FILED
United States Court of Appeals
Tenth Circuit

August 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KIM PEREIRA,

Defendant - Appellant.

No. 23-6010
(D.C. Nos. 5:22-CV-00534-R &
5:09-CR-00305-R-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Kim Pereira, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his Federal Rule of Civil Procedure 60(b) motion. *See Spitznas v. Boone*, 464 F.3d 1213, 1218 (10th Cir. 2006) ("COA is required to appeal from the denial of a true Rule 60(b) motion in the district court . . . ."). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the matter.

I.

In 2010, Pereira pleaded guilty to one count of sexual exploitation of children and waived his right to appeal. The district court sentenced him to 240 months'

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

imprisonment. In 2022, Pereira filed a 28 U.S.C. § 2255 motion, which the district court dismissed as untimely under the one-year statute of limitations for federal prisoners to bring a § 2255 motion. Pereira filed a Rule 60(b) motion asserting that equitable tolling exceptions should apply to his § 2255 motion. The district court denied Pereira's Rule 60(b) motion because the motion was not timely filed within the required 28 days of the district court's denial of his § 2255 motion. The district court also denied a COA.

Thus, the scope of this matter is limited to the district court's denial of Pereira's Rule 60(b) motion and denial of a COA. While Pereira has not filed an application for a COA in this Court, we construe his notice of appeal as a request for a COA. *See* 10th Cir. R. 22.1(A).

II.

"[W]e require a COA to appeal the denial of a Federal Rule of Civil Procedure 60(b) motion to reconsider denial of a § 2255 motion . . . ." *United States v. Cobb*, 307 F. App'x 143, 144–45 (10th Cir. 2009) (unpublished)[1] (cleaned up). 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

[1] Unpublished decisions are not precedential, but may be cited for their persuasive value. Fed. R. App. P. 32.1; 10th Cir. R. 32.1 (2023).

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). Pereira 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.

Pereira asserts that equitable tolling exceptions should apply to his untimely § 2255 motion because the Federal Rules of Criminal Procedure are "vague and confusing . . . ." R. at 113. Rule 60(b) permits courts to relieve a party from a final judgment. *See* Fed. R. Civ. P. 60(b). Pereira's briefing before this Court fails to point to a particular subsection of Rule 60(b) that would apply to him, and his explanation as to why he did not timely file his § 2255 motion amounts to ignorance of the law. "However, it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (cleaned up). Therefore, like the district court, we deny a COA, and reasonable jurists would not debate otherwise.

IV.

The district court certified that an appeal would not be taken in good faith and denied Pereira leave to proceed *in forma pauperis* ("IFP"). *See* Fed. R. App. P. 24(a)(3). Pereira later filed a motion to proceed IFP with this Court. We DENY his IFP request.

V.

We DENY a COA and DISMISS the matter.

Entered for the Court

Allison H. Eid
Circuit Judge