

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES RICCARDI,

Defendant - Appellant.

No. 20-3205
(D.C. No. 2:02-CR-20060-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **HOLMES**, Circuit Judges.

James Riccardi appeals the district court’s order denying his motion for return of property pursuant to Fed. R. Crim. P. 41(g). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In 2003, Riccardi was convicted of multiple crimes for which he was sentenced to 262 months’ imprisonment. We affirmed his conviction and sentence.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

United States v. Riccardi, 405 F.3d 852, 876 (10th Cir. 2005). In 2006, he filed his first motion to vacate his conviction and sentence under 28 U.S.C. § 2255. The district court denied the motion and we affirmed. He has since filed three requests for authorization to file a second or successive § 2255 motion, which we denied.

In early 2019, Riccardi wrote letters to the district court and the Federal Public Defender's Office (FPD) about his suspicion that his communications with his attorneys were recorded when he was housed in the Leavenworth Detention Center between 2002 and 2003. His suspicion stemmed from findings in an unrelated criminal case in the District of Kansas that the U.S. Attorney's office in Kansas had obtained unauthorized audio and video recordings of some inmate attorney-client phone calls and visits while those inmates were housed at Leavenworth. Riccardi requested an investigation into a potential Sixth Amendment claim based on the recordings he suspected had been made of his communications with counsel. In response to both inquiries, a federal public defender informed him that the FPD had no evidence that would permit it to file a § 2255 motion on that basis on his behalf. She explained that cameras were not installed in the attorney-client meeting rooms at Leavenworth until 2008 and the investigation into phone calls there only dated back to 2010, so there was no evidence of any video or audio recordings of Riccardi's conversations with his attorneys in 2002 and 2003.

Unsatisfied, Riccardi filed a motion in July 2019 asking the district court either to appoint private counsel to investigate potential improper-recording claims or to order the government to produce all recordings of his conversations with counsel

while housed there, along with any records of such recordings. In response to the government's argument that the motion was an unauthorized successive § 2255 motion, he asked the court to construe the motion as one for the return of property pursuant to Rule 41(g). The court denied his requests for court-appointed counsel and post-conviction discovery, declined to treat the motion as a post-conviction Rule 41(g) motion because such motions cannot be used to collaterally attack a conviction, and, to the extent the motion was an unauthorized successive § 2255 motion, dismissed it for lack of jurisdiction.

Soon thereafter, Riccardi filed his third motion in this court seeking authorization to file a successive § 2255 motion raising claims that the presumed recordings of his conversations with counsel violated his Sixth Amendment rights. In denying authorization, we noted that he presented no evidence that his visits or phone calls with counsel had been recorded, his name was not on the list submitted in the unrelated criminal case identifying inmates who may have been impacted by the unauthorized recordings, and the FPD had informed him that there was no evidence of any recordings of his conversations with counsel. We concluded he failed to meet the standard for authorization in 28 U.S.C. § 2255(h)(1), because he had not explained how any evidence of recordings of those conversations would establish that no jury would have found him guilty of the offenses for which he was convicted. *See In re Riccardi*, No. 19-3260, Order at 2 (10th Cir. Dec. 17, 2019).

Undaunted, Riccardi filed the Rule 41(g) motion at issue here, asking that any recordings of his conversations with counsel at Leavenworth and any related records

be released to him. He stated in the motion that he did “not seek to collaterally attack his conviction,” R. at 83, but in his reply to the government’s response to his motion, he maintained that “serious prosecutorial misconduct has occurred,” *id.* at 113. Specifically, he alleged it is “conceivable that [the facility] turned recordings over to the [U.S. Attorney’s Office],” and that the prosecutor who handled his case and other government officials obtained and listened to the recordings. *Id.* at 108. He also alleged it was “plausible” that prosecutors had “these recordings at one time only to destroy them at a later date.” *Id.* at 109.¹

Noting the similarities between Riccardi’s July 2019 motion and this one, the district court concluded the motion was an improper attempt to use Rule 41(g) to obtain discovery, presumably to challenge his conviction based on an alleged Sixth Amendment violation, and it denied the motion on that basis. Further, noting that Riccardi’s reply brief suggested that his purpose in obtaining any recordings was to pursue a prosecutorial misconduct claim, the court explained that such a claim would be a collateral challenge to his conviction and sentence that must be asserted in a § 2255 motion. The court also explained that it could not simply construe the motion

¹ The government filed an untimely response to Riccardi’s motion, including an affidavit by the assistant U.S. attorney who handled his prosecution, indicating that she had no recollection of requesting his calls and that her review of the case file revealed no evidence of such calls. She also swore she did not listen to any recordings of calls he made to his attorneys or anybody working for his attorneys while he was detained at Leavenworth or any other facility. The district court accepted the untimely response but stated in its order that in denying the Rule 41(g) motion, it did not rely on any grounds asserted in the response.

as a § 2255 motion because Riccardi had not obtained authorization from this court to file such a motion and the district court would lack jurisdiction to consider it.

DISCUSSION

A. Legal Standards

Rule 41(g) allows a person “aggrieved by an unlawful search and seizure of property or by the deprivation of property” to “move for the property’s return.” Fed. R. Crim. P. 41(g). Attempts to use Rule 41(g) motions to obtain relief other than the return of unlawfully seized property in the government’s possession have failed. *See, e.g., Clymore v. United States*, 415 F.3d 1113, 1120 (10th Cir. 2005) (discussing former Rule 41(e), now found at Rule 41(g), and holding that a motion for return of property cannot be used to obtain compensatory damages for property that can no longer be returned); *United States v. Rodriguez-Aguirre*, 414 F.3d 1177, 1182 (10th Cir. 2005) (holding that a motion for return of property is “an inappropriate vehicle” for attacking a civil forfeiture judgment); *see also United States v. Burton*, 167 F.3d 410, 410 (8th Cir. 1999) (holding that a motion for return of property may not be used to collaterally attack a guilty plea).

The rule “provides an equitable remedy” that is available only if the movant “can show irreparable harm and an inadequate remedy at law.” *United States v. Bacon*, 900 F.3d 1234, 1237 (10th Cir. 2018) (internal quotation marks omitted). “Rule 41(g) jurisdiction should be exercised with caution and restraint, and the district court should dismiss a Rule 41(g) motion if the movant has failed to make this showing.” *Id.* (brackets and internal quotation marks omitted).

We review a district court's resolution of legal questions in ruling on a Rule 41(g) motion de novo, but we review its weighing of equitable considerations and its decision to deny the motion for an abuse of discretion. *United States v. Shigemura*, 664 F.3d 310, 312 (10th Cir. 2011).

B. Application

Riccardi maintains that his reason for seeking the recordings and related records was immaterial to whether he is entitled to them under Rule 41(g), and that the district court erred by denying his motion on the ground that it was an improper attempt to obtain discovery to support a collateral attack on his conviction.

The bulk of Riccardi's motion and reply focused on issues relevant not to a Rule 41(g) motion, but to making speculative arguments about prosecutorial misconduct. It is thus not surprising that the district court interpreted his motion as an attempt to obtain information he could use to support a § 2255 motion, and it correctly resisted his efforts to do so—Rule 41(g) is not a discovery tool.

Further, although the district court did not address other reasons the motion fell short, we “may affirm on any basis supported by the record,” *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), and the record plainly demonstrates that Riccardi was not entitled to relief under the Rule 41(g) standard. The motion was based on speculation that his conversations with counsel had been recorded—he provided no evidence to that effect. And he ignored competent evidence in the record that there were no such recordings, including the FPD's letters in response to his initial inquiries explaining that there was no evidence of any video or audio

recordings of Riccardi's conversations with his attorneys. Further, the motion did not even mention the irreparable harm/inadequate legal remedy standard, much less establish that it was satisfied here. Accordingly, the district court could have denied his motion on that basis as well. *See Bacon*, 900 F.3d at 1237 (explaining that a district court should dismiss a Rule 41(g) motion if the movant fails to establish irreparable harm and the inadequacy of legal remedies).

CONCLUSION

We affirm the order denying Riccardi's Rule 41(g) motion.

Entered for the Court

Timothy M. Tymkovich
Chief Judge