FILED
United States Court of Appeals
Tenth Circuit

October 26, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER MOORE, JR.,

Defendant - Appellant.

No. 21-5056
(D.C. No. 4:19-CV-00722-CVE-CDL &
4:98-CR-00078-CVE-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

Defendant-Appellant Christopher Moore, Jr., a federal inmate appearing pro se, seeks a Certificate of Appealability (COA) to appeal from the district court's dismissal of his successive 28 U.S.C. § 2255 motion. See United States v. Moore, No. 19-cv-00722, 2021 WL 2657002 (N.D. Okla. June 28, 2021). Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny a COA and dismiss the appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Background

Mr. Moore was convicted of one count of armed bank robbery, 18 U.S.C. § 2113 (count one), three counts of carjacking, 18 U.S.C. § 2119, and four counts of using or carrying a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c). He was sentenced to 950 months' imprisonment and five years of supervised release. On direct appeal, this court affirmed the judgment. United States v. Moore, 198 F.3d 793 (10th Cir. 1998). Mr. Moore filed his first § 2255 motion, which the district court denied, and we denied a COA. United States v. Moore, 172 F. App'x 877 (2006).

In 2016, Mr. Moore sought authorization from this court to allow the district court to consider a second or successive § 2255 motion in light of Johnson v. United States, 576 U.S. 591 (2015). We ultimately granted the authorization after instructing him to supplement his motion to address United States v. Davis, 139 S. Ct. 2319 (2019), which struck down the residual clause of § 924(c)(3).

In his motion, Mr. Moore argued that his § 924(c) convictions must be vacated in light of Davis because the predicate offenses for those convictions only qualify as crimes of violence under the now-invalid residual clause of § 924(c). See Aplt. Br. at 11. The district court held otherwise finding that armed bank robbery and carjacking qualify as crimes of violence under the still-valid elements clause of § 924(c). Moore, 2021 WL 2657002, at *3. The district court also found that Mr. Moore's arguments with respect to the amendments to § 924(c) under the First Step Act were beyond what it was authorized to consider, but in any event had no merit because these amendments do not apply retroactively. Id. at *4.

Discussion

To obtain a COA from this court, Mr. Moore must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a claim has been denied on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a claim has been dismissed on procedural grounds, the movant must also demonstrate that the district court's procedural ruling was debatable. Id.

The district court's conclusion that armed bank robbery is a crime of violence is not reasonably debatable. Mr. Moore was convicted of armed bank robbery under 18 U.S.C. § 2113(a) and (d). Section 2113(a) states that "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money" belonging to any bank violates the statute. Section 2113(d) increases the statutory maximum from 20 years to 25 years for anyone committing the offense who "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." Based on this statutory language, it is not reasonably debatable that the use of violent force is required to commit the crime of armed bank robbery under § 2113(a) and (d) and that armed bank robbery qualifies as a predicate offense under the elements clause of § 924(c). See, e.g., United States v. Lucero, No. 20-1323, 2021 WL 2623157, at *5 (10th Cir. June 25,

2021)[1]; Wingate v. United States, 969 F.3d 251, 263–64 (6th Cir. 2020); King v. United States, 965 F.3d 60, 70–71 (1st Cir. 2020); United States v. Smith, 957 F.3d 590, 593–94 (5th Cir. 2020); In re Pollard, 931 F.3d 1318, 1321 (11th Cir. 2019).

The district court's conclusion that carjacking is a crime of violence is not reasonably debatable. Mr. Moore was convicted of carjacking under 18 U.S.C. § 2119. Section 2119 states that "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation" violates the statute. Again, based on the text of the statute, it is not reasonably debatable that use of violent force is required to commit the crime of carjacking under § 2119 and that carjacking qualifies as a predicate offense under the elements clause of § 924(c). See, e.g., United States v. Kundo, 743 F. App'x 201, 203 (10th Cir. 2018) (unpublished); United States v. Felder, 993 F.3d 57, 80 (2d Cir. 2021) (collecting cases and stating that every other circuit court that has considered the matter has also found carjacking to be a crime of violence under § 924(c)).

Mr. Moore also argues that his sentence should be reduced based on amendments to § 924(c) under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. See Aplt. Br. at 29–30. This claim is beyond what this court authorized in a second or successive § 2255 motion, and therefore the court lacks jurisdiction to consider this claim. See In re Cline, 531 F.3d 1249, 1253 (10th Cir. 2008) (per curiam).

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[1] We cite this and other unpublished dispositions only for their persuasive value. 10th Cir. R. 32.1.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge