FILED
United States Court of Appeals
Tenth Circuit

July 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PONCE DE LEON GOINGS,

Defendant - Appellant.

No. 21-1050
(D.C. Nos. 1:20-CV-01707-RM &
1:17-CR-00328-RM-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Petitioner-Appellant Ponce De Leon Goings, a federal inmate represented by counsel, seeks a Certificate of Appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. See 28 U.S.C. § 2253.

Background

The Bureau of Alcohol, Tobacco, and Firearms (ATF) surveilled Mr. Goings' apartment after receiving information that his domestic partner purchased a firearm for him. 1 R. 14. After ATF agents observed Mr. Goings carrying the firearm, they stopped

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

him and seized a .45 caliber handgun from a holster on his hip. 1 R. 14. Mr. Goings' criminal record included a 2000 New York conviction for third-degree felony robbery, for which he served more than two years in prison, and a 2006 Alabama conviction for marijuana distribution, for which he served "almost two years" in prison. 1 R. 82. Thus, in January 2018, Mr. Goings pled guilty to one count of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). 1 R. 10. The district court sentenced Mr. Goings to twenty-four months' imprisonment and three years' supervised release. 1 R. 30.

Consistent with the law at the time, Mr. Goings was not advised that knowledge of his prohibited status was an element of a § 922(g)(1) violation. However, after Mr. Goings was sentenced, the Supreme Court held otherwise. Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019). Less than a year after the decision in Rehaif, Mr. Goings filed his § 2255 motion.

Mr. Goings argued that his plea was invalid and that there was a reasonable probability that, but for the error, he would not have entered this plea. 1 R. 43. Mr. Goings recounted that he thought his felony conviction had been expunged and that he did not know of his prohibited status when arrested. 1 R. 44. The government conceded the timeliness of the motion, conceded that Rehaif applied retroactively, and waived a plea-agreement-based waiver defense. 1 R. 51–52. The government instead argued that Mr. Goings had procedurally defaulted this argument by not pursuing it on direct appeal. 1 R. 53. The government further asserted that Mr. Goings could not overcome this default because he failed to show cause for the default or actual prejudice. 1 R. 53. In the alternative, the government argued that even if Mr. Goings had not procedurally

defaulted his claim, any error was harmless because he could not show that, but for the error, he would not have entered the plea. 1 R. 55–56.

The district court held that Mr. Goings' theory was procedurally defaulted. 1 R. 89. It concluded that Mr. Goings could not establish actual prejudice and so his procedural default was not excused. 1 R. 88. Further, in the alternative, the district court determined that even if Mr. Goings' procedural default was excused, any error was harmless error because Mr. Goings could not show a reasonable probability that he would not have entered his plea but for the error. 1 R. 89.

Discussion

A. Certificate of Appealability

To obtain a COA from this court, Mr. Goings must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a claim has been denied on the merits, the petitioner must demonstrate that reasonable jurists "would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a claim has been denied on procedural grounds, the petitioner must also demonstrate that reasonable jurists "would find it debatable whether the district court was correct in its procedural ruling." Id.

The district court's disposition is not reasonably debatable. A defendant may not raise an issue in a § 2255 motion if he failed to present the issue on direct appeal. See United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994). However, this can be

excused if the defendant can show "cause excusing his procedural default and actual prejudice resulting from the errors of which he complains." Id.

Mr. Goings maintains that he had a plausible post-Rehaif defense, specifically "that he did not in fact know that he had a felony conviction that had not been expunged." Aplt. Br. At 15. Section 922(g)(1) prohibits "any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" . . . "to possess in or affecting commerce, any firearm or ammunition." Having served two different sentences that were each about two years, Mr. Goings could not plausibly claim that he was unaware that he was a felon. See United States v. Tignor, 981 F.3d 826, 830 (10th Cir. 2020); United States v. Trujillo, 960 F.3d 1196, 1208 (10th Cir. 2020). Moreover, in a post-arrest statement, Mr. Goings recounted that "the first one I had her go buy was a (purple) Glock 23. Once she was able to buy the purple one I said okay, they made a mistake and they let us get a gun." 1 R. 75. He further confirmed that "he did not purchase the guns himself because he knew he had been to jail before." 1 R. 75. At sentencing, Mr. Goings further stated that, when he met his partner, he told her that he was a felon and could not be around guns. 3 R. 138–39. Although this Circuit has not yet decided whether the government must prove knowledge that the defendant's convictions had not been expunged, see Tignor, 981 F.3d at 830, even with such a burden, Mr. Goings could not prevail.

Mr. Goings argues that he carried the gun openly and cooperated with authorities when they detained him. Aplt. Br. 21. Mr. Goings also relies upon his statements that he believed he could legally possess a gun. Aplt. Br. 6–7. However, merely because Mr.

Goings no longer saw his inmate number on the New York State Department of Corrections website says little about why he might think the conviction was expunged. 1 R. 75. Further, Mr. Goings provides no facts that might support a belief that his Alabama felony conviction had been expunged.

Mr. Goings also argues that the district court's failure to advise him of all the elements of the charge under § 922(g)(1) was structural error warranting automatic reversal without regard to the mistake's effect on the proceeding. Aplt. Br. 26. Mr. Goings failed to raise this argument below and therefore we need not consider it. See Strauss v. Angie's List, Inc., 951 F.3d 1263, 1266 n.3 (10th Cir. 2020). Further, such argument is precluded by Supreme Court precedent. See Greer v. United States, 141 S. Ct. 2090, 2100 (2021).

B. In Forma Pauperis Status

Mr. Goings also moves the court for IFP status on appeal. Mr. Goings may obtain IFP status if he "seeks appellate review of any issue not frivolous." Coppedge v. United States, 369 U.S. 438, 445, 82 S. Ct. 917, 921, 8 L. Ed. 2d 21 (1962). Mr. Goings asserts that he made two non-frivolous arguments on appeal.

The first is his argument that he was in fact prejudiced when he was not told the knowledge-of-status element of § 922(g)(1) because there is a reasonable likelihood that he would not have entered his guilty plea. However, as discussed above, the lack of a factual predicate for his expungement argument renders this insubstantial.

The second argument was that the district court's failure to advise him of all the elements of the charge was structural error warranting automatic reversal without regard

to the mistake's effect on the proceeding. Mr. Goings argues that this is not a frivolous issue. Although this argument was foreclosed by Trujillo at the time of the motion, Mr. Goings argues that the Fourth Circuit created a circuit split on this issue when it ruled that such an error is structural. See United States v. Gary, 954 F.3d 194, 205 (4th Cir. 2020), cert. granted, 141 S. Ct. 974, 208 L. Ed. 2d 510 (2021), and rev'd sub nom. Greer v. United States, 141 S. Ct. 2090 (2021).[1] While an argument that addresses a circuit split is not frivolous, see Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999), Mr. Goings failed to raise this issue below and therefore, clearly waived it, see Strauss, 951 F.3d at 1266 n.3. Therefore, Mr. Goings failed to raise any nonfrivolous argument on appeal and IFP status is denied.

We DENY a COA, DENY the motion to proceed IFP, and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[1] The Supreme Court resolved this split against the Fourth Circuit shortly after Mr. Going's filed his motion. See Greer, 141 S. Ct. at 2100.