

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY CARL AKERS,

Defendant - Appellant.

No. 22-3083
(D.C. No. 2:04-CR-20089-KHV-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS, MURPHY, and EID**, Circuit Judges.**

On April 11, 2022, Montgomery Carl Akers filed a pro se “Motion for Clarification Of Sentence To Be Served As Ordered By The Court” in the District of Kansas. The court dismissed Akers’s motion for lack of jurisdiction because the motion sought the court’s ruling on “the conditions of his confinement and the execution of his sentence,” and Akers failed to establish “that the [c]ourt ha[d] jurisdiction to consider his claim as a part of this closed criminal case.” R. at 116–

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

17. Akers timely appealed the court’s dismissal of his motion. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

On November 20, 2006, Akers pled guilty to one count of wire fraud, a violation of 18 U.S.C § 1343. The district court in the District of Kansas sentenced him to 327 months’ imprisonment. The Bureau of Prisons (“BOP”) placed Akers in the United States Penitentiary in Marion, Illinois (“USP Marion”) to serve his sentence. USP Marion is located in the Southern District of Illinois.

After serving sixteen years, Akers filed a “Motion for Clarification Of Sentence To Be Served As Ordered By the Court” in the District of Kansas. R. at 92. He alleged that, following a disciplinary proceeding, he had been placed in the Communications Management Unit in USP Marion. He alleges this unit is “not [run] by the Attorney General,” is not subject to BOP policies, and that, while there, he has been treated as a “terrorist.” *Id.* at 91–92. His motion asked the district court to clarify “if this [c]ourt has secretly or otherwise adjudged [Akers] as a terrorist and held [Akers] or recommended to the Federal Bureau of Prisons that [Akers] serve time in a contract facility for terrorists.” *Id.* at 92.

The district court held Akers’s motion “attacks the conditions of his confinement and the execution of his sentence” and would “potentially fall under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) or 28 U.S.C § 2241.” R. at 116. The court noted Akers did not file a *Bivens* action or seek a writ of habeas corpus, and, if he had, he failed to show that the district court in the District of

Kansas would have jurisdiction over either claim. Akers had not shown the District of Kansas had any other basis for jurisdiction. Therefore, the district court dismissed his motion. Akers appealed.

II.

On appeal,¹ Akers alleges the district court “purposely mischaracterized the record” in finding that he challenged the conditions of his confinement or execution of his sentence. Aplt. Br. at 2 (capitalization omitted). He argues he is actually “challenging the validity of a conviction or sentence” because he “has never been placed on notice that he has been adjudged a terrorist” but “has had to endure conditions of confinement as a terrorist” during his imprisonment. *Id.* at 2–3 (emphasis omitted). Akers contends that “[t]here can be no doubt that [he] was/is seeking clarification of the [validity] of a conviction and sentence of terrorism from the district court.” *Id.* at 4 (emphasis and capitalization omitted). We disagree. Akers was convicted of wire fraud, not terrorism, and nothing in the record indicates he is attacking the wire fraud conviction. Rather, he is challenging his placement in a particular unit at USP Marion. Therefore, the district court did not err in construing his complaint as an attack on the conditions of his confinement or execution of his sentence. *See Standifer v. Ledezma*, 653 F.3d 1276, 1280 (10th Cir. 2011); *Franklin*

¹ Because Akers proceeds pro se, “we construe [his] pro se pleadings liberally and hold [him] to a less stringent standard than that of an attorney.” *United States v. Green*, 886 F.3d 1300, 1307 (10th Cir. 2018). We will not act as his advocate. *Id.* (quoting *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)).

v. Lucero, 22-2125, 2023 WL 2962260, at *5 n.4 (10th Cir. Apr. 17, 2023) (unpublished).²

Nor did the district court err in finding it did not have jurisdiction over Akers's motion. The court has a duty to determine its own jurisdiction. *United States v. Garcia-Herrera*, 894 F.3d 1219, 1220 (10th Cir. 2018). "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute," and jurisdiction "must be established in every cause under review in the federal courts." *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015). The burden of establishing jurisdiction "rests upon the party asserting jurisdiction." *Id.* Thus, Akers must show the District Court in Kansas had jurisdiction to consider his motion.

A federal inmate who alleges the conditions of his confinement violate his civil rights must bring a civil claim against the prison officials under *Bivens*. See *Standifer*, 653 F.3d at 1280 (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)). A *Bivens* claim may be heard by a court that has personal jurisdiction over the defendants. See 28 U.S.C. § 1391(b)(1)–(3); *Arocho v. Nafziger*, 367 F. App'x 942, 949 (10th Cir. 2010) (unpublished). If the inmate is challenging the execution of his sentence, such as the deprivation of good-time credits, he may file for a writ of habeas corpus under 28 U.S.C. § 2241. See *Franklin*, 2023 WL 2962260, at *5 n.4. Section 2241 claims are heard by "the district court of the

² Unpublished cases are not binding precedent, but we consider them for their persuasive value. See Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

district wherein the restraint complained of is had.” 28 U.S.C. § 2241(a). In either case, Akers has not shown that that district court is in the District of Kansas.

Finally, Akers’s argument that “only the sentencing court can clarify if it has adjudicated” Akers as a “terrorist,” Aplt. Br. at 2, is unpersuasive. Akers was not adjudged a “terrorist” by the district court. And it is the BOP, not the courts, that “designate the place of the prisoner’s imprisonment” and determine “the prisoner’s programmatic needs.” 18 U.S.C. § 3621(a), (h)(1)(A). The BOP, not the district court, classifies inmates based on their needs and the needs of the correctional facility. 28 C.F.R. § 524.11(c); *see also id.* § 524.70 (“The Bureau of Prisons monitors and controls . . . community activities of certain inmates who present special needs for management.”). We therefore reject Akers’s argument that the sentencing court in the District of Kansas has jurisdiction to hear his motion concerning his placement in the Communications Management Unit in USP Marion.

Akers failed to identify any other basis for jurisdiction in the District of Kansas. Accordingly, the district court lacked jurisdiction to hear his motion.

III.

For the reasons stated above, we AFFIRM the district court’s dismissal of Akers’s Motion for Clarification Of Sentence To Be Served As Ordered By The

Court for lack of jurisdiction.³ We also GRANT Akers’s motion for leave to proceed *in forma pauperis*.

Entered for the Court

Allison H. Eid
Circuit Judge

³ Akers filed a “Motion to Show Cause” on June 3, 2022, asking the court to take judicial notice of the other proceedings he has pending and arguing he is being denied meaningful access to the courts. *See* Aplt. Mot. (June 3, 2022). To the extent Akers’s filings are being denied in other cases, the court is unable to grant relief in this case.