FILED
United States Court of Appeals
Tenth Circuit

October 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY DAVID TEAGUE,

Defendant - Appellant.

No. 21-2081
(D.C. Nos. 2:21-CV-00582-RB-JFR &
2:21-CR-01133-RB-GBW-1)
(D. N.M.)

ORDER AND JUDGMENT*

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

Anthony David Teague seeks a certificate of appealability (COA) to appeal from the dismissal of what the district court deemed to be a successive 28 U.S.C. § 2255 motion. We conclude Teague's motion was actually a motion seeking relief under Fed. R. Civ. P. 60(b), not a successive § 2255 motion. Accordingly, we grant Teague a COA, vacate the district court's dismissal order, and remand for the district court to consider the merits of his Rule 60(b) motion.

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

In 2003, Teague was convicted of one count of threat to injure a person through interstate commerce in violation of 18 U.S.C. § 875(c). He was sentenced to 21 months' imprisonment. We affirmed his conviction and sentence on direct appeal. *United States v. Teague*, 443 F.3d 1310, 1311 (10th Cir. 2006).

Teague has since filed several § 2255 motions, the first of which was denied in 2007. In October 2020, the district court imposed filing restrictions prohibiting him from filing any new pleadings challenging his sentence, unless (1) he is represented by an attorney, or (2) he files a motion and obtains permission to proceed pro se.

In the matter on which Teague now seeks a COA, he acknowledged the district court's filing restrictions, and, pursuant to those restrictions, filed a Motion for Leave to Proceed Pro Se. In that motion, he sought permission to file a "Motion for Relief from Judgment" under Rule 60(b), a copy of which he attached. Teague insisted his proposed motion was not asserting a successive § 2255 claim, but instead challenging a defect in the integrity of his original § 2255 proceeding under Rule 60(b). *See Spitznas v. Boone*, 464 F.3d 1213, 1215-16 (10th Cir. 2006) (a Rule 60(b) motion "is a 'true' 60(b) motion if it . . . challenges a defect in the integrity of the federal habeas proceeding").

That defect, he contended, consisted of the district court's admitting into evidence an affidavit from Teague's former defense counsel without affording Teague an opportunity to address that evidence. Teague argues this alleged defect violated his due process rights as well as statutes and rules applicable to § 2255 proceedings. R. at 48 (citing 28 U.S.C. § 2246 and Rules Governing 2255 Cases, Rule 7(c)).

Notwithstanding Teague's insistence that his motion was a "true" Rule 60(b) motion, the district court construed the motion as an unauthorized new § 2255 motion and dismissed it for lack of jurisdiction. Without explicitly ruling on Teague's Motion for Leave to Proceed Pro Se, the court also dismissed Teague's proposed Rule 60(b) motion "for failing to comply with the filing restrictions." R. at 50.

II. Discussion

A. COA Analysis

To appeal from the district court's decision, Teague must obtain a COA. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). Because the district court decided the Rule 60(b) motion on a procedural ground, Teague must show "[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] 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). We conclude Teague has satisfied both prongs of the *Slack* test.

A prisoner may not file a second or successive § 2255 motion unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A); *id.* § 2255(h). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

A Rule 60(b) motion should be treated 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." *Spitznas*, 464 F.3d at 1215. A Rule 60(b) motion may not be treated as a successive § 2255 motion if it "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." *Id.* at 1216.

In Teague's proposed Rule 60(b) motion, he argued that the district court failed to allow him an opportunity to respond to evidence the government had presented by affidavit, in violation of 28 U.S.C. § 2246 and the Rules Governing § 2255 Cases. In his COA application, Teague asserts that his proposed Rule 60(b) motion should not be treated as a second or successive § 2255 motion because it "doesn't even mention his [ineffective assistance of counsel] claims." COA App. at 3. Indeed, Teague's proposed Rule 60(b) motion specifically refrains from specifying how he would have responded to his former trial counsel's affidavit if given the chance, "for fear of treading into successive-motion territory." R. at 48.

We hold that Teague alleged a valid basis for relief under Rule 60(b)—a challenge to the district court's failure to allow Teague an opportunity to respond to the affidavit of his former trial counsel. Reasonable jurists could therefore debate the district court's decision to treat his Rule 60(b) motion as a second or successive § 2255 motion and to dismiss it for lack of jurisdiction.

Regarding the other prong of the *Slack* test, "[w]e will only take a 'quick' look at the federal habeas petition to determine whether [the petitioner] has facially allege[d] the denial of a constitutional right." *Gibson v. Klinger*, 232 F.3d 799, 803

(10th Cir. 2000) (internal quotation marks omitted). When considering a COA application from a procedural ruling involving a Rule 60(b) motion, the source of the constitutional claim is the underlying habeas petition. *See Dulworth v. Jones*, 496 F.3d 1133, 1137-38 (10th Cir. 2007), *abrogated in part by Harbison v. Bell*, 556 U.S. 180 (2009). Teague's Rule 60(b) claim arises from the claims in his underlying § 2255 motion that, among other things, he was incompetent to stand trial, and his counsel was constitutionally ineffective for having failed to (1) further investigate Teague's competency, and (2) pursue a temporary insanity defense. Reasonable jurists could debate whether these § 2255 claims state valid claims for the denial of a constitutional right. Because Teague has satisfied both prongs of the *Slack* test, we grant a COA.

B. District Court's Decision Dismissing the Rule 60(b) Motion

Having granted a COA, we now consider the merits of the district court's decision at issue. *See United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013) (a COA is a jurisdictional prerequisite to appellate review). The district court acknowledged that Teague argued his proposed motion was a true Rule 60(b) motion. The district court, however, disagreed with Teague's characterization, and held that his motion "simply rehashes his arguments 'seeking vindication of a habeas claim by challenging the habeas court's previous [2007] ruling on the merits of that claim.'" R. at 50 (quoting *Spitznas*, 464 F.3d at 1216). The court therefore construed

Teague's Rule 60(b) motion as a second or successive § 2255 motion and dismissed it for lack of jurisdiction.[1]

We conclude the district court erred. Teague's proposed motion asserts a defect in the integrity of the 2007 habeas proceedings—namely, that Teague was not afforded the opportunity to respond to his former trial counsel's affidavit, which had been submitted by the government. He contends the district court's failure to allow him that opportunity violated 28 U.S.C. § 2246 and Rule 7(c) of the Rules Governing § 2255 Cases. Teague's challenge therefore was properly brought in a Rule 60(b) motion and the district court had jurisdiction to consider it on the merits.

III. Conclusion

When a district court improperly characterizes a Rule 60(b) motion as a second or successive petition, we will remand to permit the district court to address the Rule 60(b) motion in the first instance. *Spitznas*, 464 F.3d at 1219. Accordingly, we vacate the district court's dismissal order and remand for the district court to consider the merits of Teague's Rule 60(b) motion. We note that Teague filed a motion to

[1] The district court also dismissed Teague's motion for failing to comply with the filing restrictions, which prohibited Teague from filing any motions unless he is represented by an attorney or he files a motion and obtains permission to proceed pro se. As noted, Teague acknowledged those restrictions and, in an effort to comply with them, filed a motion for leave to proceed pro se, with his Rule 60(b) motion attached only as a "proposed" motion. R. at 46. We are unsure what else Teague should have done to comply. In any event, because the district court actually reviewed Teague's proposed motion and deemed it an unauthorized second or successive § 2255 motion, it would seem the district court implicitly granted Teague's motion to proceed pro se.

proceed on appeal without prepayment of fees and costs, but that he later paid the full filing fee. Accordingly, his motion is denied as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk