FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHAD EUGENE CALDWELL,

Defendant - Appellant.

No. 21-4026
(D.C. Nos. 2:16-CV-00607-DAK &
2:03-CR-00325-DAK-1 &
2:03-CR-00696-DAK-1)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Chad Caldwell seeks a certificate of appealability (COA) to appeal an order denying his 28 U.S.C. § 2255 motion as untimely. Because reasonable jurists would not find the district court's procedural ruling debatable, we deny Caldwell's request and dismiss this matter.

Caldwell's § 2255 motion stems from his federal convictions for armed bank robbery and an associated firearm offense. When pleading guilty to those offenses in 2003, Caldwell stipulated that he would be sentenced as a career offender because his criminal history included two crimes of violence. *See* U.S.S.G. §§ 4B1.1(a), 4B1.2(a).

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This stipulation increased Caldwell's offense level, producing a higher sentencing range under the then-mandatory United States Sentencing Guidelines. Caldwell ultimately received a 272-month prison term and did not appeal his convictions or sentence.

Over a decade later, Caldwell moved to vacate his sentence under § 2255. Relevant here, Caldwell's motion asserted that one of the prior convictions that supported his career-offender status—a California burglary offense—no longer qualified as a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) after the Supreme Court's decision in *Johnson v. United States*, which invalidated an identically worded statutory definition as unconstitutionally vague. 576 U.S. 591, 597, 606 (2015). The district court dismissed the motion as untimely, alternatively concluded that any error in Caldwell's sentence was harmless, and declined to issue a COA.

Caldwell now seeks a COA from this court so he can appeal the district court's order dismissing his motion. *See* 28 U.S.C. § 2253(c)(1)(B). Because the district court dismissed Caldwell's motion on procedural grounds, we can grant that request only if Caldwell shows that reasonable jurists could debate both the district court's procedural ruling and the validity of his constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As explained below, Caldwell has not made this showing as to the district court's procedural ruling.

The district court based its procedural ruling on the timeliness of Caldwell's motion. Specifically, it determined that Caldwell filed the motion more than one year after the judgment became final in his underlying criminal case. *See* § 2255(f)(1). As in the district court, Caldwell argues that his motion was timely because he filed it within

one year of *Johnson*, which he says announced a new constitutional rule that applies retroactively on collateral review. *See* § 2255(f)(3); *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) (holding that *Johnson* applies retroactively). But we have held that *Johnson* did not create a new constitutional rule as applied to the mandatory Guidelines. *United States v. Pullen*, 913 F.3d 1270, 1283 (10th Cir. 2019). And while other circuits may have taken a different view, the district court, as Caldwell recognizes, "was bound by this court's contrary holding[]." Aplt. Br. 6. Thus, reasonable jurists could not debate the district court's ruling that Caldwell's motion was untimely because he filed it more than one year after his conviction became final.

Nor could they debate whether Caldwell can overcome this untimeliness by proving actual innocence. To invoke the actual-innocence exception to the one-year filing deadline, Caldwell must show based on new evidence that "it is more likely than not that no reasonable juror would have *convicted* him." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (emphasis added) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). But Caldwell does not argue that he is innocent of his underlying crimes; he argues that he is innocent of "being a career offender" under the Guidelines. That argument affects Caldwell's *sentence*, and in this circuit, "[a] person cannot be actually innocent of a noncapital sentence."[1] *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993). Caldwell suggests that an exception to this rule applies when a person is "innocent of the

[1] For this reason, it makes no difference whether, as Caldwell argues, "a change in the law can be the basis for a factual[-]innocence claim." Aplt. Br. 11. Even if that's true, the change in law asserted here impacts Caldwell's sentence and thus cannot establish actual innocence. *See Richards*, 5 F.3d at 1371.

fact—i.e., the prior conviction—necessary to sentence [that person] as a[] habitual offender." *Selsor v. Kaiser*, 22 F.3d 1029, 1036 (10th Cir. 1994). Yet even if such an exception exists, it would not apply here: Caldwell contends that his California burglary offense no longer qualifies as a "crime of violence" under the Guidelines, not that he did not commit that offense in the first place. Caldwell cites no authority from this court suggesting that a sentencing argument of that kind constitutes actual innocence.[2]

In sum, Caldwell fails to show that reasonable jurists could debate the district court's procedural ruling that his § 2255 motion is untimely and does not assert an actual-innocence claim. We therefore decline Caldwell's COA request and dismiss this matter. *See Slack*, 529 U.S. at 484.

Entered for the Court

Nancy L. Moritz
Circuit Judge

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[2] Contrary to Caldwell's view, *Richards* itself did not "acknowledge[] that 'one might be actually innocent of a sentence in some circumstances.'" Aplt. Br. 8 (quoting *Richards*, 5 F.3d at 1371). The language Caldwell quotes comes from a parenthetical attached to a "But see" cite that notes the Eighth Circuit's *opposing* view. *See Richards*, 5 F.3d at 1371 (citing *Jones v. Arkansas*, 929 F.2d 375, 381 & n.16 (8th Cir. 1991)). But *Richards* rejected that view and instead held that "[a] person cannot be actually innocent of a noncapital sentence." *Id.*