FILED
United States Court of Appeals
Tenth Circuit

August 31, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD CLARK,

Defendant - Appellant.

No. 17-5013
(D.C. Nos. 4:14-CV-00565-JHP-PJC
& 4:09-CR-00013-JHP-2)
(N.D. Okla.)

ORDER[*]

Before **HARTZ**, **HOLMES**, and **BACHARACH**, Circuit Judges.

In this appeal, pro se[1] Defendant-Appellant Richard Clark, a federal prisoner, seeks a certificate of appealability ("COA") in order to challenge the

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Mr. Clark appears in these proceedings without counsel, we construe his pleadings liberally, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), but stop short of acting as his advocate, *see United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

district court's denial of his Motion for Relief from orders dated May 11, 2015 and October 6, 2015, and the judgment dated May 11, 2015.

Exercising jurisdiction under 28 U.S.C. § 1291, we conclude, however, that the COA rubric is inapplicable because Mr. Clark's motion is not a true Rule 60(b) motion. Instead, for reasons we explicate below, we treat Mr. Clark's COA application as an implied request for authorization to file a successive 28 U.S.C. § 2255 motion and **deny** relief. We further **deny** his request to proceed *in forma pauperis* ("IFP") on appeal, and **remand** the case to the district court with instructions to **vacate** its order denying his purported Rule 60(b) motion on the merits.

I

"In July 2007, approximately eighteen months prior to the commencement of criminal proceedings against Mr. Clark, the government placed a caveat on his residence," *United States v. Clark*, 717 F.3d 790, 797 (10th Cir. 2013), "claim[ing] an interest in and to [Clark's residence] for the reason that the property *may* be subject to forfeiture to the United States." *United States v. Clark*, 650 F. App'x 603, 605 (10th Cir. 2016) (unpublished) (second alteration in original) (quoting the caveat). On January 15, 2009, a federal grand jury returned an indictment charging Mr. Clark with twenty-one separate criminal offenses, including: conspiracy, in violation of 18 U.S.C. § 371; wire fraud, in violation of

18 U.S.C. §§ 1343 and 2(a); securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2(a); and money laundering, in violation of 18 U.S.C. §§ 1957(a) and 2(a).

Following his conviction on fourteen of the twenty-one counts, the district court sentenced Mr. Clark to 151 months' imprisonment, and we affirmed his conviction on direct appeal. *See Clark*, 717 F.3d at 798. In doing so, "we reject[ed] Mr. Clark's constitutional challenges" to "the government's imposition of a caveat on his home." *Id.* at 804. Specifically, we rejected Mr. Clark's assertion that the government's caveat "violated [his] constitutional rights to due process and a fair trial," and rendered him "unable to pay for chosen counsel [or] . . . to secure a loan against his house for the same purpose." *Id.* at 798–99 (first alteration in original).

Subsequently, Mr. Clark moved the district court to vacate, set aside, or correct his sentence under § 2255. Mr. Clark raised two claims: first, "counsel was ineffective in failing to properly advocate to protect Mr. Clark's Fourth, Fifth and Sixth Amendment rights when the government restrained Clark's home [pre-indictment] without notice or a hearing"; and, second, "counsel was ineffective in failing to properly seek a due process hearing to challenge the government's continued restraint of Clark's home [post-indictment] without a probable cause finding by the grand jury that it was forfeitable." *United States v. Clark*, Dist. Ct. No. 4:09-cr-13-JHP, Doc. 513, at 4 (Richard Clark's Mot. to Vacate, Set Aside or

Correct His Sentence, Filed by Person in Federal Custody Pursuant to Title 28 U.S.C. § 2255, filed Sept. 22, 2014) (capitalization omitted).

The district court concluded that Mr. Clark's ineffective-assistance arguments were not viable under the Sixth Amendment. Specifically, the court denied Mr. Clark's motion in its entirety (and declined to issue a COA), reasoning that "[b]ecause the Sixth Amendment right to appointed counsel does not extend to forfeiture matters, there can be no right of effective assistance of counsel in such matters." *Clark*, Doc. 551, at 4 (Order, filed May 11, 2015) (citation omitted). Put another way, the court stated that "the Sixth Amendment . . . afford[ed] [Mr. Clark] no relief" because "the right to the effective assistance of counsel does not extend to interference with property interests." *Id.* at 5. The court deemed "irrelevant whether [Mr. Clark's] counsel" erred "in failing to challenge the alleged restraint [on his residence] because the Sixth Amendment does not guarantee [him] competent representation vis-à-vis his property interests." *Id.* We then denied Mr. Clark a COA, finding that "reasonable jurists could not disagree with the district court's conclusion that Clark had no right to have counsel assist him in disputing the government's placement of a caveat on his residence." *Clark*, 650 F. App'x at 605.

After these developments, Mr. Clark filed a "Motion for Relief [under Rule 60(b)] from the Orders Dated May 11, 2015, October 6, 2015, and the Judgment Dated May 11, 2015"—i.e., the district court's orders and judgment denying Mr.

Clark § 2255 relief and a COA. R. at 82 (Mot., filed Jan. 12, 2017). In that submission, Mr. Clark argued that he "raised **TWO**" claims of ineffective assistance of counsel:

> The first claim involved Government conduct in failing to provide a pre-indictment notice or a hearing on [the government's] pre-indictment restraint of Clark's home and its equity then available to Clark.
>
> The second claim involved Government conduct upon the Grand Jury indictment not alleging Clark's restrained home's equity as an asset of forfeiture, or substitute asset.

Id. at 84. According to Mr. Clark, the district court addressed only his first ineffective-assistance claim, *not* his second claim. The district court denied Mr. Clark's motion, without explanation, on January 13, 2017,[2] and Mr. Clark's request for a COA followed.

II

The nature of our consideration of Mr. Clark's "Motion for Relief" under Rule 60(b) depends on whether this filing constitutes a "true" Rule 60(b) motion or a veiled successive § 2255 motion. *See Spitznas v. Boone*, 464 F.3d 1213, 1215–16 (10th Cir. 2006) (distinguishing between "a second or successive habeas" application and "a 'true' [Rule] 60(b) motion").[3]

[2] The lack of reasoning ultimately has no impact on our disposition, because the district court lacked jurisdiction to entertain Mr. Clark's motion.

[3] Though *Spitznas* involved a state prisoner seeking habeas relief under 28 U.S.C. § 2254, its teachings regarding how to distinguish between second-or-successive filings and true Rule 60(b) motions are equally applicable in the § 2255 context. *See Spitznas*, 464 F.3d at 1216 ("We begin with steps to be

A Rule 60(b) motion counts as "a second or successive [§ 2255 motion] if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Id.* at 1215. Put differently, the motion constitutes "a second-or-successive [§ 2255 motion] if the success of the motion depends on a determination that the court had incorrectly ruled on the merits in the [§ 2255] proceeding." *In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012). A "true" Rule 60(b) motion, by contrast, "(1) challenges only a procedural ruling of the [§ 2255] court which precluded a merits determination of the [§ 2255 motion]; or (2) challenges a defect in the integrity of the federal [§ 2255] proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior [§ 2255 motion]." *Spitznas*, 464 F.3d at 1215–16 (citation omitted).

Accordingly, "we look at the relief sought, rather than a pleading's title or its form, to determine whether [the pleading amounts to] a second-or-successive collateral attack on a defendant's conviction." *United States v. Baker*, 718 F.3d 1204, 1208 (10th Cir. 2013); *accord United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (explaining that "the relief sought," rather than the title of the

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followed by district courts in this circuit when they are presented with a Rule 60(b) motion in a habeas *or* § 2255 case. The district court should first determine, using the criteria we have outlined above, whether the motion is a true Rule 60(b) motion or a second or successive petition." (emphasis added)); *see United States v. Nelson*, 465 F.3d 1145, 1147 (10th Cir. 2006) (noting that "the same mode of analysis applies" to § 2254 and § 2255, when addressing the "interplay" between either of these statutes and Rule 60(b)).

motion, ultimately controls whether a pleading amounts to a § 2255 motion). When a district court appropriately characterizes a motion as a "true" Rule 60(b) motion and denies relief, we require the prisoner to obtain a COA before proceeding with his appeal. *See Spitznas*, 464 F.3d at 1217–19. "If, on the other hand, the district court . . . incorrectly treated a second or successive [§ 2255 motion] as a true Rule 60(b) motion and denied it on the merits, we will vacate the district court's order for lack of jurisdiction and construe the [prisoner's] appeal as an application to file a second or successive [§ 2255 motion]." *Id.* at 1219.

III

A

The district court summarily denied (not dismissed) Mr. Clark's Rule 60(b) motion. Urging the issuance of a COA, Mr. Clark describes his motion as a "'true' 60(b)," and submits that the district court erroneously "addressed only **ONE** of the **TWO** grounds or issues in [his] § 2255 criminal motion." Aplt.'s Opening Br. at 22. Specifically, Mr. Clark contends that the district court only reached his first purported ground for relief, and not the second. He arrives at this conclusion because, in his view, only the first ground implicated rights against civil forfeiture, which the district court determined the Sixth Amendment assistance-of-counsel right did not protect.

In this regard, Mr. Clark explains:

> Clark's pre-indictment ground or issue properly may also be characterized as a civil forfeiture matter. The **SECOND** ground or issue is properly characterized as a post-indictment ineffective assistance of counsel claim . . . . This post-indictment ground or issue is *not* a civil forfeiture matter and involves the loss of liberty issues. . . . [U]pon indictment, there is no civil forfeiture matter to be raised or discussed. . . . [T]he district court was addressing, at best, the pre-indictment Sixth Amendment counsel ground or issue, and not the post-indictment ground or issue where forfeiture was not at issue where the Grand Jury did not find probable cause that Clark's home was forfeitable.

Id. at 12–13 (second emphases added) (citations omitted). Under the rubric of *Spitznas*, however, we conclude that Mr. Clark's motion must be treated as a successive § 2255 motion.

Mr. Clark's motion purports to raise a defect in the integrity of the federal § 2255 proceeding because it alleges that the district court ignored one of the two issues that he presented in his § 2255 motion. *See Spitznas*, 464 F.3d at 1215–16. However, it is clear to us that Mr. Clark's claim of error is "inextricably [linked] to a merits-based attack on the disposition of a prior [§ 2255 motion]." *In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009) (quoting *Spitznas*, 464 F.3d at 1216). As such, his motion is a successive § 2255 motion.

More specifically, Mr. Clark's claim of error is inextricably linked to his merits contention that the district court erred in concluding that his entire § 2255 motion was fatally infirm "[b]ecause the Sixth Amendment right to appointed counsel does not extend to forfeiture matters," and "does not guarantee [him] competent representation vis-à-vis his property interests." *Clark*, Doc. 551, at

4–5. Mr. Clark supports his contention that the district court overlooked his second ground by pointing to forfeiture-related legal analysis in the court's order that he contends would not have been applicable in resolving his second ground, because "no civil forfeiture [was] at issue once the Grand Jury's indictment was returned," and that this second ground "impacts directly upon Clark's liberty." Aplt.'s Opening Br. at 13–14.

Thus, by the logic of Mr. Clark's own argument, in order to determine whether the district court overlooked his second ground, we would have to assess the merits of his contention that the court's Sixth Amendment analysis adjudicating his § 2255 motion did not properly relate to that ground. In other words, we would have to wade knee deep into the district court's resolution of the merits of his § 2255 motion. No "true" Rule 60(b) motion would oblige us to do that. Accordingly, we must deem his motion a successive motion under § 2255. *See Nelson*, 465 F.3d at 1148–49 (finding that a similar motion "undoubtedly" amounted to a successive § 2255 motion).

B

Because Mr. Clark's purported Rule 60(b) motion actually constituted (in substance) a successive § 2255 motion, the district court lacked jurisdiction to address it. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) ("A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization."). We

must therefore direct the district court to vacate its order denying the motion. *See Nelson*, 465 F.3d at 1148 (explaining that, "if the prisoner's pleading must be treated as a second or successive § 2255 motion, the district court does not even have jurisdiction to deny the relief sought in the pleading," and vacating a district court's order); *see also United States v. Ailsworth*, 610 F. App'x 782, 785 (10th Cir. 2015) (unpublished) (vacating a district court's denial of a "Rule 60(b)" motion that actually amounted to a successive habeas motion).

We deem Mr. Clark's COA application an implied application for authorization to file a successive § 2255 motion. *Spitznas*, 464 F.3d at 1219 (indicating that where "the district court has incorrectly treated a second or successive petition as a true Rule 60(b) motion and denied it on the merits, we . . . construe the petitioner's appeal as an application to file a second or successive petition."). Viewed as such, we deny authorization. We may entertain a second or successive § 2255 motion *only* if it contains "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). Because Mr. Clark makes no such showing (and does not even advance an argument to that effect), we must deny his implied application for authorization.

C

Finally, because Mr. Clark has not advanced a "reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," *Watkins*

v. Leyba, 543 F.3d 624, 627 (10th Cir. 2008) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997)), we deny Mr. Clark's application to proceed *in forma pauperis*, and remind him of his obligation to pay the filing fees in full.

IV

Based on the foregoing, we deem Mr. Clark's COA application to be an application for authorization to file a successive § 2255 motion and **DENY** him authorization, **DENY** his motion to proceed *in forma pauperis*, and **REMAND** this case to the district court with instructions to **VACATE** the order adjudicating Mr. Clark's purported Rule 60(b) motion.

Entered for the Court

JEROME A. HOLMES
Circuit Judge