FILED
United States Court of Appeals
Tenth Circuit

September 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY CARL AKERS,

Defendant - Appellant.

No. 23-3016
(D.C. No. 2:09-CV-02206-KHV &
2:04-CR-20089-KHV-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Defendant Montgomery Carl Akers, a federal prisoner appearing pro se, appeals the district court's denial of leave to file a motion pursuant to Federal Rule of Civil Procedure 60(d)(3). He also requests to proceed *in forma pauperis* and that we appoint him counsel. We affirm the district court's denial of leave. We also deny Defendant's request to proceed *in forma pauperis* and his request for appointment of counsel.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I.

In 2006, while serving a sentence for bank fraud and other offenses, Defendant pleaded guilty to wire fraud. Since then, Defendant has filed several federal habeas petitions. These repeated filings were often frivolous, alleging fraud upon the court, conspiracy, and that it was "factually impossible" for him to have admitted to the offense of wire fraud. In response, the district court imposed filing restrictions which required Defendant to seek leave from the district court before filing additional motions pro se. In July 2018, "we decline[d] to assist Akers in further wasting judicial resources with extensive discussion." In the matter at hand, Defendant requested leave to file a motion pursuant to Federal Rules of Civil Procedure 60(d)(3), alleging that U.S. District Judge Vratil "committed fraud upon her own court." Reasoning that the proposed Rule 60 motion was an unauthorized second or successive motion barred by 28 U.S.C. § 2255, or that it was frivolous, the district court denied leave to file the motion.

II.

During habeas proceedings, we require a Certificate of Appealability ("COA") when a petitioner "(1) challenges a procedural ruling of the habeas court which precluded a merits determination of the habeas application []; or (2) challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition." Spitznas v. Boone, 464 F.3d 1213, 1216 (10th Cir. 2006) (citing Gonzalez v. Crosby, 545 U.S. 524, 532, 532 n.4 (2005)); See 28 U.S.C.

§ 2253(c)(1)(A). The law defines this as a Federal Rule Civil Procedure 60(b) motion. But when a petitioner does engage in a merits-based attack on a prior habeas petition, we require no COA. Spitznas, 464 F.3d at 1218. Rather, we consider the motion a second habeas petition which 28 U.S.C. § 2244(b)(1) requires us to dismiss. Id. ("both a COA and an application to file a second or successive petition are gatekeeping functions, we see no basis for doubling them up . . . ."). A Rule 60(d)(3) motion, which is relevant here, may fall within this latter category. It permits a court to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3).

So we must decide whether Petitioner motioned under Rule 60(b) or whether he attacked the merits of the prior habeas petition under Rule 60(d)(3).

Defendant argues that the district court should have granted him leave to file his Rule 60 motion because it is an independent action that "has nothing to do with the under-lying [sic] elements in the first habaes [sic] proceedings as far as a determination of the merits of the case." But Defendant undermines his own argument when he asserts that the court must allow him to file his Rule 60 motion because "the findings of judge-Vratil [sic] are erroneous and geared toward the judicial machinery in order to convict and sustain a wrongful conviction and that it was "factually impossible" for him to admit to the offense of wire fraud. Defendant attacks a purported defect in the integrity of the federal habeas proceedings—essentially a fraud upon the court. Fed. R. Civ. P. 60(d)(3). And such a challenge. just as the district court said, "leads inextricably to a merits-based attack on the

disposition" of his prior habeas petition. Thus, Defendant's proposed Rule 60 motion is an unauthorized second or successive motion under § 2255 which we dismiss.

We also note that this is not the first time Defendant has made such arguments. On June 15, 2017, the district court rejected his fraud upon the court claims under Rules 60(b)(3) and 60(d)(3). He appealed to this Court, and we affirmed. Defendant has repeatedly claimed that it was "factually impossible" for him to have confessed to wire fraud, but courts have repeatedly rejected those claims. In a previous order affirmed by this Court, the district court stated, "[A]s the Court has repeatedly explained, the plea agreement and plea colloquy establish each of the elements of the crime of wire fraud." Therefore, even if Defendant's proposed Rule 60 motion was a "true" motion, we would reject it as frivolous.

Defendant also moves this court to proceed *in forma pauperis*. To proceed *in forma pauperis*, Defendant must show "a financial inability to pay the required filing fees *and* the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991) (emphasis added). As discussed above, Defendant has failed to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." Id. We deny his motion accordingly.

Defendant also moves to this court to appoint him counsel. We have stated that "there is no constitutional right to counsel beyond the appeal of a criminal conviction, and that generally appointment of counsel in a [habeas] proceeding is left to the court's discretion." Swazo v. Wyoming Dept. of Corr. State Penitentiary

Warden, 23 F.3d 332, 333 (10th Cir. 1994). Defendant argues the court should appoint him an attorney because he cannot properly research or obtain discovery for his fraud claim. But because the district court properly construed Defendant's proposed Rule 60 motion as an unauthorized second or successive motion, research and discovery are unnecessary. We therefore deny his motion for appointment of counsel.

For these reasons, we AFFIRM the district court's denial of leave to file a Rule 60 motion and deny Defendant's motions to proceed *in forma pauperis* and for appointment of counsel.

Entered for the Court

Joel M. Carson III
Circuit Judge