FILED
United States Court of Appeals
Tenth Circuit

August 17, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT WAYNE ROBINSON,

Petitioner - Appellant,

v.

JASON LENGERICH, Colorado Department of Corrections, Buena Vista Correctional Facility, Warden; PHIL WEISER, The Attorney General of the State of Colorado,

Respondents - Appellees.

No. 20-1325
(D.C. No. 1:20-CV-00393-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **HOLMES**, and **PHILLIPS**, Circuit Judges.

Robert Wayne Robinson, a Colorado prisoner proceeding pro se,[1] seeks to appeal the district court's dismissal of his 28 U.S.C. § 2254 application. We deny Robinson's request for a certificate of appealability (COA) and dismiss this matter.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Robinson appears pro se, we construe his filings liberally but do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

A jury convicted Robinson in 2004 of aggravated robbery, criminal mischief, menacing, third-degree assault, and resisting arrest. A Colorado court sentenced him to 64 years' imprisonment as a habitual criminal under Colo. Rev. Stat. § 18-1.3-801. Proceeding pro se, Robinson filed a first § 2254 application in 2010. The district court denied relief, and this court denied a certificate of appealability.

In 2020, with the assistance of counsel, Robinson filed a new § 2254 application in the district court. Because he filed it without authorization from this court, the district court transferred it to this court for possible authorization. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam) ("When a second or successive § 2254 or § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so under [28 U.S.C.] § 1631, or it may dismiss the motion or petition for lack of jurisdiction."). This court denied authorization. *In re Robinson*, No. 20-1242, Order (10th Cir. Aug. 11, 2020). The district court therefore dismissed the unauthorized § 2254 application for lack of jurisdiction. Robinson now seeks to appeal the dismissal.

Robinson must obtain a COA before he can appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000) (holding "a state prisoner must obtain a COA to appeal the denial of a habeas petition . . . filed pursuant to § 2254"). To obtain a COA, Robinson must show "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) (emphasis added). Robinson has not met this burden.

The district court concluded that it lacked jurisdiction to consider Robinson's application because it was second or successive and this court had not authorized it. *See Cline*, 531 F.3d at 1251 ("A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until this court has granted the required authorization."). Robinson argues the district court erred because his 2010 § 2254 application should not count as a "first" § 2254 application for purposes of the second or successive rules, citing *Castro v. United States*, 540 U.S. 375, 377 (2003). *Castro* held that where a court "treats as a request for habeas relief under 28 U.S.C. § 2255 a motion that a *pro se* federal prisoner has labeled differently," the "recharacterized motion will not count as a § 2255 motion for purposes of applying § 2255's 'second or successive' provision" "*unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing." *Id.* But *Castro* does not apply here because the district court did not "treat[] as a request for habeas relief," *id.*, a motion Robinson had "labeled differently," *id.* Robinson expressly sought habeas relief in his 2010 "Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254," R. vol. I at 27, and "conceded" in the district court his 2020 "application was second or successive and unauthorized," *In re Robinson*, No. 20-1242, Order at 2 (10th Cir. Aug. 11, 2020).

Robinson further argues his 2020 application did not require authorization because he included an allegation of fraud on the court, citing *Berryhill v. Evans*, 466 F.3d 934, 937 (10th Cir. 2006). *Berryhill* observed that a motion filed under Fed. R. Civ. P. 60(b) "can be decided by the district court without prior authorization." *Id.* But this rule applies "where the allegation of fraud attacks only some defect in the integrity of the federal habeas proceedings." *Id.* (internal quotation marks omitted). The rule does not apply to "allegations [that] seek to assert or reassert habeas claims (alleged fraud committed regarding [the] original sentence and direct appeal)," or allegations that "are inextricably intertwined with a claim of fraud committed on the state courts (and perpetuated by an alleged continuing fraud committed in the habeas proceeding to cover up the fraud on the state court), resulting in a merits-based attack on his state convictions." *Id.* Robinson's 2020 § 2254 application alleged fraud only in the state court proceedings. It therefore falls outside the scope of the exception to authorization discussed in *Berryhill*. And "without authorization from the appropriate court of appeals, a district court may not act on a petitioner's second or successive motion to vacate a petitioner's conviction, even where that motion alleges fraud on the [conviction] court." *United States v. Williams*, 790 F.3d 1059, 1073 (10th Cir. 2015) (discussing § 2255 motion).

Reasonable jurists could not debate the correctness of the district court's procedural ruling. We therefore deny Robinson's application for a COA and dismiss this matter.

We deny Robinson's motion to proceed on appeal without prepayment of costs or fees because he failed to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk