[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-12940
Non-Argument Calendar

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D.C. Docket No. 2:17-cv-00172-RWS

GRADY LEE MOTES,

Petitioner-Appellant,

versus

SHERIFF GERALD COUCH,

Respondent-Appellee.

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Appeal from the United States District Court
for the Northern District of Georgia

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(March 14, 2019)

Before MARCUS, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Grady Lee Motes, a Missouri prisoner, appeals the district court's denial of his pro se Federal Rules of Civil Procedure 60(b)(2) motion to set aside the final judgment entered previously in his habeas corpus proceedings under 28 U.S.C. §

2254. On appeal, Motes, still pro se, argues that: (1) a time-bar in his underlying habeas petition is inapplicable because his petition was based on federal question and diversity jurisdiction; (2) the district court incorrectly construed his post-judgment motion to compel as a Rule 60(b)(2) motion, instead asserting that relief was possible under Rule 60(b)(6); and (3) his underlying state court conviction was invalid. After thorough review, we affirm in part and dismiss in part.

We have an obligation to satisfy ourselves of our own jurisdiction and may raise the issue sua sponte. AT&T Mobility, LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 494 F.3d 1356, 1360 (11th Cir. 2007). We review jurisdictional issues de novo. Id.

A district court's denial of a motion to vacate under Rule 60(b) is reviewed only for abuse of discretion. Cano v. Baker, 435 F.3d 1337, 1342 (11th Cir. 2006). Review is narrow and the appellant's burden on appeal is heavy. Id. It is not enough that a grant of the Rule 60(b) motion might have been permissible or warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to abuse of discretion. Id. To demonstrate that the district court abused its discretion in denying a Rule 60(b) motion, a movant must provide a justification so compelling that the district court was required to vacate its order. Id.

In an appeal from the grant or denial of a Rule 60(b) motion, or a motion construed as a Rule 60(b) motion, the appeal is limited to a determination of whether

the district court abused its discretion in granting or denying the motion, and it does not extend to the validity of the underlying judgment. See Am. Bankers Ins. Co. of Fla v. Nw. Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999). Indeed, an appeal from the denial of a Rule 60(b) motion does not bring up the underlying judgment for review where the appeal is untimely as to the underlying judgment. Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 263 n.7 (1978). The timely filing of a notice of appeal is mandatory and jurisdictional. Advanced Estimating Sys. v. Riney, 77 F.3d 1322, 1323 (11th Cir. 1996). While a party generally has one year to file a motion pursuant to Rule 60(b)(2), a Rule 60(b)(2) motion does not toll the time for filing a notice of appeal unless it is filed within 28 days of the judgment being appealed. Fed. R. Civ. P. 4(a)(4)(A)(vi), 60(c)(1).

Rule 60(b) allows a district court to relieve a party from a final judgment for multiple reasons, several of which are expressly enumerated in Rule 60(b)(1)–(5). Fed. R. Civ. P. 60(b). Included in these expressly enumerated reasons is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). A Rule 60(b)(2) motion is an extraordinary motion and the requirements of the rule must be strictly met. Waddell v. Hendry Cnty. Sheriff's Office, 329 F.3d 1300, 1309 (11th Cir. 2003). To prevail under Rule 60(b)(2), the moving party must show (1) that the evidence was newly discovered since the trial, (2) due diligence on the part of the

movant to discover the new evidence, (3) that the evidence is not merely cumulative or impeaching, (4) that the evidence is material, and (5) that the evidence is such that a new trial would probably produce a new result. Id. Evidence that would not produce a new result does not meet the above requirements. Willard v. Fairfield S. Co., 472 F.3d 817, 824 (11th Cir. 2006).

Rule 60(b)(6), in turn, allows the district court to grant relief for "any other reason" in addition to those expressly listed in subsections (1) through (5). Fed. R. Civ. P. 60(b)(6). Rule 60(b) empowers the district court to vacate judgments whenever appropriate to accomplish justice. Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). The desirability for order and predictability in the judicial process speaks for caution in the reopening of judgments. Id. A habeas petitioner seeking relief under Rule 60(b)(6) must prove "extraordinary circumstances" justifying the reopening of a final judgment. Howell v. Sec'y, Dep't of Corr., 730 F.3d 1257, 1260 (11th Cir. 2013). In other words, a Rule 60(b)(6) movant must persuade the court that the circumstances are sufficiently extraordinary to warrant relief. Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1317 (11th Cir. 2000). Even if this showing is made, "whether to grant the requested relief is . . . a matter for the district court's sound discretion." Id. (quotations omitted). The Supreme Court has also indicated that these "extraordinary circumstances" will "rarely occur

in the habeas context," and that appellate review is "limited and deferential." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

We've also held that relief under Rule 60(b)(6) is inappropriate where the case falls into one of the other categories listed in subsections (1)–(5) of Rule 60(b). United States v. Real Prop. & Residence Located at Route 1, Box 111, Firetower Rd., Semmes, Mobile Cty., Ala., 920 F.2d 788, 791 (11th Cir. 1991) ("Firetower Rd."). In Firetower Rd., we specifically held that the district court erred in relying on Rule 60(b)(6) in granting post-judgment relief because the case fit within Rule 60(b)(1)'s mistake, inadvertence, or neglect umbrella. Id.; see also Solaroll Shade & Shutter v. Bio–Energy Sys., 803 F.2d 1130, 1133 (11th Cir. 1986) ("[We] consistently ha[ve] held that [Rules] 60(b)(1) and (b)(6) are mutually exclusive.").

In this case, we lack jurisdiction to review any of Motes's claims concerning the dismissal of his § 2254 petition in 2017. Motes filed his Rule 60(b)(2) motion approximately nine months after the district court denied his habeas petition -- well outside the 28-day window for tolling the time to appeal -- so our review is limited to the denial of his Rule 60(b)(2) motion and does not extend to the underlying proceedings. See Fed. R. Civ. P. 4(A)(vi), 60(c)(1); Am. Bankers Ins. Co. of Fla., 198 F.3d at 1338. As a result, we lack jurisdiction to consider his challenges to the underlying habeas proceeding and his original conviction.

We do have jurisdiction over the district court's 2018 denial of relief under Rule 60(b)(2). However, the district court did not abuse its discretion in this ruling. For starters, the district court properly construed Motes's motion as falling under Rule 60(b)(2), because -- while his arguments in his motion were unclear -- he explicitly alleged that he possessed new evidence in support of his claims. Notably, our case law provides that relief under Rule 60(b)(6) is inappropriate where the motion fits into one of the grounds listed in subsections (1)–(5). Firetower Rd., 920 F.2d at 791; Solaroll Shade & Shutter, 803 F.2d at 1133. Thus, the district court properly construed Motes's motion as falling under Rule 60(b)(2).

Moreover, the district court did not abuse its discretion in denying relief under Rule 60(b)(2). As the record reveals, Motes did not allege any new evidence that affected the district court's conclusion that it did not have jurisdiction over his habeas petition. In other words, he produced no new evidence that would lead to a different result had the district court granted his motion, so relief was due to be denied. See Waddell, 329 F.3d at 1309; Willard, 472 F.3d at 824.

**AFFIRMED IN PART; DISMISSED IN PART.**[1]

[1] In addition, we GRANT Motes's motion for leave to proceed on appeal in forma pauperis, DENY AS MOOT his motion for appointment of counsel, and otherwise DENY his remaining motions, including his motion to consolidate, his motion to request that the Eighth Circuit move him to a medical center, and his motion for "review and endorsement." See Fed R. App. P. 3(b)(2); 28 U.S.C. § 1291 (providing that appellate jurisdiction is limited to appeals taken from final decisions); Zinni v. ER Solutions, Inc., 692 F.3d 1162, 1166 (11th Cir. 2012) (holding that an issue becomes moot when it no longer presents a live controversy for which a court cannot afford

meaningful relief); Miller v. FCC, 66 F.3d 1140, 1145–46 (11th Cir. 1995) (holding that federal courts are prohibited from issuing advisory opinions).