FILED
United States Court of Appeals
Tenth Circuit

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM HENRY SHERRATT,

Petitioner - Appellant,

v.

SHANE NELSON, Warden; UTAH BOARD OF PARDONS & PAROLE; UTAH SUPREME COURT,

Respondents - Appellees.

No. 19-4073
(D.C. No. 4:19-CV-00002-DN)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **MATHESON**, and **BACHARACH**, Circuit Judges.

William Henry Sherratt seeks a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(1) to appeal the district court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We deny a COA and dismiss this matter.

Background

In 2000, Mr. Sherratt was convicted in Utah state court of two first-degree felony counts. He was sentenced to concurrent indeterminate terms of five years to life in prison. Mr. Sherratt has previously filed at least three habeas petitions concerning the

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

same conviction. *See Sherratt v. Friel*, No. 07-4155, 2008 WL 313177 (10th Cir. Feb. 4, 2008) (denying COA and dismissing appeal); *Sherratt v. Friel*, No. 07-4228, 2008 WL 1815723 (10th Cir. Apr. 23, 2008) (denying COA and dismissing appeal); *Sherratt v. Utah Bd. of Pardons & Parole*, No. 11-4174, 2012 WL 2045768 (10th Cir. June 7, 2012) (denying COA and motion for authorization and dismissing appeal).

In his most recent petition, Mr. Sherratt invoked Federal Rule of Civil Procedure 60(d)(3) and challenged decisions by the Utah Board of Pardons and Parole (the Parole Board) in light of the Utah Supreme Court's recent decision in *Neese v. Utah Board of Pardons and Parole*, 416 P.3d 663 (Utah 2017). In an affidavit attached to the petition, Mr. Sherratt asserted that he was wrongfully accused and was actually innocent of the crimes charged. The district court dismissed Mr. Sherratt's petition for lack of jurisdiction as an unauthorized second or successive petition. *See* 28 U.S.C. § 2244(b)(3)(A). Mr. Sherratt seeks a COA to appeal the dismissal.

Discussion

A § 2254 petition is used to attack the validity of a conviction and sentence. *See McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997). By contrast, a petition under § 2241 is used to attack the execution of a sentence, including parole decisions. *See id.*; *see also United States v. Furman*, 112 F.3d 435, 438 (10th Cir. 1997) (noting that challenges to parole procedures go to the execution of a sentence and should be brought under § 2241). Whether a petition is filed under § 2254 or § 2241, if the detention complained of "'arises out of process issued by a State court,'" the petitioner must obtain a COA in order to appeal the district court's decision. *Montez v. McKinna*,

208 F.3d 862, 867 (10th Cir. 2000) (quoting § 2253(c)(1)(A)). To obtain a COA when the district court's decision rests on procedural grounds, as in this case, a petitioner must show both "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Sherratt's assertions in his affidavit that he was wrongfully accused and is actually innocent of the crimes charged present a challenge to the validity of his state court conviction. It is not clear that he intended these assertions to serve as grounds for relief in this petition. However, to the extent he did, such claims fall under § 2254. Because Mr. Sherratt previously filed a § 2254 petition concerning the same conviction, they are second or successive. Under these circumstances, reasonable jurists could not debate the correctness of the district court's dismissal of claims challenging his state court conviction for lack of jurisdiction because Mr. Sherratt did not obtain prior authorization from this court before filing any § 2254 claims in the district court.

Although Mr. Sherratt filed his habeas petition on a § 2254 form, his four enumerated claims attacking the decisions of the Parole Board go to the execution of his sentence and are properly brought under § 2241. Circuit authorization is not required for such claims. *See Stanko v. Davis*, 617 F.3d 1262, 1269 n.5 (10th Cir. 2010) (holding that "the requirement for prior circuit authorization contained in § 2244(b)(3) does not apply to habeas petitions brought under § 2241"). Reasonable jurists, therefore, could debate

the correctness of the district court's dismissal for lack of jurisdiction of claims challenging the execution of Mr. Sherratt's sentence by the Parole Board.

Nevertheless, to obtain a COA, Mr. Sherratt must show that reasonable jurists could also debate whether he stated a valid claim for the denial of a constitutional right. When a district court has dismissed a petition on procedural grounds, "without developing its factual or legal basis through full briefing, we . . . simply take a quick look at the face of the complaint to determine whether the petitioner has facially alleged the denial of a constitutional right." *Paredes v. Atherton*, 224 F.3d 1160, 1161 (10th Cir. 2000) (brackets and internal quotation marks omitted). The face of Mr. Sherratt's habeas petition reveals that he has not satisfied this standard. The Utah Supreme Court decision on which Mr. Sherratt relies turned on the due process requirements of the state constitution. *See Neese*, 416 P.3d at 671-72 (holding that Utah's constitution requires additional procedural protections for certain Parole Board hearings). Federal habeas relief is not available for a violation of state law. *See Montez*, 208 F.3d at 865. On its face, Mr. Sherratt's habeas petition does not allege the denial of a federal constitutional right.

Finally, we note that in his application for a COA, Mr. Sherratt contends that his petition was not second or successive because it was based on fraud on the court. A fraud-on-the-court claim is second or successive "if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Spitznas v. Boone*, 464 F.3d 1213, 1215 (10th Cir. 2006); *see also Untied States v. Baker*, 718 F.3d 1204, 1207 (10th Cir. 2013) (explaining that a fraud-on-the court claim may be brought

either as an independent action under Rule 60(d)(3) or as a motion under Rule 60(b)(3), but the label does not change the analysis used to determine whether it is an unauthorized second or successive petition). It is not second or successive "if it either (1) challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application, or (2) challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition." *Spitznas*, 464 F.3d at 1216 (citation omitted).

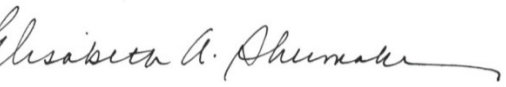
Mr. Sherratt's invocation of the fraud-on-the-court doctrine is unavailing for purposes of his request for a COA. His allegations of fraud relate to the impact of the *Neese* decision on previous habeas petitions challenging the execution of his sentence by the Parole Board. But as explained above, his § 2241 claims are not subject to § 2244(b)(3)'s strictures on second or successive petitions. To obtain a COA for those claims, he must show that reasonable jurists could debate whether his petition stated a valid claim for the denial of a constitutional right, which he has not done.

Conclusion

Mr. Sherratt has not shown that reasonable jurists could debate the correctness of the district court's ruling with regard to any § 2254 claims or debate whether he stated a

valid § 2241 claim for the denial of a constitutional right. We deny Mr. Sherratt's application for a COA and dismiss this matter.[1]

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

[1] Mr. Sherratt's *Motion to Recuse Parties (Federal Judges)* is denied. All other pending motions are denied as moot.