court authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). To avoid this constraint, prisoners occasionally try to disguise a second or successive § 2255 motion as a motion brought pursuant to Rule 60(b). “[W]hether a postjudgment pleading should be construed as a successive application depends on whether the pleading (1) seeks relief from the conviction or sentence or (2) seeks to correct an error in the previously conducted habeas proceeding itself.” *United States v. Nelson*, 465 F.3d 1145, 1147 (10th Cir. 2006).

In its order, the district court explained that a § 2255 motion is one “‘claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence. . . .’” R. at 97 (quoting § 2255(a)). And it noted that Mr. Palmer argued in his motion that the judgment in his criminal case was void because the court lacked jurisdiction from the inception of the case, which violated his constitutional right to due process. The court therefore concluded that the substance of Mr. Palmer’s arguments fell “within the ambit of a § 2255 motion” because they challenged the court’s

jurisdiction to sentence him and/or argued his sentence was imposed in violation of the Constitution. *Id.* at 98.

Mr. Palmer argues in his COA application that the district court abused its discretion in construing his Rule 60(b)(4) motion as a successive § 2255 motion because it was properly brought under Rule 60(b). He also contends he is “challeng[ing] a defect in the integrity of the federal proceedings.” COA Appl. at 7. He asserts that the district court’s judgment in his criminal case was void for lack of jurisdiction, which violated his constitutional right to due process. Because of this alleged constitutional violation, he argues COA should be granted.

Mr. Palmer, however, has failed to show that reasonable jurists could debate the district court’s decision to construe his Rule 60(b) motion as an unauthorized second or successive § 2255 motion. In his Rule 60(b) motion, Mr. Palmer did not argue there was an error or defect in his § 2255 proceeding. Instead, he attacked the validity of the judgment in his criminal case by arguing the district court lacked jurisdiction.

We considered similar circumstances in another case where a prisoner “attempted to evade the authorization requirements by filing [a] nominal Rule 60(b) motion[.]” *Cline*, 531 F.3d at 1253. In his Rule 60(b) motion, the prisoner raised several arguments “claim[ing] that the district court lacked jurisdiction to convict or sentence him.” *Id.* The district court ruled that the claims constituted successive § 2255 claims, which required circuit-court authorization. *See id.* at 1250. The prisoner objected to the district court’s recharacterization of his Rule 60(b) motion. *See id.* at 1253. But we concluded “[t]he district court properly treated the[] post-conviction claims as unauthorized second or

successive § 2255 claims because they all substantively challenge[d] the constitutionality of [the prisoner's] conviction and detention, and [were] effectively indistinguishable from habeas claims.” *Id.* (internal quotation marks omitted).

The same holds true here. Because Mr. Palmer’s Rule 60(b) motion challenged the constitutionality of his conviction and detention, the district court properly treated the motion as an unauthorized second or successive § 2255 motion over which it lacked jurisdiction. Accordingly, we deny a COA because reasonable jurists would not find debatable the district court’s procedural ruling. We grant Mr. Palmer’s motion for leave to proceed without prepayment of costs or fees, and we deny his motion to expedite as moot.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk