

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 2, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS BERNAL
SALAZAR,

Defendant - Appellant.

No. 20-6160
(D.C. Nos. 5:20-CV-00473-F
& 5:18-CR-00006-F-3)
(W.D. Okla.)

ORDER*

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **BACHARACH**,
Circuit Judges.

This case grew out of a federal conviction on drug-and-gun charges (possession of methamphetamine with intent to distribute and possession of a firearm while being unlawfully present in the United States). *See* 21 U.S.C. § 841(a)(1); 18 U.S.C. § 922(g)(5). The defendant, Mr. Juan Carlos Bernal Salazar, moved in district court to vacate his sentence. The district court denied the motion, and Mr. Bernal Salazar sought relief under

* This order does not constitute precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But the order may be cited for its persuasive *vale* if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Federal Rule of Criminal Procedure 52(b). The court dismissed this motion for lack of jurisdiction, and Mr. Bernal Salazar wants to appeal both rulings.

To appeal these rulings, he needs a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (a certificate of appealability is necessary to appeal the denial of a motion to vacate a sentence): *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (a certificate of appealability is necessary to appeal the denial of a motion that was dismissed as an unauthorized second motion to vacate the sentence). To obtain a certificate of appealability, Mr. Bernal Salazar must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Mr. Bernal Salazar has not made this showing.

1. Denial of the Motion to Vacate the Sentence

Mr. Bernal Salazar argues in part that the district court should have granted his motion to vacate the sentence. In this motion, he alleged ineffectiveness of his trial counsel for failure to challenge the charge of unlawfully possessing a firearm. 18 U.S.C. §§ 922(g)(5), 924(a)(2). According to Mr. Bernal Salazar, his attorney should have challenged the element of possession because the firearm had been found on premises occupied by several individuals.

For this argument, Mr. Bernal Salazar must show that reasonable jurists could debate the correctness of the district court’s ruling. *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000). In our view, the ruling was not reasonably debatable. The attorney had nothing to challenge because Mr. Bernal Salazar pleaded guilty rather than go to trial.

In pleading guilty, Mr. Bernal Salazar admitted possession of the firearm. This admission is generally conclusive; we can second-guess the admission only if Mr. Bernal Salazar presented a credible reason to question what he had said when pleading guilty. *United States v. Weeks*, 653 F.3d 1188, 1205 (10th Cir. 2011). He has presented no such reason. As a result, his attorney could not be considered ineffective for failing to challenge the government's proof of possession.

Mr. Bernal Salazar also points out that the criminal law prohibited possession only if he knew that he had been illegally in the United States. *See* 18 U.S.C. § 922(g)(5) (prohibiting possession of firearms by individuals unlawfully in the United States); *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019) (requiring proof that the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm”). According to Mr. Bernal Salazar, the government could not prove this element.

Irrespective of the government's ability to prove this element, however, his attorney would not have been ineffective. When Mr. Bernal Salazar pleaded guilty, our precedent allowed a finding of guilt irrespective of whether the defendant knew that he was in a group

prohibited from possessing a firearm. *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012).

The law later changed. *Rehaif*, 139 S. Ct. at 2200. But an attorney is not ineffective for failing to predict abrogation of our existing precedent. *See Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (“[W]e have rejected ineffective assistance claims where a defendant ‘faults his former counsel not for failing to find existing law, but for failing to predict future law’ and have warned ‘that clairvoyance is not a required attribute of effective representation.’” (citations omitted)).

2. Dismissal of the Rule 52(b) Motion

After the district court denied the motion to vacate the sentence, Mr. Bernal Salazar moved for relief under Federal Rule of Criminal Procedure 52(b). In this motion, he again alleged that his attorney was ineffective, adding that (1) the district court had imposed an overly harsh sentence by miscalculating the quantity of drugs and (2) the government could not prove possession of the firearm. The district court dismissed the motion for lack of jurisdiction, reasoning in part that Mr. Bernal Salazar could not use Rule 52(b) to collaterally challenge his conviction or sentence. *See* note 1, below.

To obtain a certificate of appealability on this issue, Mr. Bernal Salazar must show that the district court’s procedural ruling was subject to

reasonable debate. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). He has not made this showing.

Though Mr. Bernal Salazar reargues the merits of his arguments, he does not defend the use of Rule 52(b) to collaterally challenge a conviction or sentence.¹ See *United States v. Frady*, 456 U.S. 152, 164, 166 (1982) (stating that the Rule 52(b) standard for plain error does not apply in post-conviction proceedings). Because Rule 52(b) is unavailable to collaterally challenge the conviction, Mr. Bernal Salazar has not shown a reason to question the district court's procedural ruling.

* * *

Because Mr. Bernal Salazar has not shown that the district court's rulings are subject to reasonable debate, we decline to grant a certificate of

¹ This rule allows a district court to consider a plain error affecting a defendant's substantial rights. Fed. R. Crim. P. 52(b). Despite the narrowness of the rule, the district court considered and rejected the possibility of construing the motion as one to alter or amend the judgment (Fed. R. Civ. P. 59(e)) or to reopen the case (Fed. R. Civ. P. 60). Mr. Bernal Salazar does not challenge the district court's reasons for rejecting construction as a motion to alter, amend, or reopen.

appealability. With no certificate, we dismiss this matter.²

Entered for the Court

Robert E. Bacharach
Circuit Judge

² Though we dismiss the matter, we grant Mr. Bernal Salazar's motion for leave to proceed in forma pauperis.