FILED
United States Court of Appeals
Tenth Circuit

August 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHAYNE E. TODD,

Petitioner - Appellant,

v.

MIKE HADDON; BRIAN NIELSON,

Respondents - Appellees.

No. 22-4099
(D.C. No. 2:19-CV-00700-DBB)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Shayne E. Todd seeks a certificate of appealability (COA) to appeal the district court's denial of his application for a writ of habeas corpus. Because he has failed to show that the district court's denial of his application was debatable among reasonable jurists, we deny a COA and dismiss this matter.

BACKGROUND

In 2001, Mr. Todd pled guilty in state court to possession of a dangerous weapon by a restricted person. A jury then convicted him of first-degree murder. He was sentenced to one to fifteen years on the dangerous weapon charge and to five years to life

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

on the murder conviction, to be served consecutively to each other and to any other prior terms he was currently serving. He unsuccessfully appealed his conviction and sentence, and unsuccessfully sought post-conviction relief in the Utah state courts.

On November 15, 2010, the Utah Board of Pardons and Parole (UBPP) issued a decision stating that Mr. Todd's next parole rehearing would be scheduled for February 2029. In February 2019, the UBPP held a redetermination review and made no change in the scheduled rehearing date. Mr. Todd unsuccessfully sought through several state-court motions to correct his allegedly illegal sentence.

In 2012, Mr. Todd filed an application for habeas corpus under 28 U.S.C. § 2254 in the Utah federal district court. The district court dismissed the petition as untimely, and we denied him a COA. *See Todd v. Bigelow*, 534 F. App'x 748, 751 (10th Cir. 2013).

Mr. Todd then filed his present application in September 2019, captioning it a habeas petition under 28 U.S.C. § 2241. The district court determined that the application asserted claims under both 28 U.S.C. §§ 2241 and 2254. To the extent Mr. Todd challenged the execution of his sentence, the district court treated those claims as having been brought under § 2241. But his challenges to the validity of his conviction and sentence fell under 28 U.S.C. § 2254.

The district court denied the § 2241 claims on the merits. It then dismissed the § 2254 claims without prejudice, finding that they represented a second-or-successive challenge to the same conviction and sentence challenged in his previous § 2254 application and that Mr. Todd had not obtained authorization from this court to pursue a

second-or-successive application. *See* 28 U.S.C. § 2244(b)(1)–(3) (describing bar on unauthorized second-or-successive claims). It also denied a petition for writ of mandamus that Mr. Todd had filed in the habeas proceeding. Finally, the district court denied him a COA to appeal its order.

DISCUSSION

To pursue this appeal, Mr. Todd must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867–68 (10th Cir. 2000) (requiring a COA whether a state prisoner's petition was filed pursuant to § 2254 or § 2241, so long as the detention arises out of process issued by a state court). To be entitled to a COA, he must make a "substantial showing of the denial of a constitutional right." § 2253(c)(2). This means that for those claims the district court denied on their merits, he must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And to raise a challenge concerning those claims denied on procedural grounds, he must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." *Id.*

Mr. Todd filed two separate requests for a COA in this court, an original request dated October 26, 2022, and a second request on January 24, 2023. In determining whether to grant a COA, we have fully considered the arguments made in both requests. Because Mr. Todd proceeds pro se, we construe his pleadings liberally, without acting as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

1. Arguments Concerning the District Court's Procedural Rulings

Mr. Todd argues his current application is not barred by the one-year statute of limitations contained in 28 U.S.C. § 2244(d)(1). But the district court did not rely on the limitations period in reaching its decision.[1] Because a COA is properly denied here on other grounds, we need not resolve any timeliness issue concerning the current application. *See generally Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (stating § 2244(d)(1)'s limitation period is not jurisdictional).

Mr. Todd also appears to argue that *his 2012 application* was improperly dismissed as untimely and therefore does not "count" as a prior application for second-or-successive purposes. The district court's 2013 dismissal of his first § 2254 application—which we upheld on appeal by denying a COA—counted as a ruling on the merits of the application for purposes of § 2244(b). *See In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (stating the dismissal of a first habeas petition as time-barred was a decision on the merits that triggered the second-or-successive provisions of AEDPA). That decision has not been reversed or vacated, and it cannot be collaterally attacked in this proceeding. Accordingly, it continues to stand as a ruling on the merits of Mr. Todd's first habeas application. His current § 2254 claims challenge the same

[1] The district court did rely on the untimeliness of Mr. Todd's § 2254 claims as one of several reasons to dismiss them rather than transferring them to this court for authorization. *See* R. vol. II at 31. But even if his claims were somehow timely, Mr. Todd would still require authorization to bring them, which he has not obtained.

conviction and sentence as did his first application and the district court therefore properly treated them as second or successive.[2]

Mr. Todd also implies that he can use § 2241, or the habeas principles it codifies, to avoid the second-or-successive limitations on his § 2254 claims. Although § 2241 is available to challenge the execution of his sentence, *see Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008), it cannot be used to attack his underlying conviction and sentence, *see Straley v. Utah Bd. of Pardons*, 582 F.3d 1208, 1213 (10th Cir. 2009). It is therefore unavailable to circumvent the second-or-successive bar to his § 2254 challenges.

Finally, Mr. Todd claims he is entitled to a common-law writ of personal replevin to free him from custody. A writ of replevin is generally used in civil cases to compel the delivery of property. *See* Utah R. Civ. P. 64B; *Moss v. Kopp*, 559 F.3d 1155, 1166 (10th Cir. 2009). As Mr. Todd appears to acknowledge, *see* COA Appl. (10/26/22) at 10, in current federal usage it is no substitute for a writ of habeas corpus. In any event, Mr. Todd cannot circumvent the restriction on second-or-successive applications by requesting a writ of "personal replevin." *See United States v. Baker*, 718 F.3d 1204, 1208 (10th Cir. 2013) (stating title given to relief sought, however unusual or creative, is not what counts when assessing whether an applicant has presented a second-or-successive

[2] To the extent Mr. Todd seeks authorization to file a second-or-successive § 2254 application, *see* COA Appl. (10/26/22) at 1, he must comply with this court's procedures by filing an application for authorization using the proper form.

collateral attack on a conviction; rather, this court examines the substance of the relief sought).

2. Arguments Concerning the District Court's Merits Determinations

A. Thirty-Year Statutory Sentence Argument

Mr. Todd asserts that because he was sentenced to consecutive terms of one to fifteen years and five years to life, Utah Code Ann. § 76-3-401(6) limits his maximum sentence to 30 years. Therefore, he asserts, his sentence should have ended in July 2019. Section 76-3-401(6) provides that "[i]f a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment, *except* . . . if . . . an offense for which the defendant is sentenced authorizes . . . a maximum sentence of life imprisonment." (emphasis added). The Utah Court of Appeals rejected this claim, reasoning that the murder offense for which Mr. Todd was sentenced authorized life imprisonment and the 30-year limitation therefore did not apply. The district court rejected his corresponding habeas claim, reasoning that even if the Utah courts had erred concerning the statute's application, federal habeas corpus relief would not lie for an error of state law.

Mr. Todd argues, however, that federal habeas relief should lie for this alleged error, because it has resulted in his being incarcerated for longer than the statutorily authorized maximum sentence, thus violating his federal constitutional right to due process. *See, e.g.*, *United States v. Shipp*, 589 F.3d 1084, 1088 (10th Cir. 2009) ("[D]ue process requires that the sentence for the crime of conviction not exceed the statutory maximum." (brackets and internal quotation marks omitted)). Assuming Mr. Todd's

claim can be cast in due process terms, he fails to show the district court debatably erred by deferring to the state court's resolution of this claim.

Mr. Todd asserts he was convicted of a "first degree felony, second degree murder," not "first-degree murder."[3] COA Appl. (10/26/22) at 12; COA Appl. (01/24/23) at 3. But even assuming he was convicted of second-degree murder, Mr. Todd fails to show that it is debatable whether the Utah courts violated his right to due process by applying the exclusion in § 76-3-401(6), given the fact that his "murder" conviction, however described, carried a maximum sentence of life imprisonment as a first-degree felony, *see id.* § 76-3-203.

Mr. Todd also argues that the application of § 76-3-401(6) to him, along with the denial of parole "based upon a harsher eligibility guideline[] established in 1989," COA Appl. (10/26/22) at 22, violated the Ex Post Facto Clause. He fails to cogently describe any basis for finding such a violation. Among other things, § 76-3-401(6) contained the same exclusionary language when he committed his crime, when he was found guilty, and when he was sentenced. He has not raised a debatable issue concerning this claim.

B. Fraud on the Court/Void Judgment

Mr. Todd asserts that unnamed extenuating circumstances, including fraud on the court, made his criminal judgment void. *See* COA Appl. (10/26/22) at 23; COA Appl. (01/24/23) at 4. He cites two Utah Rules of Civil Procedure: Rule 60(b)(4), which

[3] We note that the Utah Courts, the federal district court, and this court have all previously characterized Mr. Todd's conviction as one for "first-degree murder." *See* R. vol. I at 105, 349; *Todd*, 534 F. App'x at 749. But for the reasons we discuss, we need not determine in this proceeding whether this characterization was correct.

permits a court to grant relief from a judgment or order where the judgment is void; and Rule 81(e), which provides that the rules of civil procedure apply to criminal proceedings where there is no other applicable statute or rule. Beyond his bare assertions, he develops no adequate argument for our review. This argument is therefore waived. *See, e.g.*, *United States v. Muñoz*, 812 F.3d 809, 821 n.12 (10th Cir. 2016) (inadequately developed appellate arguments are waived).

C. Court's Communication with the Jury

Mr. Todd complains that he was denied various constitutional rights when the trial court communicated with the jury in his absence during his trial. This claim is an unauthorized second-or-successive § 2254 claim, and reasonable jurists could not debate that it was properly dismissed for that reason.

3. Remaining Issues Alluded to in COA Motions

To the extent that Mr. Todd attempts to raise other issues through isolated statements in either of his COA requests, these arguments are insufficiently developed for our review and/or frivolous, and we decline to address them.[4]

[4] Mr. Todd states that he "incorporates by reference the arguments in his response to [the State's answer in district court]" and thereby seeks a COA "on each claim." COA Appl. (10/26/22) at 13. Incorporation by reference of district court pleadings "is not acceptable appellate procedure" and we deem any such incorporated arguments waived through inadequate development in this court. *Fulghum v. Embarq Corp.*, 785 F.3d 395, 410 (10th Cir. 2015).

CONCLUSION

We deny a COA and dismiss this matter. We grant Mr. Todd's application to proceed on appeal without prepayment of fees and costs.

Entered for the Court

Jerome A. Holmes
Chief Judge