

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAWN J. GIESWEIN,

Defendant - Appellant.

No. 23-6108
(D.C. No. 5:07-CR-00120-F-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **HARTZ** and **BACHARACH**, Circuit Judges.

Shawn J. Gieswein, proceeding pro se,¹ seeks a certificate of appealability (COA) to appeal from the district court’s determination that his motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure is actually an unauthorized second or successive 28 U.S.C. § 2255 motion that it lacked jurisdiction to consider. *See* 28 U.S.C. § 2253(c)(1)(B). Mr. Gieswein has filed an application for a COA. We deny a COA and dismiss this appeal.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Gieswein appears pro se, we liberally construe his filings. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we do not make arguments for pro se litigants or otherwise advocate on their behalf. *Id.*

Mr. Gieswein was convicted in 2007 of being a felon in possession of a firearm and witness tampering. He was sentenced to 240 months in prison, which reflected an enhanced sentence under the Armed Career Criminal Act. We affirmed his conviction and sentence on direct appeal. Mr. Gieswein filed his first § 2255 motion in 2011. The district court denied the motion. We granted a certificate of appealability, but ultimately affirmed the district court's denial of relief. In 2016, Mr. Gieswein was resentenced without the enhancement following the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015). The district court imposed the same 240-month term of imprisonment, and we affirmed. Mr. Gieswein has since filed numerous unsuccessful post-judgment motions attempting to collaterally attack his conviction and sentence.

Here, Mr. Gieswein has filed a Rule 60(b)(6) motion arguing that the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), rendered his 2007 conviction unconstitutional. The district court found that Mr. Gieswein's motion was actually a second or successive motion under § 2255 and therefore dismissed the motion for lack of jurisdiction because Mr. Gieswein had not obtained an order from this court authorizing the district court to consider the motion. *See In re Cline*, 531 F.3d 1249, 1250 (10th Cir. 2008); 28 U.S.C. § 2255(h) ("A . . . successive motion must be certified as provided in [§] 2244 by a panel of the appropriate court of appeals.").

To obtain a COA, Mr. Gieswein must show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Mr. Gieswein cannot make this showing. "It is the

relief sought, not his pleading’s title, that determines whether the pleading is a § 2255 motion.” *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006). Here, Mr. Gieswein’s motion argues that a change in substantive law—namely, the *Bruen* decision—justifies relief from his conviction. In those circumstances, such a motion should be treated as a second or successive § 2255 motion. *See United States v. Baker*, 718 F.3d 1204, 1206 (10th Cir. 2013) (explaining that a post-judgment motion should be treated as a second or successive § 2255 motion “if it asserts or reasserts claims of error in the prisoner’s conviction.”). The district court was therefore correct in its procedural ruling that Mr. Gieswein’s Rule 60(b)(6) motion was actually a successive motion under § 2255.

We deny a COA and dismiss this matter. We grant Mr. Gieswein’s motion for leave to proceed in forma pauperis.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk