FILED
United States Court of Appeals
Tenth Circuit

August 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENNIS MARTIN,

Petitioner - Appellant,

v.

LUKE PETTIGREW, Warden,

Respondent - Appellee.

No. 23-7026
(D.C. No. 6:21-CV-00370-JFH-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **TYMKOVICH**, and **EID**, Circuit Judges.

Dennis Martin, an Oklahoma prisoner appearing pro se,[1] seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas application. We deny a COA and dismiss this matter.

I. Background

In 1985, Mr. Martin pleaded guilty in Oklahoma state court to first degree murder and was sentenced to life imprisonment. Since then, he has filed four 28 U.S.C. § 2241 petitions asserting that because he is an Indian and the crime was committed against an

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Mr. Martin represents himself, so we construe his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Indian on Indian land, the state court lacked jurisdiction to convict and sentence him. Based on that assertion, he alleged that he is wrongfully imprisoned because there are no records establishing that he was validly arrested, charged, tried, or convicted of a crime.

The district court denied relief and we denied a COA as to three of the district court's orders (he did not seek a COA as to the first order). *See Martin v. Oklahoma (Martin III)*, 734 F. App'x. 612, 613 (10th Cir. 2018); *Martin v. Bear (Martin II)*, 725 F. App'x 729, 730 (10th Cir. 2018); *Martin v. Bear (Martin I)*, 683 F. App'x 729, 730 (10th Cir. 2017). In each order denying a COA, the court explained, as had the district court, that Mr. Martin's claims were not cognizable under § 2241 because they challenged the validity of the sentence, not its execution. *See Martin III*, 734 F. App'x at 613; *Martin II,* 725 F. App'x at 730-31; *Martin I*, 683 F. App'x at 730.

In 2018, Mr. Martin filed his first § 2254 application, making the same arguments he had made in his § 2241 petitions. The district court denied it as untimely under the one-year statute of limitations in 28 U.S.C. § 2244(d)(1). The court also denied a COA, and Mr. Martin did seek one in this court.

Mr. Martin filed the habeas application at issue here in 2021. He styled it as a § 2241 petition and made essentially the same arguments he had made many times before. The district court concluded that the petition was properly construed as a § 2254 application because it challenged the validity of the sentence, not its execution. The court directed Mr. Martin to resubmit his application pursuant to § 2254 on the court's form.

He filed an amended petition on the form, but crossed out § 2254 and wrote in § 2241 at the top. Invoking *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), he reiterated

his by now familiar claim that the state court lacked jurisdiction to convict and sentence him because he is an Indian, the victim was an Indian, and the crime occurred in Indian country.[2] Mr. Martin also filed numerous motions related to the claims raised in the amended petition, including one challenging the parole board's calculation of his sentence and asserting that he had already discharged the sentence.

The district court held that the amended petition was an unauthorized second or successive § 2254 application and dismissed it for lack of jurisdiction. The court resolved the pending motions in the same order. It construed the motion alleging that Mr. Martin had discharged his sentence as a § 2241 petition because it challenged the execution of his sentence. The court explained that Mr. Martin could raise his claim in a separate § 2241 proceeding but not in the pending § 2254 proceeding. Accordingly, the court declined to consider the construed § 2241 petition on the merits and dismissed it without prejudice. The court denied the rest of Mr. Martin's motions.

Mr. Martin now seeks a COA to appeal the district court's order. He does not expressly challenge the court's rulings on his motions, but in his original and amended combined opening brief and application for a COA, he alludes to some of the issues he raised in his motions.

[2] In *McGirt*, the Supreme Court held that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "certain enumerated offenses" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459, 2460 (quoting 18 U.S.C. § 1153(a)).

II. Discussion

To appeal the district court's dismissal of the § 2254 application, Mr. Martin must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). To obtain a COA where, as here, a district court dismisses a § 2254 application on procedural grounds, the petitioner must show "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).

A prisoner may not file a second or successive § 2254 application unless he first obtains an order from the circuit court authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2254 application. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

Mr. Martin does not challenge the district's decision to construe his § 2241 petition as a second or successive § 2254 application. And given the nature of the arguments in Mr. Martin's current habeas application and our prior orders explaining that those same claims are properly brought under § 2254, not § 2241, we find no error in the district court's decision to treat his § 2241 petition as a § 2254 application. *See Castro v. United States*, 540 U.S. 375, 377 (2003) (recognizing long-standing practice of federal courts to treat request for habeas relief under proper statutory section where pro se prisoner has labeled the petition differently). He does not dispute that he previously filed a § 2254 application challenging the same conviction. Nor does he dispute that the district court's dismissal of his first § 2254 application as time-barred was a decision on the merits and that he was required to obtain our authorization before filing another

§ 2254 application. *See In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (holding that the dismissal of a § 2254 habeas application as time-barred is a decision on the merits and any later application challenging the same conviction is second or successive and subject to the authorization requirements in § 2244(b)). Mr. Martin does not contend that this court granted him the requisite authorization.

Mr. Martin has failed to show that jurists of reason would debate the correctness of the district court's procedural ruling dismissing for lack of jurisdiction his § 2254 application as an unauthorized second or successive application. We thus deny a COA. And because we deny a COA as to the dismissal of the application, we need not address the district court's rulings on Mr. Martin's motions.

III. Conclusion

We deny a COA and dismiss this matter. We grant Mr. Martin's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk