FILED
United States Court of Appeals
Tenth Circuit

September 16, 2019

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS REYES,

Defendant - Appellant.

No. 19-3075
(D.C. Nos. 6:18-CV-01224-EFM &
6:15-CR-10119-EFM-1)
(D. Kan.)

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**ORDER DENYING A CERTIFICATE OF APPEALABILITY**[*]

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Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

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Defendant Jesus Reyes, appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's order denying his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Because Reyes has failed to make a substantial showing of the denial of a constitutional right, we deny his request for a COA and dismiss the matter.

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I

*The offense conduct*

On May 29, 2015, Reyes was arrested in Wichita, Kansas, following a traffic stop. Reyes initially admitted to the officers that he was driving with a suspended license and had absconded from parole supervision. After arresting Reyes, the officers found a stun-gun on his person and determined that Reyes had outstanding warrants for a parole violation and a state criminal violation. A search of Reyes's vehicle produced a marijuana cigarette, two baggies of methamphetamine, two digital scales, and two firearms.

*The initial criminal proceedings*

On August 18, 2015, a federal grand jury returned an indictment charging Reyes with one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The case proceeded to trial in November 2016. At the conclusion of the evidence, the jury found Reyes guilty of all three counts. Reyes was subsequently sentenced to a term of imprisonment of 210 months.

*The direct appeal*

Reyes filed a direct appeal challenging only his sentence. The government agreed with Reyes that the sentencing court erred by counting Reyes's prior state conviction for possession of cocaine with intent to sell as a qualifying "controlled substance offense" under U.S.S.G. § 4B1.1(a). On February 9, 2018, this court

issued an order granting the government's motion to remand the case with instructions for the sentencing court to vacate Reyes's sentence and to resentence him. United States v. Reyes, No. 17-3026 (10th Cir. Feb. 9, 2018).

*Resentencing*

On April 25, 2018, Reyes was resentenced to a term of imprisonment of 120 months.

*The § 2255 proceedings*

On August 13, 2018, Reyes initiated these proceedings by filing a pro se motion to vacate, set aside, or correct sentence pursuant to § 2255. In Ground One of his motion, Reyes asserted a "Miranda violation of law," and he alleged in support that the arresting officers "failed to read [him his] rights when [he] was placed under arrest." ROA, Vol. 4 at 22. In Ground Two of his motion, Reyes asserted that one of the arresting officers testified falsely at trial regarding the amount of methamphetamine that was seized from Reyes's vehicle. In Ground Three of his motion, Reyes asserted that the arresting officers searched his vehicle without his consent. Finally, in Ground Four of his motion, Reyes asserted that his attorney "failed to object to surten [sic] questions, failed to file subpoenas, and retrive [sic] evidence, and failed to file motions that [Reyes] asked for." Id. at 26. Reyes alleged in support that his attorney failed to (a) argue that the arresting officers tampered with evidence by seizing three bags of methamphetamine but only submitting two bags to the chemist for analysis, (b) failing to argue "violation[s] of [the] 4th, 5th, and fourteenth and sixteenth Amendments," and (c) failing to subpoena or otherwise

seek discovery of the arresting officers' "dashcam and body cam" videos, or surveillance videos from a gas station that sat across from where the traffic stop occurred. Id. at 27. The motion asked the district court to vacate Reyes's convictions and conduct a new trial, dismiss the case in its entirety, or, at a minimum, conduct an evidentiary hearing on the issues raised in the motion.

On February 11, 2019, the district court issued a memorandum and order denying Reyes's § 2255 motion without an evidentiary hearing. With respect to Ground One, the district court noted that Reyes "did not raise this issue on direct review," and thus the issue was potentially procedurally barred. Id. at 35. Nevertheless, the district court "ch[ose] to simply address the merits" of the issue. Id. The district court noted that Reyes had filed a pretrial motion to suppress evidence arguing that a Miranda violation occurred. The district court further noted that it conducted a hearing on the motion and "concluded that there was indeed a Miranda violation." Id. The district court noted that, based upon this conclusion, it "suppressed [Reyes's] statements and would not allow the government to introduce those statements at trial." Id. "Thus," the district court concluded, "the Miranda violation played no part in [Reyes's] conviction." Id. The district court concluded that, because Reyes "ha[d] not alleged any additional facts that would change the result on collateral review," there was no basis for granting § 2255 relief on Ground One. Id.

With respect to Ground Two, the district court noted that Reyes failed to raise the issue on direct appeal. But the district court noted that Reyes "raise[d] the issue

in his Motion for New Trial filed after trial." Id. at 36. The district court in turn noted that it denied that motion and, in doing so, "determined that although there may have been some inconsistent testimony [at trial] regarding the . . . grams [of methamphetamine that Reyes] possessed, it hardly constitute[d] ample indication of evidence tampering." Id. (quotations omitted). Lastly, the district court concluded that, because Reyes failed to "allege any additional facts on collateral review that would change the previous result," he was not entitled to relief on Ground Two. Id.

Addressing Ground Three, the district court noted that Reyes argued therein "that an illegal search and seizure occurred at the time of his arrest because officers pulled him out of the car by calling him a different name and searched the car without his consent." Id. The district court in turn noted that Reyes "did not previously raise the issue of calling him a different name in his direct appeal or in his motion to suppress," and "d[id] not give any reasons as to why he failed to previously raise the issue." Id. The district court acknowledged that Reyes's "motion to suppress . . . did challenge the traffic stop as unreasonable." Id. The district court noted that it denied Reyes's motion to suppress and, in doing so, "found that the stop and subsequent detention were reasonable and did not violate his rights." Id. at 36–37. "With regard to the evidence seized from the car," the district court noted that it "determined that even though [Reyes] made a non-Mirandized statement, the evidence in the car would have inevitably been discovered." Id. at 37. For this reason, and because Reyes "d[id] not allege any additional facts to reconsider this

issue on collateral review," the district court concluded that Ground Three "[wa]s without merit." Id.

In analyzing Ground Four, the district court began by discussing "the two-prong test" for ineffective assistance of counsel "set forth in Strickland v. Washington," 466 U.S. 668 (1984). ROA, Vol. 1 at 37. Applying that test to Reyes's claims, the district court noted that Reyes failed to "give facts regarding what questions needed to be objected to, what subpoenas and/or evidence was needed, or what motions were not filed" by his trial attorney. Id. at 39. "In sum," the district court concluded, Reyes "point[ed] to no evidence, in the record or otherwise, to support his contention that the outcome of his jury trial would have been different had his counsel done any of these things." Id. at 40. The district court also noted that Reyes alleged "that there was tampering with evidence; violation of the 4th, 5th, 14th, and 16th amendments; and withholding of evidence related to dashcam and body cam video, and video of the gas station." Id. But the district court concluded that Reyes "fail[ed] to support these contentions with any evidence, argument, or legal authority," and "also [failed to] state why he did not previously raise any of these issues." Id. Therefore, the district court rejected the allegations as meritless.

Lastly, the district court concluded that Reyes failed to make "a substantial showing of the denial of a constitutional right," and it therefore denied him a COA. Id. at 41.

Final judgment was entered in the case on February 11, 2019. Reyes filed a notice of appeal and an application for COA with this court.

II

A COA is necessary to appeal the final order in a § 2255 proceeding. See 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To the extent the district court's order hinges on a procedural ruling, we will grant a COA only if "the prisoner shows, at least, that jurists of reasons 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." 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." Id. at 485.

In his application for COA, Reyes simply repeats the conclusory allegations that were contained in his § 2255 motion. After reviewing his application and the record on appeal, we are not persuaded that he has made a substantial showing of the denial of a constitutional right with respect to any of the grounds for relief alleged in his § 2255 motion.

The application for COA is therefore DENIED and the matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge