FILED
United States Court of Appeals
Tenth Circuit

September 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GERALD PAUL HEADLEY, JR.,

Defendant - Appellant.

No. 23-8048
(D.C. Nos. 1:18-CV-00193-SWS &
1:16-CR-00226-SWS-1)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Defendant Gerald Paul Headley, Jr., a federal prisoner appearing pro se, seeks a certificate of appealability (COA) in order to appeal the district court's denial of Headley's motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b)(1) from the district court's prior denial of Headley's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. For the reasons that follow, we deny Headley's request for a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I

On October 7, 2016, a criminal complaint was filed against Headley in the United States District Court for the District of Wyoming charging him with violating 18 U.S.C. §§ 2241(c) and 1153. On November 16, 2016, a federal grand jury returned a four-count indictment against Headley. Counts I through III of the indictment charged Headley with aggravated sexual abuse, in violation of 18 U.S.C. §§ 2241(c), 2246, and 1153. Count IV charged Headley with abusive sexual contact, in violation of 18 U.S.C. §§ 2244(a)(5), 2246, and 1153.

On December 21, 2016, Headley entered into a plea agreement with the government, pursuant to which he agreed to plead guilty to Count IV and a second count of abusive sexual contact as a lesser-included offense of Count I. The government, for its part, agreed to dismiss the remaining two counts of the indictment. The parties agreed that the appropriate sentence was 180 months' imprisonment. And both parties agreed to waive their right to appeal the judgment, conviction, and sentence.

On January 3, 2017, the district court conducted a change-of-plea hearing. During that hearing, the district court questioned Headley and confirmed that his decision to plead guilty was knowing and voluntary. At Headley's request, his defense counsel read into the record portions of the prosecutor's statement describing the conduct underlying the two offenses to which Headley had agreed to plead guilty. The district court then confirmed with Headley that he endorsed the facts read into the record by defense counsel.

On March 24, 2017, the district court held a sentencing hearing. When Headley stated during the hearing that he had not seen the presentence investigation report (PSR), the district court declared a recess to allow Headley to review the PSR with his defense counsel. Following the recess, Headley stated on the record that he had reviewed the PSR and did not have any questions regarding it. At that point, the district court accepted the plea agreement and sentenced Headley to 180 months in prison, to be followed by a lifetime of supervised release.

Headley filed a timely notice of appeal, but subsequently dismissed his appeal after the government filed a motion to enforce the plea waiver in the plea agreement.

In late 2018, Headley filed a § 2255 motion asserting that his defense counsel had rendered ineffective assistance in nine specific ways, and that his appellate counsel had also rendered ineffective assistance by voluntarily withdrawing Headley's direct appeal. In October 2019, the district court denied Headley's § 2255 motion and declined to issue a COA. Headley filed a notice of appeal and an application for COA with this court. In March 2020, this court issued an order denying Headley's application for COA. *Headley v. United States*, 804 F. App'x 973 (10th Cir. 2020).

Headley then sought authorization from this court to file a second or successive § 2255 motion. *United States v. Headley*, No. 22-8060, 2022 WL 17820568 at *1 (10th Cir. Dec. 20, 2022). Headley argued in support, in relevant part, "that he pleaded guilty to a lesser included offense that was not included in the indictment." *Id*. (internal quotation marks omitted). This court denied Headley leave to file a second or successive § 2255 motion, noting that his "proposed claim d[id] not rely on newly discovered

evidence or a new rule of law, as required under § 2255(h)." *Id*. (internal quotation marks omitted).

"Undeterred, [Headley] then returned to the district court where he filed a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)," arguing that "his conviction for a charge not made in the indictment by a grand jury (presumably in violation of the Fifth Amendment's grand jury guarantee) constitute[d] an extraordinary and compelling reason for compassionate release." *Id*. The district court denied the motion and Headley appealed. This court dismissed the appeal as moot, concluding that "[t]he district court did not abuse its discretion when it held a sentence reduction was not available to [Headley] under the legal theory of relief he advanced in his § 3582(c)(1)(A) motion." *Id*. at *2. This court noted in support that "[n]othing in § 3582(c) permit[ted] [Headley] to make an end run around a direct appeal or § 2255 motion by raising a challenge to the constitutionality of his plea, conviction, and/or sentence in a motion for compassionate relief under § 3582(c)(1)(A)." *Id*.

On June 12, 2023, Headley, still undeterred, filed in the district court a Rule 60(b)(1) and (b)(6) motion asking the district court to "set[] aside it's [sic] judgment to deny his previously filed § 2255 motion." ROA, Vol. 1 at 126. Headley asserted in his motion that he "recently learned of the controlling precedent that prove[d] he pleaded guilty to a charge that was not made in the indictment," thereby rendering him "actually and factually innocent." *Id*. The "controlling precedent" cited by Headley was this court's decision in *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998). ROA, Vol. 1 at 126, 130. In *Castillo*, this court concluded that "the crime of abusive sexual contact is

not a lesser included offense of the crime of sexual abuse." 140 F.3d at 886. Headley argued that, in light of *Castillo*, "[t]he lesser included offense of Count One in the plea agreement was not made in the indictment under Count One as originally charged." ROA, Vol. 1 at 130. Headley argued that "this [wa]s a substantial denial of a Constitutional right, namely, the Due Process Clause under the Fifth Amendment." *Id*. Headley in turn argued that "the district court erred in it's [sic] order denying [Headley's] § 2255 motion, because contrary to it's [sic] ruling, his guilty plea was unknowing and involuntary . . . with respect to the lesser included offense of Count One at his change of plea hearing." *Id*. at 131.

On June 28, 2023, the district court issued an order denying Headley's Rule 60 motion as untimely. After recounting Headley's arguments, the district court concluded that Headley was arguing that the court "erroneously applied controlling law when it denied his § 2255 motion." *Id*. at 149. The district court thus concluded, citing *Kemp v. United States*, 142 S. Ct. 1856 (2022), that Headley's motion fell solely within the scope of Rule 60(b)(1) because the term "mistake," as employed in Rule 60(b)(1), "'includes legal errors made by judges.'" ROA, Vol. 1 at 150 (quoting *Kemp*, 142 S. Ct. at 1862). In other words, the district court concluded that "[i]n seeking relief under Rule 60(b) while contending th[e] Court committed an error of law, . . . Headley's contention [wa]s governed by Rule 60(b)(1) and not Rule 60(b)(6)." *Id*. The district court in turn concluded that because "Rule 60(b)(1) applie[d] to . . . Headley's request for relief, so d[id] the one-year time limit for Rule 60(b)(1) motions." *Id*. at 150–51. That is, "even assuming the accuracy of . . . Headley's current legal argument for purposes of th[e]

motion," the district court concluded that "his request for relief under Rule 60(b)(1) based on 'mistake' [wa]s untimely and barred under Rule 60(c)(1)." *Id*. at 151. Lastly, the district court rejected Headley's request for equitable tolling and concluded that Headley "ha[d] not shown any extraordinary circumstances that hindered or prevented him from filing this Rule 60 Motion in a timely manner." *Id*. More specifically, the district court concluded that even if Headley first learned of the decision in *Castillo* in May 2022, that "was well more than a year after" the district court "denied his § 2255 motion" and "more than a year before he filed [his] Rule 60 Motion." *Id*. at 152. In addition, the district court concluded that Headley's "after-the-fact assertions of innocence [we]re unconvincing and not well received." *Id*.

On July 17, 2023, Headley filed a notice of appeal. On July 19, 2023, this court issued an order directing a limited remand to the district court to consider whether to issue a COA for this appeal. On July 20, 2023, the district court issued an order denying Headley a COA.

Headley has since filed in this court a combined opening brief and application for COA.

II

A COA is required to appeal from "the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B). An order denying a Rule 60(b) motion in a § 2255 proceeding is considered a final order for purposes of § 2253(c)(1)(B). *See Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006). A COA "may issue under [§ 2253(c)(1)(B)] only if the applicant has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2). To make that showing, the applicant must demonstrate that "reasonable jurists could debate whether" the motion "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

Federal Rule of Civil Procedure 60(b) authorizes a district court, "[o]n motion and just terms," to "relieve a party or its legal representative from a final judgment, order, or proceeding for" certain specified reasons. Fed. R. Civ. P. 60(b). Included among those reasons are "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Rule 60(b) also includes a catch-all provision that refers to "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). We have held that "Rule 60(b)'s categories are mutually exclusive" and that, to obtain relief under Rule 60(b)(6), a party must make an argument not encompassed by the other, more specific provisions of Rule 60(b). *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1293 (10th Cir. 2005).

Here, the district court concluded that the arguments asserted by Headley in his motion fell within the scope of Rule 60(b)(1) and that, consequently, Rule 60(b)(6)'s catch-all provision did not apply. After reviewing the record in this case, we conclude that reasonable jurists could not disagree with this conclusion.

Rule 60(c)(1) provides that "[a] motion under Rule 60(b) must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Rule 60(c)(1) further provides that for a motion filed under Rule 60(b)(1), the motion "must be made . . . no more than a year after the entry of the judgment or order or the date of the proceeding" from which relief is

sought. *Id*. We have held that this one-year period represents "the outside limit for seeking relief" under Rule 60(b)(1). *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1177 (10th Cir. 2005).

The district court in this case concluded, and it is essentially undisputed, that Headley's motion was filed well outside of the one-year limitations period outlined in Rule 60(c)(1). Specifically, Headley filed his Rule 60(b) motion on June 12, 2023, which was more than three-and-a-half years after the district court denied his original § 2255 motion. Given these facts, reasonable jurists could not disagree with the district court's conclusion that Headley's Rule 60(b) motion was untimely.[1]

III

Because Headley has failed to establish his entitlement to a COA, we DENY his application for a COA and dismiss this matter.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

[1] Although the district court entertained and rejected Headley's request for equitable tolling, the one-year period under Rule 60(c)(1) is not subject to equitable tolling. *See United States v. Williams*, 56 F.4th 366, 372–73 (4th Cir. 2023) (citing cases).