FILED
United States Court of Appeals
Tenth Circuit

April 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EDGAR NELSON PITTS,

Plaintiff - Appellant,

v.

BUREAU OF PRISONS; CUNDIFF; ANDRE MATEVOUSIAN; FIELDS, Chaplin,

Defendants - Appellees.

No. 22-1176
(D.C. No. 1:20-CV-01422-RM-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Edgar Nelson Pitts, a pro se federal prisoner, appeals from a district court order that denied his motion for reconsideration of an order that denied relief from a stipulated dismissal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

BACKGROUND

Mr. Pitts, an adherent of the Rastafarian faith, is incarcerated at the U.S. Penitentiary, Administrative Maximum, in Florence, Colorado. In May 2020, he sued the Bureau of Prisons (BOP) and various prison officials, claiming they violated the Religious Freedom Restoration Act ("RFRA") and his rights under the First, Fifth, and Eight Amendments by denying him "an Ital Rastafarian Livity (diet)." R. at 17. On the defendants' motion, the district court dismissed all of his claims except for his RFRA claim against the BOP and certain other defendants in their official capacities.

Afterward, the parties engaged in settlement negotiations. The BOP's senior attorney advisor met with Mr. Pitts in June and October 2021 to discuss his dietary issues. On November 30, 2021, the advisor gave Mr. Pitts a proposed four-page settlement agreement. Therein, the BOP offered to provide him nutritional shakes and additional servings of oatmeal and peanut butter, and it agreed to follow a memorandum for "substituting fresh fruits and vegetables" on "the Nation[al] Menu Fruit and Vegetable Exchange" (the "Exchange"). R. at 458-59. Mr. Pitts reviewed the document and proposed changes.

Ten days later, on the morning of December 9, the advisor gave Mr. Pitts a revised proposed settlement agreement. Mr. Pitts reviewed it and raised a concern regarding the document's treatment of the fruits-and-vegetables memorandum. The advisor left to "discuss the matter with the legal team." R. at 454.

At 2:45 p.m., the advisor returned with a third draft of the proposed settlement agreement, adding one sentence to page three for fresh fruits and vegetables in the event

the memorandum is revoked. The advisor showed page three to Mr. Pitts. He agreed to the modification and signed the settlement agreement and a stipulated dismissal, which was filed later that day. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii) (providing that "the plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared.").

The next day, Mr. Pitts submitted a Fed. R. Civ. P. 60(b) motion to the district court, seeking to void the settlement agreement and reopen the case. He claimed he "made a mistake in signing" the agreement because he "was only given page 3 of the" final draft and had not read the remainder. R. at 432-33. But he acknowledged that he had in his possession the two prior drafts of the agreement. In a reply brief, he complained that he made a mistake by not seeking "a more specific definition of the . . . [E]xchange." Suppl. R. at 4. The district court denied Mr. Pitts's motion, ruling that he merely made a unilateral mistake as to the meaning of the settlement agreement, and there was no allegation that his acceptance of the settlement agreement was procured by fraud or deceit.

Mr. Pitts then filed a motion under Fed. R. Civ. P. 59(e), seeking reconsideration of the denial of Rule 60(b) relief. He argued that the BOP's legal adviser deceived him into settling the case because the "Exchange was at that time . . . the status quo, which was and remain[s] in direct conflict with [his] religous [sic] exercise." R. at 497. The district court denied reconsideration, stating that Mr. Pitts failed to show any evidence of deceit or explain why he did not claim deceit in his Rule 60(b) motion.

Mr. Pitts appeals the denial of reconsideration.

DISCUSSION

I. Standards of Review

"We review a district court's decision denying a motion for reconsideration for abuse of discretion." *Roberts v. Winder*, 16 F.4th 1367, 1385 (10th Cir. 2021) (internal quotation marks omitted). "Under an abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (internal quotation marks omitted).

II. Reconsideration

Grounds for granting a motion to reconsider under Rule 59(e) include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

On the other hand, relief from a final judgment, order or proceeding under Rule 60(b) requires a mistake; newly discovered evidence; fraud, misrepresentation, or misconduct; a void or satisfied judgment; or some other justified reason. Fed. R. Civ. P. 60(b). "Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *ClearOne Commc'ns, Inc. v. Bowers*, 643 F.3d 735, 754 (10th Cir. 2011) (internal quotation marks omitted).

Fundamentally, we note that Mr. Pitts does not clearly address the district court's grounds for denying reconsideration (failure to identify evidence of deceit or to explain the omission of deceit in his Rule 60(b) motion). Although we liberally construe Mr. Pitts's pro se filings, we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "[M]ere conclusory allegations with no citations to the record or any legal authority for support" are insufficient to perfect an issue for appellate review. *Id.* at 841.

In any event, Mr. Pitts's *belief* that the BOP advisor "misrepresented the . . . Exchange as being a direct response to resolve [his] RFRA claim," Aplt. Opening Br. at 19 (internal quotation marks omitted), is not "clear and convincing proof of fraud, misrepresentation, or misconduct," *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005) (internal quotation marks omitted); *see also Fontenot v. Crow*, 4 F.4th 982, 1018 (10th Cir. 2021) (observing that clear-and-convincing proof is "satisfied by evidence that would place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable" (internal quotation marks omitted)), *cert. denied*, 142 S. Ct. 2777 (2022); *Zurich N. Am.*, 426 F.3d at 1292 (stating that Rule 60(b) fraud requires "evidence of intent or a deliberate plan or scheme").

In fact, in his Rule 60(b) motion, Mr. Pitts claimed responsibility for not seeking a more specific definition of Exchange foods. He admitted making a "stupid mistake" and did not accuse the BOP's advisor of deceit. R. at 433. On appeal, he does not contend that reconsideration should have been granted to revisit the denial of Rule 60(b) relief on

the basis of mistake. Any argument that reconsideration should have been granted on that basis is therefore waived. *See Burke v. Regalado*, 935 F.3d 960, 995 (10th Cir. 2019) ("The failure to raise an issue in an opening brief waives that issue." (internal quotation marks omitted)).

Additionally, because Mr. Pitts did not claim deceit in his Rule 60(b) motion, the district court properly relied on that omission as a ground for denying reconsideration. *See Servants*, 204 F.3d at 1012 (explaining that a motion for reconsideration "is not appropriate to . . . advance arguments that could have been raised in prior briefing"). On appeal, Mr. Pitts does not challenge that ground for denying reconsideration. "When an appellant does not challenge a district court's alternate ground for its ruling, we may affirm the ruling." *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1252 (10th Cir. 2009).

CONCLUSION

We affirm the district court's order denying reconsideration. We deny Mr. Pitts's motion for leave to proceed without prepayment of the filing fee because he has not demonstrated "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997).

Entered for the Court

Bobby R. Baldock
Circuit Judge