

UNITED STATES COURT OF APPEALS

August 8, 2011

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIANO BEDOLLA,

Defendant - Appellant.

No. 11-3141

(D.C. No. 5:04-CR-40001-SAC-1)

(D. Kansas)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Before **BRISCOE**, Chief Judge, **MURPHY**, and **MATHESON**, Circuit Judges.

Mariano Bedolla, a federal prisoner, was convicted of drug offenses, including possession of methamphetamine and conspiracy to distribute methamphetamine, and was sentenced to 235 months' imprisonment. *United States v. Bedolla*, 232 F. App'x 805, 806 (10th Cir. 2007). This court affirmed his convictions. *Id.* at 811. On August 14, 2008, Bedolla filed a *pro se* 28 U.S.C. § 2255 motion seeking relief from his convictions and sentence. The district court denied the motion on May 18, 2009, and Bedolla did not seek a COA to appeal that ruling. Instead, he filed a Fed. R. Civ. P. 60(b) motion raising three claims: (1) the district court denied his § 2255 motion without permitting him the

opportunity to file a supporting memorandum or providing him with a transcript of the sentencing proceeding, (2) trial and appellate counsel were ineffective for failing to raise *Apprendi* and *Booker* claims, and (3) trial counsel was ineffective for failing to seek a departure or a variance from the advisory guidelines sentence.

The district court construed the latter two claims as an unauthorized request to file a second or successive § 2255 motion and transferred them to this court after concluding it did not have jurisdiction to address them. *See* 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”); *see also United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (“It is the relief sought, not [the] pleading’s title, that determines whether the pleading is a § 2255 motion.”). The court concluded Bedolla’s first claim was a “true” Rule 60(b) motion but rejected it on the merits. *See Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006) (permitting a district court to reach the merits of “true Rule 60(b) allegations” in a mixed Rule 60(b) motion).

Bedolla now seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his Rule 60(b) motion.¹ *See id.* at 1217-18 (holding a

¹The district court’s characterization of Bedolla’s two ineffective assistance claims was affirmed by this court and his request to file a second or successive
(continued...)

COA is required to appeal the denial of Rule 60(b) relief from a habeas judgment). To be entitled to a COA, Bedolla must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate “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.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotations omitted). In evaluating whether Bedolla has satisfied his burden, this court undertakes “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each of his claims. *Id.* at 338; *see also LaFleur v. Teen Help*, 342 F.3d 1145, 1153 (10th Cir. 2003) (reviewing the denial of a Rule 60(b)(6) motion for abuse of discretion). Although Bedolla need not demonstrate his appeal will succeed to be entitled to a COA, he must “prove something more than the absence of frivolity or the existence of mere good faith.” *Id.* (quotations omitted).

This court has reviewed Bedolla’s appellate brief and application for COA, the district court’s order, and the entire record on appeal pursuant to the

¹(...continued)
§ 2255 motion was denied. *In re Bedolla*, No. 11-3117 (10th Cir. June 6, 2011) (order denying motion for remand and motion for authorization).

framework set out by the Supreme Court in *Miller-El* and concludes Bedolla is not entitled to a COA. Accordingly, we **deny** his request for a COA and **dismiss** this appeal. Bedolla's request to proceed *in forma pauperis* on appeal is **granted**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge