FILED
United States Court of Appeals
Tenth Circuit

September 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEVEN G. BARKUS,

Petitioner - Appellant,

v.

JEFFREY H. ROSENLUND, Chief United States Probation Officer, District of Utah,

Respondent - Appellee.

No. 21-4034
(D.C. No. 2:21-CV-00007-DAK)
(D. Utah)

ORDER

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

This matter is before the court on *Appellant's Petition for Rehearing and Rehearing En Banc*. Upon careful consideration, the petition is granted in part as follows.

Pursuant to Fed. R. App. P. 40, Appellant's request for panel rehearing is granted in part to the extent of the modifications in the attached revised order and judgment. The court's July 7, 2021 order and judgment is withdrawn and replaced by the attached revised order and judgment, which shall be filed as of today's date.

The petition and the revised order and judgment were transmitted to all non-recused judges of the court who are in regular active service. As no member of the panel and no other judge in regular active service requested that the court be polled,

Appellant's request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

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ORDER AND JUDGMENT*

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

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Pro se appellant Steven G. Barkus appeals the district court's dismissal of his petition for habeas relief under 28 U.S.C. § 2241.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

I. BACKGROUND

A jury convicted Mr. Barkus in the United States District Court for the Northern District of Ohio of mail fraud, wire fraud, securities fraud, conspiracy to defraud the United States, and tax evasion. The district court sentenced him to 97 months in prison, followed by three years of supervised release. *See United States v. Lombardo*, 582 F. App'x 601, 607 (6th Cir. 2014) (unpublished). The Sixth Circuit affirmed. *See id.* at 604.

Mr. Barkus has been serving his supervised release in Ogden, Utah. He filed a 28 U.S.C. § 2241 habeas petition against the Chief United States Probation Officer in the District of Utah. The petition asserted ineffective assistance of counsel and challenged the validity of his conviction.[3]

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[1] Because Mr. Barkus appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

[2] A federal habeas petitioner is not required to obtain a certificate of appealability to seek review of a district court's denial of a habeas application under § 2241. *See Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

[3] His § 2241 petition stated one ground:

> MY TRIAL LAWYER WAS INEFFECTIVE FOR NOT PRESENTING MATERIAL DEFENSE TESTIMONY & DOCUMENTS I GAVE HIM NOR MY RELIANCE ON THE ZERO-TAX-LIABILITY JUDICIAL DECREE THAT NEGATED INTENT TO DEFRAUD THE U.S. WHICH PROVED MY ACTUAL INNOCENCE WITH WHICH NO

The district court dismissed the petition, holding that (1) Mr. Barkus should have presented his claim to the court where he was convicted in a 28 U.S.C. § 2255 motion, but failed to do so; and (2) even if his § 2255 remedy were inadequate or ineffective, his § 2241 petition was untimely.

II. **DISCUSSION**

In his brief to this court, Mr. Barkus does not contest the district court's determination that he should have challenged his conviction in a § 2255 motion. He argues only that his failure to file a timely § 2241 petition should have been excused because he had alleged "actual innocence." Aplt. Br. at 1-4. He states that he had identified witnesses and provided documents to his counsel, who failed to present them at trial. *Id.* at 2-3.

We affirm based on the district court's first ground for dismissal—that Mr. Barkus should have pursued his ineffective assistance of counsel claim through a § 2255 motion in the federal district court where he was convicted—the Northern District of Ohio.

A § 2255 motion is ordinarily the only means to challenge the validity of a federal conviction following the conclusion of direct appeal. *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011). This motion must be filed "in the district court where sentence was imposed." *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010).

REASONABLE JUROR WOULD HAVE FOUND ME GUILTY BEYOND A REASONABLE DOUBT.

ROA at 8.

But "in rare instances," *id.*, an underlying conviction may be challenged by bringing a § 2241 petition under the "savings clause" in § 2255(e), *Brace*, 634 F.3d at 1169. That clause provides:

> An application for a writ of habeas corpus [(§ 2241)] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [(§ 2255)], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion [(§ 2255)] is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). Thus, a federal prisoner may file a § 2241 petition challenging the validity of his sentence or conviction only if § 2255 is "inadequate or ineffective to test the legality of his detention." *See Abernathy v. Wandes*, 713 F.3d 538, 547 (10th Cir. 2013) (quotations omitted).[4] The § 2241 petition must be brought "in the district where the prisoner is confined." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

In his brief to this court, Mr. Barkus provides no reason why he could not have brought a § 2255 action in the Northern District of Ohio raising the arguments he has

[4] A § 2241 petition typically attacks the execution, rather than the validity, of a prisoner's sentence. *See Hale v. Fox*, 829 F.3d 1162, 1165 n.2 (10th Cir. 2016); *Brace*, 634 F.3d at 1169; *Cleaver v. Maye*, 773 F.3d 230, 232 (10th Cir. 2014) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)). If, for instance, a prisoner seeks to challenge certain "matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . affecting the fact or duration of the [prisoner's] custody," that claim must be raised in a § 2241 petition. *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997). Mr. Barkus's case does not implicate this aspect of § 2241.

attempted to present in his § 2241 petition.[5] He thus has waived any argument that § 2255 was "inadequate or ineffective" to present his ineffective assistance of counsel claim or any other claim.[6] The district court properly dismissed his § 2241 petition.

[5] Nor could he argue that § 2255 was "inadequate or ineffective" given that he was aware of the evidence before trial and could have relied on it for an ineffective assistance of counsel claim in a § 2255 motion. The district court therefore appropriately dismissed for lack of jurisdiction: "[W]hen a federal petitioner fails to establish that he has satisfied § 2255(e)'s savings clause test—thus, precluding him from proceeding under § 2241—the court lacks statutory jurisdiction to hear his habeas claims." *Abernathy*, 713 F.3d at 557 (footnote omitted).

[6] Although Mr. Barkus's § 2241 petition claimed his counsel was "INEFFECTIVE" for failure to present "TESTIMONY & DOCUMENTS" that "PROVED" his "ACTUAL INNOCENCE," ROA at 8, his brief on appeal refers simply to his "actual innocence claim." Aplt. Br. at 1. Regardless, he has not even attempted to show why a § 2255 motion in the Northern District of Ohio would have been "inadequate or ineffective" under § 2255(e). Also, as we recently said:

> The Supreme Court has repeatedly sanctioned gateway actual innocence claims, but the Court has never recognized freestanding actual innocence claims as a basis for federal habeas relief. To the contrary, the Court has repeatedly rejected such claims, noting instead that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceedings." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). In rejecting such claims, the Court has observed that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401.

Farrar v. Raemisch, 924 F.3d 1126, 1131 (10th Cir. 2019) (footnote omitted).

III. **CONCLUSION**

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge