FILED
United States Court of Appeals
Tenth Circuit

August 25, 2011

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JAMES NELSON FULTON, Defendant - Appellant.	No. 11-3144 (D.C. Nos. 5:10-CV-04123-SAC and 5:07-CR-40117-SAC-1) (D. Kan.)

ORDER
DENYING CERTIFICATE OF APPEALABILITY

Before **KELLY**, **HARTZ**, and **HOLMES**, Circuit Judges.

Petitioner-Appellant James Fulton, a federal inmate appearing pro se, seeks to appeal from the district court's denial of his 28 U.S.C. § 2255 motion. See United States v. Fulton, Nos. 07-40117-01-SAC, 10-4123-SAC, 2011 WL 1484174 (D. Kan. April 19, 2011). Mr. Fulton is currently serving a 120-month sentence following his conviction on cocaine possession and distribution charges. This court affirmed his conviction and sentence on direct appeal in 2009. See United States v. Fulton, 344 F. App'x 477 (10th Cir. 2009) (unpublished). His primary argument on direct appeal was that the government entrapped him with respect to the drug transactions underlying the indictment.

In his § 2255 motion, Mr. Fulton maintains his counsel was ineffective (1) in failing to object to a lack of compliance with 21 U.S.C. § 851 at sentencing and (2) in not raising or arguing entrapment with respect to the sentence imposed. In a thorough memorandum opinion and order, the district court rejected both arguments. Fulton, 2011 WL 1484174, at *4-6, *8. Because we conclude that Mr. Fulton has not made the requisite showing, we deny his request for a certificate of appealability ("COA") and dismiss the appeal.

In his application for a COA, Mr. Fulton reasserts his claims that counsel was ineffective for failure to object to a deficient § 851 information in the trial court and on appeal, and for failure to assert a sentencing-entrapment argument. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2). This standard requires an applicant to show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks and citations omitted).

Reasonable jurists could not debate the district court's determination that the information complied with § 851. The statute requires "stating in writing the previous convictions to be relied upon" and provides a procedural mechanism to notify the defendant of the allegation of prior convictions and to allow him an

opportunity to challenge those convictions. 21 U.S.C. § 851(a)-(c); Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2582 (2010). There is no requirement that the statutory penalty section for the underlying offense be listed, let alone the length of an enhanced sentence. 21 U.S.C. § 851(a)(1); accord United States v. Morales, 560 F.3d 112, 114 (2d Cir. 2009) ("Section 851 does not require that a prior felony information identify the statutory basis of a proposed enhancement or its length . . . ."). To the extent that Mr. Fulton argues that the requirements of § 851 are jurisdictional and, therefore, the court's noncompliance with the § 851 colloquy procedure deprived it of jurisdiction to enhance his sentence, his position is contrary to the law of the circuit. United States v. Davis, 636 F.3d 1281, 1295 n.4 (10th Cir. 2011) ("Failure to file an information under § 851 does not deprive the district court of jurisdiction to impose a sentence." (citation omitted)); United States v. Flowers, 464 F.3d 1127, 1129-30 (10th Cir. 2006). The district court's conclusion that Carachuri-Rosendo did not elevate the procedural requirements of § 851 to jurisdictional prerequisites is not reasonably debatable. Fulton, 2011 WL 1484174, at *6.

Nor is the district court's conclusion that Mr. Fulton cannot show ineffective assistance of counsel in regard to his sentencing-entrapment argument because he cannot demonstrate prejudice. Because Mr. Fulton had a prior felony drug conviction, 120 months was the mandatory minimum term of imprisonment for count three, 21 U.S.C. § 841(b)(1)(B). Accordingly, the sentencing court

lacked discretion to impose a lower sentence, and the court of appeals could not alter his sentence on this theory. Fulton, 2011 WL 1484174, at *8.

Accordingly, we DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge