NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 11, 2023*
Decided September 13, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

Nos. 22-2644 & 22-2866

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERTO CRUZ-RIVERA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cr-00160-TWP-KMB-01

Tanya Walton Pratt, *Chief Judge*.

O R D E R

Roberto Cruz-Rivera was convicted of failing to register as a sex offender, a requirement imposed by federal law in light of his conviction in New York for rape. See 18 U.S.C. §2250(a). We affirmed his conviction and sentence. 74 F.4th 503 (7th Cir. 2023). While that appeal was pending, Cruz-Rivera filed in the district court two motions for

* After examining the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R. App. P. 34(a); Cir. R. 34(f).

DNA testing under 18 U.S.C. §3600(a). He contended that such a test could be used to show his innocence of rape.

The district court denied the first motion on the ground that Cruz-Rivera's appeal from the judgment of conviction divested it of jurisdiction. It denied the second motion for the same reason and added (without explanation) that the motion would fail on the merits. The first of these decisions is mistaken. A notice of appeal divests a district court of jurisdiction to alter the judgment on appeal, so the district court could not have declared Cruz-Rivera innocent, but does not subtract from a court's power to decide collateral matters that are not before the court of appeals. See, e.g., *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013). The request for DNA testing did not attack the judgment of conviction. True, a particular result of a DNA test might lay the groundwork for such a challenge (or for one to the sentence, which may have been affected by the conviction for rape), but a request for the test itself was unrelated to any issue in the pending appeal. By the time of Cruz-Rivera's second motion, however, his appeal from the denial of the first was pending—and as the two motions sought identical relief, that pending appeal blocked the district court from granting the second motion.

Section 3600(a) provides:

> Upon a written motion by an individual sentenced to imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:
>
> (1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—
>
> (A) the Federal offense for which the applicant is sentenced to imprisonment or death; or
>
> (B) another Federal or State offense, if—
>
> (i) evidence of such offense was admitted during a Federal sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and
>
> (ii) in the case of a State offense—

> (I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and
>
> (II) to the extent available, the applicant has exhausted all remedies available under State law for requesting DNA testing of specified evidence relating to the State offense.

Cruz-Rivera faces an insurmountable hurdle in the language of §3600(a)(1)(B)(ii)(I), because he does not even *contend* that New York's rules for DNA testing are inadequate. He simply ignores the subject. More than that: we do not see how Cruz-Rivera could establish innocence of the state crime, as §3600(a)(1)(B) requires. His 2001 conviction in New York was based on his guilty plea, and a plea of guilty admits all factual elements of the charge. See, e.g., *Class v. United States*, 138 S. Ct. 798 (2018) (discussing precedent). Cruz-Rivera does not contend that New York would allow him to retract his plea, more than 20 years after entering it, in order to contest the evidence—evidence that the prosecution never needed to present, given his guilty plea. It follows that he is not entitled to relief in federal court under §3600(a).

Cruz-Rivera has asked for the appointment of counsel on appeal. Because neither the Sixth Amendment nor the Criminal Justice Act, 18 U.S.C. §3006A, entitles a federal prisoner to appointed counsel in collateral proceedings, see *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the evident lack of merit to his motions is a sufficient reason to deny his request for counsel.

AFFIRMED