FILED
United States Court of Appeals
Tenth Circuit

July 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN EDWARD ENGELMEYER,

Defendant - Appellant.

No. 23-6005
(D.C. No. 5:14-CR-00116-F-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Martin Edward Engelmeyer, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B) (an appeal may not be taken from a final order denying relief under § 2255 unless the movant obtains a COA). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

I.

Engelmeyer is a prisoner in the custody of the Federal Correctional Institution in Littleton, Colorado. In 2014, he pleaded guilty to distribution of child pornography and was sentenced to 210 months' imprisonment and a 10-year term of supervised release. In

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

2022, Engelmeyer filed a pro se "Motion to Vacate or Set Aside a Sentence Declaring Supervised Release Unconstitutional Pursuant to 28 [U.S.C.] § 2255/18 [U.S.C.] § 3583(e)(2)," in which he challenged his 10-year term of supervised release as illegal under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. R. Vol. I at 64. The district court construed the motion as a motion under 28 U.S.C. § 2255, dismissed it as time barred, and denied a COA. Engelmeyer did not appeal that dismissal but instead filed a "Motion to Modify or Terminate Supervise [sic] Release Conditions as Unconstitutional as Applied Pursuant to 18 [U.S.C.] § 3583(e)(2) and Fed. R. Crim. P. 32.1(c)," again challenging his 10-year term of supervised release as illegal under the Double Jeopardy Clause. *Id.* at 69. The district court again construed this second motion as a motion pursuant to 28 U.S.C. § 2255. The district court ultimately dismissed the motion as time barred with prejudice and denied a COA. Engelmeyer now seeks a COA to appeal the denial of his second § 2255 motion.

II.

To obtain a COA, a criminal defendant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Whether to grant a COA is a "threshold question that should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (cleaned up). To meet this threshold, the applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "In

evaluating whether an applicant has satisfied this burden, we undertake a preliminary, though not definitive, consideration of the legal framework applicable to each of the claims." *United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013) (cleaned up). Engelmeyer is a pro se movant, so we construe his briefing liberally. *See United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019) (cleaned up).

III.

Like the district court, we deny a COA. As the district court properly noted, since Engelmeyer did not establish a viable equitable tolling argument, the second § 2255 motion was time barred and subject to dismissal with prejudice. Engelymeyer cannot show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. Thus, "[w]e see no reason to quarrel with the judge's detailed analysis of the issue and see no basis upon which to debate the propriety of his decision. That ends the matter." *Parker*, 720 F.3d at 787.

IV.

We DENY Engelmeyer's request for a COA and DISMISS the appeal.[1]

Entered for the Court

Allison H. Eid
Circuit Judge

[1] Engelmeyer filed a motion in this Court seeking to proceed in forma pauperis. We GRANT Engelmeyer's motion to proceed IFP on appeal.