FILED
United States Court of Appeals
Tenth Circuit

October 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW LANE DURHAM,

Defendant - Appellant.

No. 23-6003
(D.C. Nos. 5:22-CV-00608-R &
5:14-CR-00231-R-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Matthew Lane Durham, a federal prisoner represented by counsel, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. We deny the motion.

As thoroughly explained in our published opinion resolving Durham's direct appeal, *see United States v. Durham*, 902 F.3d 1180, 1189–92 (10th Cir. 2018), Durham (an Oklahoma resident) went to Kenya in 2014 to work at a group home for impoverished children, and some of the children eventually accused him of sexual

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

abuse. Durham confessed such abuse to the group home's administrators, and he memorialized his confession in writing and on video.

Durham returned to the United States and a grand jury in the Western District of Oklahoma charged him with various offenses, including multiple counts of engaging in illicit sexual conduct while traveling in foreign commerce, *see* 18 U.S.C. § 2423(c). In 2015, the case went to a jury trial at which some of the victims testified. The jury convicted Durham of seven § 2423(c) violations. Through post-trial motions, the district court granted acquittal on three of the § 2423(c) convictions. Thus, Durham stood convicted of four counts of illicit sexual conduct while traveling in foreign commerce. The district court sentenced him to 480 months in prison. This court affirmed.

In July 2022, Durham (through counsel) filed his first § 2255 motion, claiming "newly discovered evidence of his actual innocence." Aplt. App. at 72.[1] He attached a sworn statement from an acquaintance named Judy Mullins who had also been involved with the Kenya group home and who knew the victims personally. Mullins said that all the victims had recently told her that staff members at the group home coerced them to accuse Durham and testify against him. Durham also attached sworn

[1] Durham asserted his claim was timely because he brought it within one year of discovering new evidence. *See* 28 U.S.C. § 2255(f)(4) (allowing a federal prisoner to bring a first § 2255 motion within one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"). The government and the district court never disputed timeliness. Because timeliness is not jurisdictional in this context, *see United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017), we do not discuss it further.

statements to this effect from two of the alleged victims. Neither Mullins nor the alleged victims offered any reason why staff members at the group home wanted to frame Durham for his crimes. Moreover, Durham did not claim the government participated in coercing the witnesses, or that the government knew about the coercion. But he claimed his due process rights were violated in any event. The government responded that the motion should be denied for two reasons. First, there was no government involvement in the alleged coercion. Second, Ms. Mullins' statement (containing triple hearsay and numerous procedural deficiencies) and the victims' new affidavits were insufficient to overcome sworn trial testimony.

The district court ruled that actual innocence, unconnected to any constitutional violation committed by the government, is not a recognized constitutional claim. It therefore denied Durham's § 2255 motion, and Durham appealed.

This appeal may not proceed unless this court grants a COA. *See* 28 U.S.C. § 2253(c)(1)(B). To merit a COA, Durham must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This means he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In the same way that this court may affirm on any basis evident in the record, it may deny a COA on any basis evident in the record. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

In his COA motion, Durham argues that this court's decision in *Anderson v. United States*, 443 F.2d 1226 (10th Cir. 1971) (per curiam), allows district courts to consider newly discovered evidence of innocence under § 2255, and the evidence need not be connected to any alleged violation of the defendant's constitutional rights during the investigation or prosecution of the underlying crime. We are doubtful *Anderson* applies here, but we need not discuss it in any detail because Durham failed to preserve this argument. In the district court, Durham's legal argument comprised only the following:

- he declared his actual innocence based on the alleged recantations;
- he invoked a due process right to a fair trial and cited some cases about the voluntariness of witness testimony (without acknowledging that those cases require government involvement in the allegedly unconstitutional conduct); and
- he invoked the test, developed under Federal Rule of Criminal Procedure 33(b)(1), for granting a new trial based on newly discovered evidence (without citing Rule 33 or acknowledging its requirement that such a motion must be brought within three years of the verdict).

He nowhere in his motion, supporting brief, or reply brief pointed the district court to *Anderson* or the contours of an actual innocence claim under § 2255.

In the absence of any argument to the district court about *Anderson* (including any argument that § 2255 cases might be treated differently than § 2254 cases when it comes to actual innocence), the district court properly followed our published cases

holding that actual innocence is not a freestanding basis for collateral relief.[2] *See Farrar v. Raemisch*, 924 F.3d 1126, 1131 (10th Cir. 2019) (citing *Vreeland v. Zupan*, 906 F.3d 866, 863 (10th Cir. 2018) (denying certificate of appealability because freestanding assertions of actual innocence cannot support habeas relief); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("[A]n assertion of actual innocence . . . does not, standing alone, support the granting of the writ of habeas corpus."); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[T]he claim of innocence . . . itself is not a basis for a federal habeas corpus no matter how convincing the evidence.")). Thus, "reasonable jurists would [not] find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

We therefore deny a COA and dismiss this matter.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[2] *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (denying COA on issues not presented to district court in § 2255 motion, in light of this court's "general rule against considering issues for the first time on appeal").