

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 18, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EVERETT LEE CAVELY,

Defendant-Appellant.

No. 08-5053

(D.C. Nos. 4:04-CV-00367-TCK-FHM
& 4:00-CR-00157-TCK-6)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **TACHA, PORFILIO**, and **TYMKOVICH**, Circuit Judges.

Everett Lee Cavely seeks a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(1)(B) to challenge the district court's denial of his motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. We deny his request for a COA and dismiss the appeal.

* After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Mr. Cavely was convicted of various drug and firearm offenses and sentenced to 440 months in prison. We affirmed his conviction and sentence, *United States v. Cavely*, 318 F.3d 987 (10th Cir.), and the Supreme Court denied him a writ of certiorari, *Cavely v. United States*, 539 U.S. 960 (2003). He timely filed his § 2255 motion but moved to amend it after the one-year filing deadline expired. Although the district court initially permitted him to amend his § 2255 motion, the court recognized in its March 26, 2008, order that the amendment was untimely. Nevertheless, the court found that Mr. Cavely's added claims under *Blakely v. Washington*, 542 U.S. 296 (2004), were foreclosed because *Blakely* does not apply retroactively.

As for his originally filed § 2255 motion, the court determined that none of Mr. Cavely's ineffective assistance of counsel claims warranted relief under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the court found that his trial attorney had not been ineffective in failing to impeach police officers on the precise timing of Mr. Cavely's consent to search his business or in failing to question officers on their justification for performing a protective sweep of his home. The court also concluded that Mr. Cavely's appellate attorney had not rendered ineffective assistance by declining to challenge the sufficiency of the evidence underlying an element of a firearms conviction. Mr. Cavely appealed, but the district court denied a COA. His application for a COA is now before this court.

An appeal from the district court's decision may not be taken absent a grant of COA by this court. 28 U.S.C. § 2253(c)(1)(B). The issuance of a COA is jurisdictional, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), and requires an applicant to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). An applicant "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

The district court refused to grant a COA because Mr. Cavely failed to make a substantial showing that he was denied a constitutional right and failed to cite authority indicating that the issues presented could be decided differently. We agree with this assessment. Nothing in Mr. Cavely's appellate materials, the district court's orders, or the relevant legal authority suggests that he was denied a constitutional right or that reasonable jurists would decide the case differently. Accordingly, for substantially the same reasons as articulated by the district court in its orders dated March 26, 2008, and April 4, 2008, we DENY Mr. Cavely's request for a COA and DISMISS the appeal.

Entered for the Court

John C. Porfilio
Circuit Judge