FILED
United States Court of Appeals
Tenth Circuit

September 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRICK EUGENE KIRTMAN,

Defendant - Appellant,

No. 22-5118
(D.C. No. 4:97-CR-00053-GKF-2)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Derrick Eugene Kirtman, a federal prisoner appearing pro se, filed in district court a Motion for the Court to Commence an Investigation to Correct a Fraud on the Court. The district court denied the motion, and Kirtman now seeks appellate review. We conclude the motion was an unauthorized successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence over which the district court lacked jurisdiction. Consequently, we construe Kirtman's notice of appeal as a request for a certificate of appealability (COA), deny that request, dismiss this

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

matter, and direct the district court to vacate its order for lack of subject matter jurisdiction to resolve the motion.

I. BACKGROUND

In 1997, a jury convicted Kirtman of one count of conspiracy to distribute crack cocaine and/or to possess crack cocaine with intent to distribute. He was sentenced to life in prison (later reduced to 365 months[1]). On direct appeal, we affirmed. *See United States v. Kirtman*, No. 98-5039, 1999 WL 49126, at *1 (10th Cir. Feb. 4, 1999) (unpublished).

Since then, Kirtman has filed many unsuccessful collateral attacks on his conviction and sentence under § 2255. *See United States v. Kirtman*, 33 F. App'x 401, 402–03 (10th Cir. 2002) (denying COA from denial of § 2255 motion); *Kirtman v. United States*, No. 06-5034, Order (10th Cir. Apr. 3, 2006) (unpublished) (denying authorization to file successive § 2255 motion); *United States v. Kirtman*, 310 F. App'x 278, 281 (10th Cir. 2009) (directing district court to dismiss § 2255 claims); *In re Kirtman*, No. 09-5036, Order (10th Cir. Apr. 13, 2009) (unpublished) (denying authorization to file successive § 2255 motion); *In re Kirtman*, No. 10-5137, Order (10th Cir. Dec. 10, 2010) (unpublished) (dismissing, for failure to prosecute, successive § 2255 motion transferred here for authorization); *In re Kirtman*, No. 11-5019, Order (10th Cir. Mar. 16, 2011) (unpublished) (denying

[1] The reduction in Kirtman's sentence was based on retroactive amendments to the Sentencing Guidelines and on the First Step Act of 2018. *See United States v. Kirtman*, 836 F. App'x 700, 702–03 (10th Cir. 2020) (recounting Kirtman's sentencing history).

authorization to file successive § 2255 motion); *United States v. Kirtman*, 836 F. App'x 700, 705–06 (10th Cir. 2020) (denying COA from denial of unauthorized successive § 2255 motion).

In 2022, Kirtman filed the motion at issue in this matter. He asked the district court to open an investigation sua sponte into fraud on the court based on allegations that prosecutors (1) issued a superseding indictment that included fraudulent statements that Kirtman had severely injured one person and assaulted and raped another, which were repeated in his Presentence Investigation Report and have been used to deny him various forms of relief from his sentence; and (2) allowed testimony from co-conspirators in exchange for lenient plea agreements.

In a one-sentence order, the district court denied the motion, stating that "the Court is not an investigative body and has no jurisdiction to do so." R., Vol. 1 at 540. Kirtman seeks to appeal.

II. DISCUSSION

Where, as here, a federal prisoner has filed one § 2255 motion, he may not file another absent certification from "a panel of the appropriate court of appeals." § 2255(h). To determine whether a post-judgment pleading is in fact a successive § 2255 motion, "we look at the relief sought, rather than a pleading's title or its form." *United States v. Baker*, 718 F.3d 1204, 1208 (10th Cir. 2013). "A prisoner's post-judgment motion is treated like a second-or-successive § 2255 motion—and is therefore subject to the authorization requirements of § 2255(h)—if it asserts or reasserts claims of error in the prisoner's conviction." *Id.* at 1206; *see also United*

States v. Williams, 790 F.3d 1059, 1068 (10th Cir. 2015) ("If a petitioner challenges his underlying conviction, his filing is a successive § 2255 motion."). "The distinction is important because § 2255(h) deprives a district court of jurisdiction over uncertified second or successive [§ 2255 motions]." *Williams*, 790 F.3d at 1068.

Applying these principles, and liberally construing Kirtman's pro se filings, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), we conclude the motion was a successive § 2255 motion. Although styled as a request for the district court to commence an investigation sua sponte into allegations of fraud on the court, Kirtman asserted multiple claims of error in his conviction, and the ultimate relief he sought was vacatur of the judgment due to the alleged fraud, *see* R., Vol. 1 at 503 (asserting that "[t]he judiciary can vacate a judgment Sua Sponte when it was obtained through a fraud on the court"). Thus, § 2255(h) required Kirtman to obtain authorization from this court before filing the motion in the district court.

Baker supports our conclusion. There, we held that a motion invoking the district court's inherent power to set aside a judgment obtained through fraud on the court and invoking Federal Rule of Civil Procedure 60(d)(3)[2] was a second or successive § 2255 motion and therefore subject to § 2255(h)'s preauthorization requirements. 718 F.3d at 1207–08. Although the motion here did not invoke Rule 60(d)(3), it did ask the district court to exercise its inherent power to investigate the allegations of fraud and vacate Kirtman's conviction. Because "we look at the

[2] Rule 60(d)(3) provides that Rule 60 "does not limit a court's power to . . . set aside a judgment for fraud on the court."

relief sought, rather than a pleading's title or its form," *id.* at 1208, *Baker*'s rule applies to Kirtman's motion.

Kirtman argues that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which enacted § 2255(h), does not constrain a district court's sua sponte exercise of its inherent powers. We have no quarrel with that proposition; we held as much in *Williams*. *See* 790 F.3d at 1073 (stating that "AEDPA will not constrain a court's authority to employ its inherent equitable powers if the court is acting on its own initiative, rather than upon the application filed by the petitioner"). But this rule applies only "where a court truly acts sua sponte—that is, where it acted without considering claims or evidence presented in the successive [§ 2255 motion]." *Id.* at 1074. As we explained in *Bylin v. Billings*, "[a] court raises an issue sua sponte when it does so 'without prompting or suggestion; on its own motion.'" 568 F.3d 1224, 1228 n.6 (10th Cir. 2009) (brackets and intervening citation omitted) (quoting Black's Law Dictionary 1437 (7th ed. 1999)). Because Kirtman alleged fraud on the court in his motion and attached some supporting evidence, the district court would not have acted sua sponte if it had commenced an investigation and overturned his conviction. *See id.* (concluding that although purporting to act sua sponte, the district court did not do so because the defendant had raised the relevant issue in a motion); *Williams*, 790 F.3d at 1075 (concluding that the district court acted on a fraud-on-the-court motion, not sua sponte).

Because the motion was a successive § 2255 motion, § 2255(h) required Kirtman to obtain authorization from this court before filing in the district court. He

did not do so, and therefore the district court did "not even have jurisdiction to deny the relief sought in the [motion]." *United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006). Furthermore, Kirtman also had to obtain a COA from this court before proceeding with this appeal. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Springer*, 875 F.3d 968, 972 (10th Cir. 2017). He did not do that, either. Nonetheless, we treat his notice of appeal as a request for a COA. *See Springer*, 875 F.3d at 980. Because the district court denied the motion on a procedural ground, Kirtman can obtain a COA only if he shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Each component of [this] showing is part of a threshold inquiry." *Id.* at 485. Thus, if he cannot make a showing on one component, we need not reach the other. *See id.*

The district court lacked subject matter jurisdiction to address the motion, creating a "plain procedural bar," *Springer*, 875 F.3d at 983 (internal quotation marks omitted). "Under these circumstances, reasonable jurists could not debate whether [Kirtman] could prevail on appeal when the district court lacked jurisdiction to issue a final order." *Id.* We therefore deny Kirtman's request for a COA.

III. CONCLUSION

We deny Kirtman's request for a COA to appeal the order denying the motion, dismiss this matter, and direct the district court to vacate its order for lack of subject

matter jurisdiction to resolve the motion. We grant Kirtman's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Nancy L. Moritz
Circuit Judge