FILED
United States Court of Appeals
Tenth Circuit

April 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DERRICK JOHNSON,

Petitioner - Appellant,

v.

WARDEN OF FLORENCE - FCI,

Respondent - Appellee.

No. 23-1043
(D.C. No. 1:22-CV-01825-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

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

Derrick Johnson, a federal prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241.[1] Exercising

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

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

jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

I. BACKGROUND

In 2018, a jury convicted Mr. Johnson of bank robbery. He was sentenced to 132 months in prison. The Fifth Circuit affirmed the conviction and sentence on direct appeal. *See United States v. Johnson*, 822 F. App'x 258, 263 (5th Cir. 2020) (unpublished).

Mr. Johnson is incarcerated at Florence Federal Correctional Institution in Florence, Colorado. On June 22, 2022, he filed a petition under 28 U.S.C. § 2241 in the United States District Court for the District of Colorado seeking to challenge the validity of his sentence. A magistrate judge found that Mr. Johnson failed to demonstrate that relief under 28 U.S.C. § 2255 was "inadequate or ineffective" and ordered him to show cause why the petition should not be dismissed for lack of jurisdiction. ROA at 38-39.

In response, Mr. Johnson argued that jurisdiction was proper because 28 U.S.C. § 2241(c)(3) is "clear and unambiguous" that habeas petitions under § 2241 are "a vehicle to provide relief to a prisoner who is [] 'in custody in violation of the Constitution or laws [or treaties] of the United States.' Period." ROA at 42 (quoting 28 U.S.C. § 2241(c)(3)). He also argued that foreclosing habeas relief was a "violation of the Constitution's Suspension Clause." *Id.* at 41.

[2] Because Mr. Johnson is proceeding pro se, we construe his filings liberally, but do not serve as his advocate. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *James v. Wadas,* 724 F.3d 1312, 1315 (10th Cir. 2013).

The magistrate judge recommended that Mr. Johnson's petition be denied for lack of jurisdiction. The district court approved the recommendation and dismissed the petition. Mr. Johnson appealed.

II. DISCUSSION

"We review the district court's dismissal of a § 2241 habeas petition de novo." *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011) (quoting *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010)).

Under the 28 U.S.C. § 2255(e)—the "savings clause"—a federal prisoner may file a § 2241 petition to challenge the validity of a sentence or conviction only if "the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the movant's] detention." As we said in *Prost v. Anderson*, 636 F.3d 578, 586 (10th Cir. 2011), the question is "whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion." *Id.* at 584. Only in "extremely limited circumstances" will § 2255 be considered inadequate or ineffective. *Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999). The petitioner bears the burden of showing that the opportunity to seek a remedy under § 2255 is inadequate or ineffective. *Brace*, 634 F.3d at 1169. If a petitioner cannot make such a showing, "the court lacks statutory jurisdiction to hear his habeas claims." *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013).

Mr. Johnson has not shown that a motion under § 2255 is inadequate or ineffective for him to challenge his conviction or sentence. The district court therefore did not err in

dismissing his petition for lack of jurisdiction. His arguments on appeal to the contrary are unavailing.

First, Mr. Johnson argues that the Supreme Court's decision in *Nance v. Ward*, 142 S. Ct. 2214 (2022), "seemingly invalidate[s]" our decision in *Prost* and mandates that § 2241 be an available remedy. Aplt. Br. at 6. In *Nance*, a death penalty case, the Court considered whether a "method-of-execution claim" by a state death row inmate "can go forward under 42 U.S.C. § 1983, rather than in habeas, when the alternative [execution] method proposed is already authorized under state law." 142 S. Ct. at 2219. The Court held that such claims could be raised under § 1983. *Id*. *Nance* is inapposite. Mr. Johnson's challenge is to the substantive validity of his sentence, *see* ROA at 52, which must be brought under § 2255 unless the savings clause applies. *See Prost*, 636 F.3d at 581 ("[A] federal prisoner's attempt to attack the legality of his conviction or sentence generally must be brought under § 2255.").

Second, Mr. Johnson argues there is no "legal proof that § 2255 Congressionally displaces 2241." Aplt. Br. at 6. But the statute speaks for itself—§ 2255(e) provides that he must challenge his sentence under § 2255 unless a motion under that statute is "inadequate or ineffective."

Finally, Mr. Johnson argues that the district court's dismissal of his § 2241 petition violated the Suspension Clause of the United States Constitution. Aplt. Br. at 1. But "[i]t is well-established that the Suspension Clause does not prohibit the 'substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention.'" *Abernathy*, 713 F.3d at 555 (emphasis omitted) (quoting *Swain v.*

Pressley, 430 U.S. 372, 381 (1977)). Here, § 2255 is the relevant substitute and, again, Mr. Johnson has made no showing that it is inadequate or ineffective.

III. **CONCLUSION**

We affirm the judgment of the district court and deny Mr. Johnson's motion for leave to proceed *in forma pauperis*. *See DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991) (noting that an appellant seeking leave to proceed *in forma pauperis* must show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal").

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge