FILED
United States Court of Appeals
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY MICHAEL SALAZAR,

Defendant - Appellant.

No. 19-1119
(D.C. Nos. 1:19-CV-00140-PAB and 1:16-CR-00022-PAB-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **LUCERO**, **PHILLIPS**, and **EID**, Circuit Judges.

More than one year after his conviction became final, Anthony Michael Salazar filed a motion under 28 U.S.C. § 2255 to vacate his sentence. The district court dismissed the motion as untimely and denied a certificate of appealability ("COA"). Although we grant Salazar's motion to proceed *in forma pauperis*, we deny a COA and dismiss the appeal.

I. BACKGROUND

Salazar was sentenced to 12 months' imprisonment followed by five years' supervised release for failing to register as a sex offender in violation of 18 U.S.C.

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[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

§ 2250(a). His supervised release began on July 22, 2015. But in September 2016, his probation officer filed a superseding petition alleging he had committed five supervised release violations. Salazar admitted to the fifth violation—"Certain Activities Relating to Material Constituting or Containing Child Pornography, in violation of 18 U.S.C. §2252A," ROA Vol. I at 28—and, in exchange, the government withdrew the other allegations. For this offense, he was sentenced to 60 months' imprisonment followed by five years' supervised release. His conviction became final on March 20, 2017.

Over a year later, in January 2019, Salazar filed a motion to vacate under 28 U.S.C. § 2255. Because Salazar filed his section 2255 motion more than a year after his judgment of conviction became final, it was untimely under section 2255(f)(1) unless he could establish an exception, such as equitable tolling or actual innocence. The district court concluded Salazar could establish neither, dismissed the motion as untimely, and denied a COA. Salazar appealed.

II. DISCUSSION

On appeal, Salazar argues that his motion is timely because of (1) intervening Supreme Court precedent recognizing a new right, (2) equitable tolling, or (3) actual innocence. We address each item in turn.

a. Newly Recognized Right

After the district court dismissed Salazar's motion, the Supreme Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019). *Haymond* considered the constitutionality of 18 U.S.C. § 3583(k). Section 3583(k) mandates a minimum five-

year term of imprisonment for certain supervised release violations committed by defendants who are "required to register under the Sex Offender Registration and Notification Act," 18 U.S.C. § 3583(k), "including the possession of child pornography." *Haymond*, 139 S. Ct. at 2374.

Four justices held that section 3583(k) violated Haymond's Fifth and Sixth Amendment rights. *See id.* at 2373. Justice Breyer concurred. *Id.* at 2385–86 (Breyer, J., concurring). Although he "agree[d] with much of the dissent," and unlike the plurality, "would not transplant the *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] line of cases to the supervised-release context," three specific aspects of the statute led him to conclude section 3583(k) was unconstitutional. *Id.*

> *First*, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. *Second*, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. *Third*, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has "commit[ted] any" listed "criminal offense."

Id. at 2386. "Taken together," Justice Breyer posited, "these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* He then concluded section 3583(k) violates the Court's holding in *Alleyne v. United States*, 570 U.S. 99 (2013), that "in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term." *Id.*

Salazar contends that his sentence, which was imposed under 18 U.S.C. § 3583(k), is now unconstitutional. *See* July 10, 2019 28(j) Letter. Construing Salazar's briefing liberally, as we must, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), we interpret Salazar's 28(j) letter to argue that *Haymond* renders his motion timely under 28 U.S.C. § 2255(f). Section 2255(f) provides that "[a] 1-year period of limitation shall . . . run from the latest of" four options, the third of which is "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." If *Haymond* satisfies section 2255(f)(3), then Salazar's motion is timely. We therefore consider whether *Haymond* satisfies section 2255(f)(3).

We consider that question in the context of whether Salazar is entitled to a COA. "A COA is a jurisdictional prerequisite to our review . . . ." *United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013); *see also United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). And we will grant a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismisses a section 2255 motion on procedural grounds, such as timeliness, an applicant must show "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."[1] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Importantly, we review the district court's "*ultimate resolution* of th[e] claim," *Pruitt v. Parker*, 388 F. App'x 841, 845 n.4 (10th Cir. 2010), not the particulars of its analysis. *See Brown v. Roberts*, 501 F. App'x 825, 830 (10th Cir. 2012) ("While we arrive at [our] conclusion through a . . . different path than . . . the district court, we find that reasonable jurists could not disagree with the district court's ultimate *resolution* in dismissing the petition."). Thus, we consider whether reasonable jurists could debate the district court's ultimate resolution, even if our analysis differs from the district court's or considers issues not contained in the district court's discussion. *See, e.g.*, *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

Here, the district court's "ultimate resolution" was to dismiss Salazar's motion as untimely. It is in that context we consider whether *Haymond* renders Salazar's section 2255 motion timely under 28 U.S.C. § 2255(f)(3). Section 2255(f)(3) applies to "newly recognized" rights that have been made "retroactively applicable to cases on collateral review." Determining whether a new right is retroactively applicable entails a three-step inquiry: (1) whether Salazar's conviction became final before the Supreme Court's decision in *Haymond*; (2) whether the rule in *Haymond* "is actually 'new,' based on whether a 'court considering [Salazar's claim] at the time his conviction became final would have felt compelled by existing precedent to conclude

[1] Because we conclude that reasonable jurists would not debate the district court's procedural rulings, "we need not decide whether the petition states a valid claim of the denial of a constitutional right." *United States v. Harrison*, 680 F. App'x 678, 679 (10th Cir. 2017).

that the rule [announced in *Haymond*] was required by the Constitution"; and (3) whether, assuming the rule is new, the rule "falls within either of the two narrow exceptions to nonretroactivity" announced in *Teague v. Lane*, 489 U.S. 288 (1989). *United States v. Chang Hong*, 671 F.3d 1147, 1151 (10th Cir. 2011), *as amended* (Sept. 1, 2011) (quotations omitted).

Under *Teague* "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (quotations omitted). "A substantive rule is one that alters the range of conduct or the class of persons that the law punishes." *Chang Hong*, 671 F.3d at 1157 (quotations omitted). "By contrast, a procedural rule regulate[s] only the manner of determining the defendant's culpability." *Id.* (quotations omitted).

Haymond satisfies the first step of our inquiry: Salazar's conviction became final before the Supreme Court's decision in *Haymond*. As for the second step, we do not address it. Even if we were to assume that reasonable jurists would not debate that *Haymond* announced a new rule, *Haymond* does not satisfy the third step, and accordingly, does not satisfy section 2255(f)(3).[2]

[2] Because 28 U.S.C. § 2255(f) is not jurisdictional, *United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017), we may consider its elements in any order. Indeed, we have previously considered the section 2255(f)(3) elements in order of analytical convenience. *See, e.g.*, *United States v. Shayesteh*, 54 F. App'x 916, 918 (10th Cir. 2003) ("Assuming without deciding that *Edmond* announced a new rule of law . . .

We begin our analysis of that step by determining whether *Haymond* announced a substantive or a procedural rule. We conclude *Haymond* announced a procedural rule. *Haymond* does not "alter[] the range of conduct or the class of persons that the law punishes"—possessing child pornography is still a crime after *Haymond*. But it does "regulate[] . . . the manner of determining the defendant's culpability." Indeed, *Haymond*, like *Alleyne*, "allocate[s] decisionmaking authority," *Schriro v. Summerlin*, between the judge and a jury. 542 U.S. 348, 353 (2004). And the Court has repeatedly held "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules." *Id.*

Haymond's status as a procedural rule signals the end of the road for its bid to become retroactive. "The exception [for watershed procedural rules] is quite narrow . . . ." *Chang Hong*, 671 F.3d at 1157. "To surmount th[e] 'watershed' requirement, a new rule . . . must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 1157–58 (quotations omitted); *see Whorton*, 549 U.S. at 420–21. "The Supreme Court has repeatedly identified its decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963)—recognizing an indigent defendant's right to counsel—as the only rule which, if *Gideon* had been decided after *Teague*, might have fallen within the second *Teague* exception." *Chang Hong*, 671 F.3d at 1158.

Shayesteh could not avail himself of it here . . . [because, *inter alia*,] *Edmond* does not announce a watershed rule of criminal procedure.").

"Simply put, [*Haymond*] is not *Gideon*." *Id.* *Haymond* does not "itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." Rather, *Haymond* is an extension of *Alleyne*'s holding that "in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term." *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring) (citing *Alleyne*, 570 U.S. at 103). No court has ever recognized *Alleyne* as retroactive. *United States v. Hoon*, 762 F.3d 1172, 1173 (10th Cir. 2014). Even *Apprendi*, which formed the basis for *Alleyne*, was not a "watershed" procedural decision. *See United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002); *see also In re Payne*, 733 F.3d 1027 (10th Cir. 2013) (agreeing with the Seventh Circuit that "rules based on *Apprendi* do not apply retroactively on collateral review" (quotations omitted)). Considering all this, a reasonable jurist could not debate the conclusion that *Haymond* is not retroactive and does not satisfy section 2255(f)(3).

b. Equitable Tolling and Actual Innocence

We turn now to the considerations that formed the basis of the district court's dismissal of Salazar's motion: that Salazar's motion was untimely because he had failed to establish the requirements for equitable tolling and actual innocence. No reasonable jurist could dispute these holdings.

"To be entitled to equitable tolling, [Salazar] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Fla.*, 549 U.S. 327, 336 (2007)

(quotations omitted). Salazar argues his counsel's "professional misconduct" satisfies the second element:

> Mr. Salazar has repeatedly called and written trial counsel complaining about his sentence and asked counsel to file a direct appeal. He was, however, told that he couldn't appeal. Counsel has refused to provide Mr. Salazar documents as retained by counsel in his criminal file so that he could attempt to formulate an appeal. Counsel further refused to advise Mr. Salazar as to the process of filing notice of appeal own [sic] his (Mr. Salazar's) own. This was in reference to both a direct appeal as well as a § 2255 Motion.

Aplt. Br. at 3. The district court rejected this argument for two reasons. First, Salazar had failed to provide specific facts demonstrating he had a "reasonable belief that the attorney appointed to represent him in connection with the charged supervised release violations would assist him in filing a § 2255 Motion." *United States v. Salazar*, No. 16-CR-00022-PAB, 2019 WL 1170551, at *3 (D. Colo. Mar. 12, 2019) (citing 18 U.S.C. § 3006A(c), which provides that appointed counsel shall represent the defendant "through appeal"). Second, "Salazar d[id] not explain why he needed access to documents in the case file to raise the claims asserted in his § 2255 Motion." *Id.*

As referenced above, because Salazar is a *pro se* movant, we construe his briefing liberally. *Hall*, 935 F.2d at 1110. But even under that standard, Salazar has not meaningfully refuted either of the district court's reasons for rejecting this claim. Instead, his appellate brief is general, vague, and fails to offer specific facts. No reasonable jurist could disagree with the district court that Salazar "failed to raise a

colorable claim that extraordinary circumstances prevented him from filing a timely § 2255 motion." *Salazar*, 2019 WL 1170551, at *3.

Salazar's last avenue for overcoming section 2255(f) is his claim of actual innocence.[3] "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotations omitted). The district court rejected this claim because Salazar's contentions only challenged the "legal sufficiency of his sentence and d[id] not demonstrate that he is innocent of the underlying offense." *Salazar*, 2019 WL 1170551, at *4. Salazar's appellate briefing suffers from the same infirmity. *See* Aplt. Br. at 4 ("Mr. Salazar . . . is actually innocent of any sentence above his statutory maximum and his sentence is illegal as argued in his brief."). We conclude that no reasonable jurist could debate the district court's resolution of this claim.

[3] We recognize that Salazar also contends it was improper for the district court to *sua sponte* raise the timeliness issue and that that his "§ 2255 Motion must be heard, regardless of whether the motion is untimely, because the Court lacked jurisdiction to impose an unconstitutional sentence under the Tenth Circuit's decision in *Haymond*." *Salazar*, 2019 WL 1170551, at *4. However, neither of these arguments is availing. Except in circumstances not present here, federal district courts generally have authority to *sua sponte* "consider . . . the timeliness of a" section 2255 motion. *Wood v. Milyard*, 566 U.S. 463, 472–73 (2012); *see also Day v. McDonough*, 547 U.S. 198, 209 (2006). And as the district court observed, Salazar's jurisdictional argument "ignores the plain language of the statute," which provides that all motions filed under section 2255 are "subject to the one-year limitation period of § 2255(f), regardless of the claim raised." *Salazar*, 2019 WL 1170551, at *4. Reasonable jurists could not debate the district court's decision to consider the timeliness issue or its rejection of the jurisdictional argument.

III. CONCLUSION

For the foregoing reasons, we DENY Salazar a COA, GRANT his motion to proceed IFP, and DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge