

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 2, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LYNN CASH,

Defendant - Appellant.

No. 21-7033
(D.C. Nos. 6:19-CV-00126-RAW &
6:11-CR-00057-RAW-1)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Michael Lynn Cash, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court’s order dismissing his 28 U.S.C. § 2255 motion because it was an unauthorized second or successive § 2255 motion. We deny a COA.

I. Background

In 2012, Mr. Cash was convicted of possession with intent to distribute methamphetamine (Count 1), possession of a firearm in furtherance of a drug trafficking crime (Count 2), and being a felon in possession of a firearm (Count 3). The probation office recommended a sentence of 360 months’ imprisonment. The district court,

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

however, sentenced Mr. Cash to 420 months in prison as follows: 240 months on Count 1 and 360 months on Count 3, to run concurrently; and 60 months on Count 2, to run consecutively to the terms imposed on Counts 1 and 3. Mr. Cash did not object to his sentence and did not raise any sentencing challenges on direct appeal; he only challenged his convictions. We affirmed the district court's judgment.

In 2015, Mr. Cash filed a § 2255 motion, asserting that he received ineffective assistance from his trial counsel and that the district court erred when it enhanced his sentence on Count 3 pursuant to the Armed Career Criminal Act (ACCA) because his predicate convictions did not support that enhancement. In response, the government agreed that Mr. Cash did not meet the requirements for an ACCA enhancement and that the district court should not have imposed a 360-month sentence on Count 3. But the government argued that the district court should have sentenced him to a total of 360 months' imprisonment because he was eligible for a career offender enhancement on Count 2 under the Sentencing Guidelines.

The district court granted in part and denied in part the § 2255 motion. The district court agreed with the parties that Mr. Cash was not eligible for the ACCA enhancement on Count 3 because he did not have three prior qualifying convictions. The court noted that it had only cited to the Sentencing Guidelines in finding Mr. Cash eligible for a sentencing enhancement and the court concluded that it should have imposed a 360-month sentence. It therefore directed that the judgment be amended to impose a 360-month sentence as follows: 240 months on Count 1 (no change from initial judgment) and 120 months on Count 3 (decreased from initial judgment) to run

concurrently; and 120 months on Count 2 (increased from initial judgment), to run consecutively to the terms imposed on Counts 1 and 3. The district court denied the remainder of the § 2255 motion and Mr. Cash appealed.

We granted a COA to address whether the district court’s amended judgment was a resentencing requiring the court to consider recent case law or was a correction of a technical error. We held that “[t]he effect of the district court’s amended judgment was essentially a judgment nunc pro tunc to correct a technical error, and not a full-blown resentencing,” and we affirmed the district court’s ruling on the § 2255 motion. *United States v. Cash*, 727 F. App’x 542, 546-47 (10th Cir. 2018). We explained:

[T]he district court recognized upon review of the sentencing transcript that it had intended to impose a 360-month term of imprisonment based on Cash’s classification as a career offender under the Sentencing Guidelines. To reflect its intended sentence, the district court applied the career offender enhancement to Count 2, and simultaneously reduced Cash’s sentence on Count 3.

Id. at 546.¹

In 2019, Mr. Cash filed another § 2255 motion. He argued that (1) he was entitled to a resentencing like other defendants who successfully had their ACCA enhancements removed; (2) removing the ACCA enhancement and adding a career offender enhancement under the Sentencing Guidelines involved a substantive and significant modification; and (3) counsel was ineffective for failing to make the correct argument in seeking a COA to appeal the denial of his first § 2255. Although he recognized that he

¹ We declined to grant a COA on Mr. Cash’s claim that he received ineffective assistance of counsel.

was filing a “second in time” § 2255 motion, Supp. R. at 43, he asserted that his motion was not second or successive under *Magwood v. Patterson*, 561 U.S. 320 (2010), because the district court “changed [his] sentence and entered an amended judgment following a partially successful §2255 motion,” Supp. R. at 44. In *Magwood*, the Supreme Court held that “where . . . there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not ‘second or successive’ at all.” *Magwood*, 561 U.S. at 341-42 (citation and internal quotation marks omitted).

The district court concluded, however, that the amended judgment did not constitute a new judgment for purposes of *Magwood*. Because Mr. Cash filed a second § 2255 motion without authorization from this court, the district court dismissed it for lack of jurisdiction. He now seeks a COA to appeal from that procedural ruling.

II. Discussion

To appeal the district court’s dismissal of his § 2255 motion as second or successive and unauthorized, Mr. Cash must obtain a COA. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant must show both “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). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court’s resolution of the procedural one. *Id.* at 485.

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. § 2255(h); *id.* § 2244(b)(3)(A). 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).

In Mr. Cash’s appeal from the denial of his first § 2255, we determined that the district court’s amended judgment was intended to correct a technical error and did not constitute a resentencing. In our decision in *In re Martin*, 398 F. App’x 326, 327 (10th Cir. 2010), we distinguished the circumstances in *Magwood*—where “the state trial court held new sentencing proceedings and then entered a new judgment at the conclusion of those proceedings”—from the case at bar where “there were no new proceedings resulting in a new judgment” and “the amended judgment merely corrected a clerical error.” Relying on our decision in Mr. Cash’s earlier appeal and our decision in *Martin*, the district court concluded that the amended judgment did not constitute a new judgment under *Magwood* because there were no new proceedings and the amended judgment was only a technical correction. Because Mr. Cash had not received authorization to file a second or successive § 2255 motion, the district court dismissed his second § 2255 motion for lack of jurisdiction.

In his COA brief, Mr. Cash argues that the amended judgment did not correct clerical or technical errors, although he concedes that this court found to the contrary in his earlier appeal. He asserts that this court relied on a “mistaken belief” about the sentencing proceedings, this error significantly prejudiced him, and prior counsel was

ineffective for failing to properly present the case. Appt. COA Br. at 9. He continues to assert that the modifications that were made to his sentence created a new judgment and therefore the district court has jurisdiction to entertain his second-in-time § 2255 motion because it is his first collateral attack on his new judgment.

Mr. Cash sought rehearing of our decision on his earlier appeal, but we denied his motion. He did not file a petition for a writ of certiorari with the Supreme Court. But he now suggests that we should disregard our prior decision because it was “based on misinformation and ineffective assistance of counsel.” *Id.* at 6. He cites no authority that would permit us to do so. He also suggests in the alternative that “if this Court finds that it cannot revisit the prior decision that the modifications addressed clerical errors, Mr. Cash argues that those types of errors require resentencing nonetheless.” *Id.* Mr. Cash has not provided any authority that would permit him to raise a claim of sentencing error in a second § 2255 motion without first receiving authorization from this court.

III. Conclusion

Mr. Cash has failed to show that reasonable jurists would debate the correctness of the district court’s procedural ruling to dismiss his second § 2255 motion for lack of jurisdiction as an unauthorized second or successive § 2255 motion. Accordingly, we deny a COA and dismiss this matter.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk