FILED
United States Court of Appeals
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KELLY CHAD KIRKWOOD,

Defendant - Appellant.

No. 18-8093
(D.C. Nos. 2:18-CV-00154-ABJ and 2:06-CR-00084-ABJ-13)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

In November 2006, Kelly Kirkwood pled guilty to possessing with intent to distribute methamphetamine, carrying firearms in relation to a drug trafficking crime, using a residence to distribute methamphetamine, being a felon in possession of a firearm, and traveling in interstate commerce to commit a crime of violence. He was sentenced to 360 months' imprisonment and did not appeal.

In September 2018, Mr. Kirkwood filed a 28 U.S.C. § 2255 motion to vacate his sentence on various grounds. The district court dismissed his motion as untimely, and

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Mr. Kirkwood now seeks a certificate of appealability ("COA") to appeal that decision. *See* 28 U.S.C. § 2253(c)(1)(B).

When a habeas motion has been dismissed on procedural grounds, a COA should only issue if the prisoner can show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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). Because both the constitutional and the procedural showings are necessary for a prisoner to receive a COA, we need not reach the constitutional issue if the district court's procedural ruling was correct. *See id.* at 485.

In his response to the government's motion to dismiss below, Mr. Kirkwood asserted that his § 2255 motion was timely because he was claiming "actual innocence." *See McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013) ("[A] prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error."). On appeal, Mr. Kirkwood first asserts that there is no statute of limitations for § 2255 motions and that "the district court violate[d] due process by changing [its] own rules for filing a § 2255 motion." (Appellant's Br. at 6.) Section 2255, however, has had a one-year statute of limitations since 1996. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

As for his actual innocence claim, Mr. Kirkwood states on appeal that it would be "easily proven in an evidentiary hearing" and that the district "court violate[d his] right to due process by not ordering" one. (Appellant's Br. at 5, 12.) "To establish actual

innocence of a crime, one 'must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt' absent a constitutional error." *Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) (alteration in original) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

However, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation [would not be] in itself sufficient" to overcome the one-year statute of limitations. *Schlup*, 513 U.S. at 316; *see also McQuiggin*, 569 U.S. at 394–95 ("The miscarriage of justice exception [to AEDPA's time limitations] applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted the petitioner." (internal quotation marks and brackets omitted)). Although Mr. Kirkwood claims that an evidentiary hearing would reveal his innocence, the evidence that he contends an evidentiary hearing would elicit is not in fact new. As the district court observed, the evidence Mr. Kirkwood identifies as proving his innocence was available to him when he pled guilty in 2006. For instance, Mr. Kirkwood contends that an evidentiary hearing would have revealed that his arrest record shows there was no methamphetamine on his person when he was arrested in early 2006; however, he never suggests, nor does the record indicate, that this arrest record is new evidence that was not available to him at the time of his November 2006 guilty plea.

Thus, the district court correctly concluded that Mr. Kirkwood's § 2255 motion was untimely because it was filed outside the one-year limitations period, and we need not address the merits of his underlying constitutional claims. *See Slack*, 529 U.S. at 485.

Moreover, we are persuaded that the district court did not abuse its discretion in denying Mr. Kirkwood's request for an evidentiary hearing. *See United States v. Flood*, 713 F.3d 1281, 1291–92 (10th Cir. 2013). Accordingly, and for substantially the same reasons as those set forth by the district court, we **DENY** Mr. Kirkwood's request for a certificate of appealability and **DISMISS** his appeal. We additionally **DENY** his motions to proceed *in forma pauperis* and for the appointment of counsel.

Entered for the Court

Monroe G. McKay
Circuit Judge