FILED
United States Court of Appeals
Tenth Circuit

August 30, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HICKORY WESLEY McCOY,

Defendant - Appellant.

No. 19-4016
(D.C. Nos. 2:16-CV-00487-TS
and 2:12-CR-00218-TS-1)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

Hickory McCoy seeks a certificate of appealability ("COA") to appeal the district court's order denying his Federal Rule of Civil Procedure 60(b) motion. For the following reasons, we deny his request for a COA and dismiss this appeal.

In June 2013, following a jury trial, Mr. McCoy was convicted of possession of marijuana with intent to distribute, possession of a firearm in furtherance of a drug trafficking offense, and being a felon in possession of a firearm. This court affirmed his conviction and sentence on appeal. *See United States v. McCoy*, 614 F. App'x 964 (10th Cir. 2015).

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[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

In June 2016, Mr. McCoy filed a pro se motion to set aside his sentence under 28 U.S.C. § 2255. Mr. McCoy's § 2255 motion raised four grounds for relief: two claims of ineffective assistance of trial counsel, one claim of ineffective assistance of appellate counsel, and one claim that the trial court erred in denying his pre-trial motion to suppress. The district court addressed the merits of the three ineffective-assistance claims but concluded that the challenge to the suppression order was procedurally barred as having been made and rejected on direct appeal. This court denied Mr. McCoy's request for a COA to appeal the district court's denial of his § 2255 motion. *See United States v. McCoy*, 671 F. App'x 715 (10th Cir. 2016).

In March 2018, Mr. McCoy filed a motion pursuant to Federal Rule of Civil Procedure 60(b) to set aside the district court's 2016 ruling that his challenge to the suppression order was procedurally barred. The district court construed the motion as an unauthorized second or successive § 2255 motion and dismissed it for lack of jurisdiction. On appeal, this court concluded that that ruling was in error and remanded for the district court to address the merits of the Rule 60(b) motion. *See United States v. McCoy*, 755 F. App'x 775 (10th Cir. 2018).

On remand, the district court concluded that Mr. McCoy's Rule 60(b) motion was not timely filed. The court additionally concluded that, had the motion been timely filed, it would fail on its merits because Mr. McCoy had challenged the trial court's denial of his motion to suppress on direct appeal to this court, thereby procedurally barring his § 2255 challenge even if the § 2255 motion had argued the suppression issue differently than in the original appeal. The district court went even

further and addressed the underlying merits of Mr. McCoy's § 2255 challenge to the suppression ruling, concluding that the trial court did not err in denying the motion to suppress. Mr. McCoy now requests a COA to appeal the Rule 60(b) ruling.

A COA is necessary to appeal the final order in a § 2255 proceeding, including the denial of a Rule 60(b) motion relating back to a § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B); *Spitznas v. Boone*, 464 F.3d 1213, 1218 (10th Cir. 2006). "A COA may only issue 'if the applicant has made a substantial showing of the denial of a constitutional right.'" *Spitznas*, 464 F.3d at 1225 (quoting § 2253(c)(2)). Where the district court has made a procedural ruling, we will only grant a COA "if 'the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Because both the procedural and substantive showings are necessary, we may "proceed[] first to resolve the issue whose answer is more apparent from the record and arguments." *Slack*, 529 U.S. at 485.

Before this court, Mr. McCoy argues that our previous holding that the district court was incorrect in construing his Rule 60(b) motion as a second or successive § 2255 motion necessarily "implie[d] that it was both timely and met the criteria defined in the provisions under [R]ule 60(b)," thereby undermining the district court's procedural ruling on the motion. (Appellant's Br. at 4.) As for the district court's ruling on the Rule 60(b) motion's merits, Mr. McCoy contends that the

evidence at the suppression hearing did not support the trial court's conclusion that reasonable suspicion supported the traffic stop leading to the discovery of the evidence used against him at trial.

"Fourth Amendment violations are [generally] not reviewable in a § 2255 motion." *United States v. Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993). However, because the district court concluded that Mr. McCoy's claim fails on the merits and because we see no error in the court's reasoning, we will address the merits here. In his Rule 60(b) motion and on appeal, Mr. McCoy contends that "the Utah left lane law is in place to prevent traffic from being impeded in the left lane" (*id.* at 5), and thus "the district court's failure to find or rule that the defendant impeded traffic eviscerates the suppression order which justified an officer stopping Mr. McCoy for impeding traffic in the left lane" (R. Vol. I at 75). The traffic law at issue is Utah Code Ann. § 41-6a-704(2), which provides that "the operator of a vehicle traveling in the left general purpose lane" of a highway "(a) shall, upon being overtaken by another vehicle in the same lane, yield to the overtaking vehicle by moving safely to a lane to the right; *and* (b) may not impede the movement or free flow of traffic in the left general purpose lane." (Emphasis added.)

Mr. McCoy's argument attempts to read section (2)(a) out of the statute by reducing the law's requirement to the "may not impede" obligation under section (2)(b). In its order ruling on the Rule 60(b) motion, however, the district court explained how the officer's testimony at the suppression hearing showed that Mr. McCoy had violated section (2)(a) of the statute. Mr. McCoy makes no effort to

challenge this conclusion, instead merely reiterating his contention that the statute requires evidence that the driver "impeded" traffic and discussing portions of the officer's testimony he believes do not amount to a violation of that rule. (Appellant's Br. at 5.) Mr. McCoy has not shown that the district court's merits ruling on his Rule 60(b) motion was in error, nor do we see any error in that ruling.

Because reasonable jurists would not debate whether Mr. McCoy has stated a valid claim of the denial of a constitutional right, we **DENY** his request for a COA and **DISMISS** the appeal. We additionally **DENY** his motion to proceed *in forma pauperis* on appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge