FILED
United States Court of Appeals
Tenth Circuit

July 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD SCOTT MCINTOSH,

Defendant - Appellant.

No. 22-7046
(D.C. No. 6:91-CR-00051-RAW-2)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Richard Scott McIntosh, pro se, appeals the district court's judgment denying his petition for a writ of coram nobis and the court's orders denying his motion to void that judgment, his motion to recuse, and his motion for appointment of counsel. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's judgment and other rulings.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. BACKGROUND

In 1991, McIntosh robbed the same Oklahoma bank twice. He was convicted first in federal district court and then in Oklahoma state court. The federal court sentenced him to 34 years in prison, the state court to life imprisonment plus 15 years. We upheld his federal conviction and sentence on direct appeal, *see United States v. McIntosh*, 999 F.2d 487, 489 (10th Cir. 1993), and dismissed his appeal from the denial of his 28 U.S.C. § 2255 motion, *see United States v. McIntosh*, No. 98-7048, 1999 WL 46719, at *1 (10th Cir. Feb. 3, 1999) (unpublished).

In 2016, McIntosh filed a motion purportedly under Federal Rule of Civil Procedure 60(b)(4), asserting that the federal court that convicted him lacked subject matter jurisdiction due to the failure to properly procure his attendance at trial through appropriate use of writs of habeas corpus ad prosequendum (HCAP). More specifically, he alleged that Oklahoma arrested him first, and although the federal district court issued an HCAP for his attendance at his arraignment on federal charges, he was afterwards returned to state custody, and the federal court failed to properly use an HCAP to procure his attendance at later proceedings, including trial.[1] The district court concluded the motion was in fact an unauthorized second or successive § 2255 motion and transferred it to this court for authorization. We

[1] Although McIntosh's purported Rule 60(b)(4) motion is not part of the record on appeal, we may take judicial notice of it. *See Binford v. United States*, 436 F.3d 1252, 1256 n.7 (10th Cir. 2006) ("[T]he court is permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record." (internal quotation marks omitted)). We likewise take judicial notice elsewhere in our decision of other court filings not of record in this appeal.

denied authorization. *See In re McIntosh*, No. 16-7001, Order at 4 (10th Cir. Mar. 9, 2016) (unpublished).

A few weeks later, McIntosh asserted substantially the same argument in a petition for a writ of coram nobis,[2] adding that after his federal arraignment but before his federal trial, he attended a preliminary hearing in state court. The district court denied that petition. We affirmed for three reasons. First, McIntosh was still in federal custody, and "[a] prisoner may not challenge a sentence or conviction for which he is currently in custody through a writ of coram nobis." *United States v. McIntosh*, 685 F. App'x 655, 655 (10th Cir. 2017) (internal quotation marks omitted). Second, relief under § 2255 was available and adequate, and McIntosh had in fact presented the same jurisdictional issue in his second § 2255 motion. *See id.* And third, "the facts underlying his jurisdictional claim occurred and were known to him over twenty-five years ago," and McIntosh had "not shown diligence in bringing his claim. He could and should have raised his jurisdictional claim on direct appeal or in his initial § 2255 motion." *Id.* at 656 (citation omitted).

In 2021, McIntosh filed a second petition for a writ of coram nobis, the denial of which is at issue in this appeal. He alleged that he was no longer in the custody of the United States, and he incorporated the substance of his first coram nobis petition.

[2] "A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal conviction for a person . . . who is no longer in custody and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241." *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013) (internal quotation marks omitted). It is an "extraordinary remedy" to be used "only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511 (1954).

The district court construed the petition as seeking vacatur of his federal convictions based on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which McIntosh had referenced in a motion for appointment of counsel he had filed more than a year prior to filing his second coram nobis petition.[3] So construed, the district court denied the petition because the Supreme Court had not held that *McGirt* is retroactively applicable. The court also denied the motion for appointment of counsel and entered a separate judgment.

McIntosh filed a post-judgment motion seeking to recuse the district judge and to void the denial of the coram nobis petition. He argued that his request for coram nobis relief was not based on *McGirt* and, by so construing it, the district court displayed prejudice toward him. The district court declined to recuse because adverse rulings alone are an insufficient basis for recusal. The court denied the motion to void its denial of the writ because our ruling affirming the denial of McIntosh's first petition for coram nobis relief was law of the case, although given that McIntosh was no longer in federal custody, only the due-diligence rationale remained vital. In the alternative, the district court reasoned that McIntosh lacked standing to challenge the transfer of custody from Oklahoma to the federal court because it involved "an issue of comity between two sovereigns." R., Vol. 2 at 25. This appeal followed.

[3] In *McGirt*, the Supreme Court held that land promised to the Creek Nation in the 19th century remains an Indian reservation, and therefore the right to prosecute Native Americans for crimes committed on the reservation rests with the federal government or the Tribe, not with the State of Oklahoma. *See* 140 S. Ct. at 2459–60.

II. DISCUSSION[4]

A. Denial of motion to appoint counsel

McIntosh argues that because coram nobis is regarded as ancillary to a criminal proceeding, *see United States v. Denedo*, 556 U.S. 904, 913 (2009), the district court erred in denying his motion for appointment of counsel. He relies on 18 U.S.C. § 3006A(c), which provides: "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings." We need not sort out whether § 3006A applies to requests for appointment of counsel to pursue coram nobis relief; even if it does, any error in failing to appoint counsel was harmless. According to his motion for appointment of counsel, McIntosh sought counsel only to advance jurisdictional arguments based on *McGirt*. *See* ECF No. 241 at 1. But in his post-judgment motion, he argued that *McGirt* was inapplicable and that his petition did not rely on it. He maintains those positions on appeal. Thus, we see no harm in failing to appoint counsel to assert an argument McIntosh disclaims making.

B. Denial of coram nobis petition

McIntosh next argues the district court erred in construing his petition as based on *McGirt*. We see no reversible error. The district court's initial construction of the petition was reasonable given the substance of McIntosh's motion for appointment of

[4] We afford McIntosh's pro se filings a liberal construction, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

counsel and the directive that courts are to consider pro se filings liberally. To the extent the district court initially overlooked McIntosh's express incorporation of the arguments he made in his first coram nobis petition, the district court remedied that itself when it ruled on the post-judgment motion.

C. Order denying motion to recuse

McIntosh argues the district judge should have recused because the judge had denied his petition on procedural grounds rather than the merits of his jurisdictional argument, and that might have affected the judge's ability to apply federal law fairly. But "a motion to recuse cannot be based solely on adverse rulings." *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1028 (10th Cir. 1988). And here, McIntosh relies only on the district judge's adverse ruling. We therefore see no abuse of discretion in the denial of the motion to recuse. *See id.* at 1026 ("The denial of a motion to recuse is reviewed for abuse of discretion.").

D. Order denying motion to void denial of coram nobis relief

Finally, we turn to the district court's denial of McIntosh's post-judgment motion to void the judgment denying coram nobis relief. Subject to certain limited exceptions, "a petition for writ of coram nobis must be rejected if the claim was raised or could have been raised on direct appeal, through a § 2255 motion, or in any other prior collateral attack on the conviction or sentence." *United States v. Miles*, 923 F.3d 798, 804 (10th Cir. 2019).[5] Here, McIntosh raised the same jurisdictional

[5] In our 2017 ruling affirming the denial of McIntosh's first petition for a writ of coram nobis, we relied on an unpublished case, *Embrey v. United States*,

claim in his second § 2255 motion and his first coram nobis petition as he did in his second coram nobis petition. Thus, unless an exception applies, he is not entitled to relief on his second coram nobis petition. *See id.* at 805 (concluding that claim raised in second coram nobis petition was procedurally barred because the defendant had raised it in his first coram nobis petition).

A court may consider a claim that was previously raised and adjudicated in an earlier petition for a writ of coram nobis if the petitioner shows "that the alleged error probably has caused the conviction of one innocent of the crime, thereby implicating a fundamental miscarriage of justice." *Id.* at 803 (internal quotation marks omitted). McIntosh has not attempted to make such a showing. Instead, his argument is based on an alleged procedural shortcoming—the failure of the federal district court to obtain an HCAP to secure his presence at trial. Accordingly, he fails to show a fundamental miscarriage of justice would result from the district court's refusal to address the merits of his claim.

We are not persuaded otherwise by McIntosh's contention that a jurisdictional challenge can be raised at any time, even on appeal or in a collateral attack. Although this proposition is true in some circumstances (and although *Miles* did not involve an attack on subject matter jurisdiction), the proposition has no application

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240 F. App'x 791, 794 (10th Cir. 2007), for a similar rule. McIntosh takes issue with *Embrey*, but we are bound to apply our precedential decision in *Miles* "absent en banc review or intervening Supreme Court precedent," *United States v. Torres-Duenas*, 461 F.3d 1178, 1183 (10th Cir. 2006). Neither condition is satisfied here.

here because McIntosh's claim does not implicate the federal district court's subject matter jurisdiction over his federal prosecution. "The sovereign that first acquires custody of a defendant in a criminal case is entitled to custody until it has exhausted its remedy against the defendant." *Weekes v. Fleming*, 301 F.3d 1175, 1180 (10th Cir. 2002). But "[t]his rule of comity *does not destroy the jurisdiction of the other sovereign* over the defendant; it simply requires [the other sovereign] to postpone its exercise of jurisdiction until the first sovereign is through with him or until the first sovereign agrees to temporarily or permanently relinquish custody." *Id.* (emphasis added).

Applying these principles, we conclude that, assuming Oklahoma was first to acquire custody of McIntosh, any failure to properly use an HCAP to obtain custody of him for later proceedings in the federal district court does not implicate the federal court's subject matter jurisdiction over his federal prosecution, which was conferred by 18 U.S.C. § 3231. "The function of the writ of habeas corpus ad prosequendum is to remove a prisoner to the proper jurisdiction for prosecution[,]" *Gilmore v. United States*, 129 F.2d 199, 202 (10th Cir. 1942), not to grant subject matter jurisdiction to the court issuing the writ, which is the exclusive province of Congress, *see Henry v. Off. of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994) ("Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress."). And as a matter of comity, the two sovereigns

here could (and apparently did) agree as to the sequencing of prosecution, including the temporary relinquishment of custody.[6]

McIntosh's remaining arguments have no bearing on our reasons for affirming the district court's denial of his motion to void the judgment denying coram nobis relief, so we decline to discuss them.[7] And our resolution of that issue renders it unnecessary to consider the district court's alternative reason for declining to void

[6] The crux of McIntosh's claim also appears factually flawed. The HCAP directed the United States Marshal to bring McIntosh before the federal district court on September 27, 1991, "for arraignment *and subsequent disposition*." R., Vol. 1 at 38 (emphasis added). A return on the HCAP and information on the district court's docket sheet indicate that a Marshal received custody of McIntosh on that day from the Muskogee County Jail and returned him there the same day. *See id.* at 39; district court docket entry dated Jan. 31, 1992. McIntosh was tried in early November 1991 and sentenced on January 28, 1992. On January 30, 1992, the Marshal received custody of McIntosh from the Muskogee County Jail and delivered him to the Muskogee County Sheriff, presumably returning him to the custody of Oklahoma. *See* R., Vol. 1 at 39; district court docket entry dated Jan. 31, 1992. According to the government's response to McIntosh's first coram nobis petition, federal pretrial detainees are usually held at the Muskogee County Jail because there is no federal detention facility in Muskogee. *See* R., Vol. 1 at 50 n.2. It thus appears that McIntosh remained in federal custody pursuant to the HCAP from September 27, 1991, through January 31, 1992, despite being held in a state facility, and despite his alleged attendance at a preliminary hearing in state court after his federal arraignment but before his federal trial.

[7] McIntosh's remaining arguments include: (1) the district court erred in applying the law of the case doctrine; (2) our prior rulings denying authorization of his second § 2255 motion and affirming the denial of his first motion for a writ of coram nobis were wrong; (3) the one-year time limit for filing a § 2255 motion is unconstitutional because it is too short; (4) our prior cases requiring a showing of due diligence as a prerequisite for coram nobis relief are wrong; and (5) the record contains no evidence of any comity between the State of Oklahoma and the federal district court with respect to his attendance at trial in federal court.

that judgment (that McIntosh lacked standing to contest a matter of comity between two sovereigns).

III. CONCLUSION

We affirm the district court's judgment denying McIntosh's petition for a writ of coram nobis and its order denying his post-judgment motion. We grant McIntosh's request to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Carolyn B. McHugh
Circuit Judge