FILED
United States Court of Appeals
Tenth Circuit

September 5, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HAROLD HENTHORN,

Defendant - Appellant.

No. 22-1238
(D.C. Nos. 1:19-CV-00047-RBJ & 1:14-CR-00448-RBJ-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Harold Henthorn seeks a certificate of appealability (COA) to appeal the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate his criminal sentence and his supplemental § 2255 motion. For reasons that follow, we deny a COA and dismiss this matter.

I. BACKGROUND

Henthorn was convicted of the first-degree murder of his second wife, Toni Henthorn, who died after falling more than 100 feet from a cliff in Rocky Mountain National Park in 2012. He was sentenced to life in prison with no opportunity of release.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Henthorn appealed, arguing that the introduction of evidence of prior similar conduct (circumstances surrounding the 1995 death of his first wife and an incident in 2011 when a large beam he threw off a deck he was repairing struck and injured his second wife) violated Federal Rule of Evidence 404(b). We affirmed. *See United States v. Henthorn*, 864 F.3d 1241, 1258 (10th Cir. 2017).

In 2019, on the last day before § 2255(f)(1)'s one-year statute of limitations expired,[1] Henthorn filed a pro se § 2255 motion (Original Motion) asserting that lead defense counsel, Craig Truman, rendered ineffective assistance. Henthorn alleged Truman continually represented that he was preparing and would present a strong defense at trial, including expert witnesses, but despite obtaining substantial funds from Henthorn to do so, he never did. Henthorn claimed that after the prosecution rested, Truman told him for the first time that he wanted to skip presenting a defense because he thought the prosecution had not proven Toni Henthorn's death had been a murder. Henthorn also alleged Truman excluded Henthorn from assisting with and participating in the defense by instructing Henthorn not to speak with him at all during the trial because he was hard of hearing in one ear, and by refusing to ask the U.S. Marshals for a working pen Henthorn could use. Henthorn further alleged that after trial, Truman explained the case had been lost when the district court ruled against Henthorn (in advance of trial) on the Rule 404(b) issue, and that Truman told Henthorn "only after it was too late - that he had sold [Henthorn] down the river," R., Vol. 1 at 191.

[1] Section 2255(f)(1)'s one-year period runs from "the date on which the judgment of conviction becomes final."

The district court determined that although most of Henthorn's allegations were unsupported and conclusory and therefore insufficient to support an ineffectiveness claim, some of the allegations warranted a hearing and appointment of counsel.

In 2020, appointed counsel filed another § 2255 motion styled as a supplemental motion, identifying twelve discrete instances of alleged ineffective assistance of trial counsel. The government moved to strike most of the supplemental motion, arguing that the district court lacked jurisdiction over eleven of the twelve instances because they did not relate back to the Original Motion and therefore were untimely under § 2255(f)(1). The government conceded that one instance related back but argued it lacked merit.

Before ruling on the two § 2255 motions and the motion to strike, the district court held a three-day evidentiary hearing. Henthorn presented expert testimony regarding Truman's performance. The government presented testimony from Truman, who explained why he had made certain decisions.

In a detailed order, the court determined that eight of the instances and parts of two others identified in the supplemental motion (Untimely Categories) did not relate back to the Original Motion and therefore were untimely under § 2255(f)(1). The court therefore dismissed the supplemental motion as to the Untimely Categories for lack of jurisdiction. The court determined that the remaining instances (two in their entirety and two in part) (Timely Categories) related back to the Original Motion.

Turning to the merits, the court found credible Truman's testimony about the defense team's extensive trial preparation, the process by which the team and Henthorn decided whether to present any evidence, including Henthorn's own testimony, and the

decision not to present any expert testimony at trial. Thus, the court found that the assertion in the Original Motion that Truman had told Henthorn "that he had never prepared a defense" and had "sold [Henthorn] down the river" was "incredible and lack[ed] any semblance of merit." *Id.* at 363 (internal quotation marks omitted). The court then concluded that the Timely Categories were not circumstantial evidence of poor preparation but instead reflected strategic choices.[2]

Based on its findings and conclusions, the district court granted in part and denied in part the government's motion to strike the supplemental motion, denied the Original Motion, and denied the supplemental motion except for Henthorn's request for an evidentiary hearing. Finally, the district court denied a COA.

II. COA STANDARD AND SCOPE OF REVIEW

Before he may appeal, Henthorn must obtain a COA. 28 U.S.C. § 2253(c)(1)(B). To obtain a COA on claims the district court denied on the merits, he must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), such 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). But in his combined opening brief and request for a COA, Henthorn has not addressed the district court's rulings on the merits of any of the categories the district court deemed timely by virtue of

[2] The Timely Categories alleged (1) failure to effectively cross-examine the detective's testimony about the 1995 accident involving Henthorn's first wife; (2) failure to offer questions on the jury questionnaire; (3) failure to introduce evidence rebutting the detective's reenactment of the 1995 accident; and (4) failure to make good on assertions in Truman's opening statement about what certain evidence would show.

their relation back to the Original Motion. Therefore, he has waived any opportunity to obtain a COA as to the merits portion of the district court's judgment. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

Henthorn's sole challenges are to the district court's rulings regarding which of the Untimely Categories do not relate back. Because the district court did not reach the merits of the Untimely Categories but denied relief on a procedural ground, Henthorn can obtain a COA only if he shows "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." *Slack*, 529 U.S. at 484. "Each component of [this] showing is part of a threshold inquiry." *Id.* at 485. Thus, if he cannot make a showing on one component, we need not reach the other. *See id.*

In his COA application, Henthorn has not addressed the constitutional component of this inquiry (nor has he even recited the COA standard or framed his arguments in light of that standard, arguing instead based on a de novo standard of review). But a "quick look" at his § 2255 filings reveals that he "facially alleged the denial of a constitutional right," which is sufficient to satisfy the constitutional component. *Gibson v. Klinger*, 232 F.3d 799, 803 (10th Cir. 2000) (brackets and internal quotation marks omitted). Our focus, therefore, is on whether he has made the requisite showing on the procedural issue, affording his Original Motion a liberal construction, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. DISCUSSION

A. Relation-back principles in § 2255 cases

Federal Rule of Civil Procedure 15 governs amendments to § 2255 motions.[3] *See United States v. Roe*, 913 F.3d 1285, 1296 & n.14 (10th Cir. 2019). Rule 15(a)(2) allows a movant to "file an amended § 2255 motion at any time during post-conviction proceedings with leave of court." *Id.* at 1296. But amendments to § 2255 motions filed beyond § 2255(f)'s one-year limitations period are considered untimely unless they relate back to the date of the original pleading. *See id.*

"Pursuant to Rule 15(c), an untimely amendment to a § 2255 motion which, by way of additional facts, clarifies or amplifies a claim or theory in the original motion may, in the District Court's discretion, relate back to the date of the original motion." *Id.* (brackets and internal quotation marks omitted); *see also* Fed. R. Civ. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]"). To relate back, the original motion must have been "timely filed" and the proposed amendment

[3] Although appointed counsel purported to file a *supplemental* § 2255 motion, the motion was clearly an *amended* motion because it concerned matters that occurred before Henthorn filed the Original Motion. *Compare* Fed. R. Civ. P. 15(c)(1)(B) (amendment to pleading concerns matters "set out—or attempted to be set out—in the original pleading"), *with* Fed. R. Civ. P. 15(d) (authorizing courts to allow "a supplemental pleading setting out any transaction, occurrence, or event that happened *after* the date of the pleading to be supplemented" (emphasis added)).

must "not seek to add a new claim or to insert a new theory into the case." *Roe*, 913 F.3d at 1296 (internal quotation marks omitted).

The "operative question" for whether an amended motion relates back pursuant to Rule 15(c)(1)(B) is whether the original and amended motions state claims that are "tied to a common core of operative facts." *Id.* at 1298 (internal quotation marks omitted). In making that determination, we consider whether the new claim is "supported by facts that differ in both time and type" from those in the original motion. *Mayle v. Felix*, 545 U.S. 644, 650 (2005). "The answer to that question will often turn on whether the newly asserted claim would have had to be pleaded as a discrete claim under Section 2255 Rule 2(b) if it was set out in the original § 2255 motion." *Roe*, 913 F.3d at 1298. Among other things, Rule 2(b) requires a § 2255 motion to "specify all the grounds for relief available to the moving party" and "state the facts supporting each ground." Rule 2(b)(1)-(2).

"[I]f an amendment [to a § 2255 motion] asserts a claim that is deemed untimely, it would need to be pursued in a second or successive petition, and the district court would lack jurisdiction to consider it absent this court's authorization [under § 2255(h)]." *United States v. Trent*, 884 F.3d 985, 994 (10th Cir. 2018).

B. Analysis

Henthorn's chances for obtaining a COA on the relation-back issue hinge on the proper construction of the Original Motion. The district court viewed the Original Motion as "focused primarily" on Henthorn's claim that Truman said he "was preparing and would present a solid defense . . . at trial, including expert witnesses," R., Vol. 1

at 354, specifically that Henthorn had given money to Truman in advance of trial to retain expert witnesses but that Truman used it for his own enrichment. Based on that view, the district court determined that it lacked jurisdiction over the Untimely Categories because they were not evidence of a failure to prepare a defense and therefore could not be connected to the Original Motion. The Untimely Categories are:

- Category 1, failure to object to irrelevant and prejudicial evidence;
- Category 2, failure to object to hearsay, lack of personal knowledge, and violations of the Confrontation Clause;
- Category 3, failure to object to improper opinion evidence;
- Category 4 (in part), failure to object to a detective's reenactments of the 1995 accident involving Henthorn's first wife;
- Category 5, failure to object to improper prosecutor questioning;
- Category 6 (partial), failure to inquire of potential jurors during voir dire;
- Category 7, introduction of prejudicial evidence by defense counsel during cross-examination;
- Category 10, mishandling of jury instructions;
- Category 11, failure to object to inappropriate prosecutor statements during the government's closing argument; and
- Category 12, derogatory statements Truman made about Henthorn.

Henthorn argues that the district court's view of the Original Motion was too narrow because, in addition to complaints about trial preparation, he alleged error during the trial itself. But as we explain, reasonable jurists would not debate the district court's conclusion that the Untimely Categories do not relate back to the Original Motion.

Even liberally construed, the Original Motion does not set forth any facts or allegations supporting ineffective assistance with respect to any of the Untimely Categories. The Original Motion focuses on Truman's failure to prepare and present a defense case-in-chief. For example, Henthorn alleged "Truman was dishonest with me regarding his strategy of defense for the purpose of fraud and extortion of money from

me and my family." *Id.* at 187. Henthorn also alleged that during the month before trial, Truman twice asked him for significant sums of money to retain expert witnesses. Henthorn provided Truman the money but discovered "[o]nly . . . after the conclusion of the trial" that "Truman had never prepared any defense at all" and "had not done any of the work of preparing a defense or preparing any witnesses *to be called to the stand on my behalf*." *Id.* at 188 (emphasis added). Henthorn opined that "it would be highly unlikely that an attorney would call witnesses to the stand who had not been prepared, or as in this case, not ever interviewed." *Id.* at 188–89. He also asserted that Truman's request for "funds for expert witness preparation directly and explicitly communicated to me that he was indeed planning to present a detailed defense during my trial *after the prosecution rested*." *Id.* at 190 (emphasis added). Consequently, Henthorn concluded, had he been aware that Truman "was not preparing any expert witnesses" or "any defense at all," Henthorn would not have paid Truman the additional money Truman requested. *Id.*

In contrast to the Original Motion's focus on the defense case-in-chief, the Untimely Categories involve Truman's performance during other parts of the trial—jury selection, the prosecution's case-in-chief, closing arguments, and the jury instruction conference—and involve "a significantly more complex and extensive factual milieu," *Roe*, 913 F.3d at 1299, than the claim as set forth in the Original Motion. Thus, the Untimely Categories are "supported by facts that differ in both time and type" from the Original Motion, *Mayle*, 545 U.S. at 650, and therefore "would have had to be pleaded as . . . discrete claim[s] under Section 2255 Rule 2(b) if [they were] set out in the original

§ 2255 motion," *Roe*, 913 F.3d at 1298. Accordingly, reasonable jurists would not debate the district court's conclusion that there is no common core of operative facts linking the Untimely Categories to the Original Motion.

Henthorn contends that two references in the Original Motion to Truman's performance "during my trial," R., Vol. 1 at 190, 191, suffice to bridge the time gap because they encompass the entirety of counsel's performance at trial, as opposed to performance before or after trial, which have been deemed separate instances requiring separate claims in cases such as *Roe*, 913 F.3d at 1299–1300, and *Watkins v. Deangelo-Kipp*, 854 F.3d 846, 849–51 (6th Cir. 2017). We disagree.

As already noted, the first of the two references to "during my trial" is immediately followed by "after the prosecution rested," R., Vol. 1 at 190, thus confining the original claim to the defense case-in-chief. And the second reference appears only in a conclusory manner in the penultimate paragraph of the Original Motion: "I suggest that the representation decisions Mr. Truman made during my trail [sic] were designed to benefit him solely." *Id.* at 191. Read in context of the rest of the motion, the reference to "representation decisions" concerned only preparation and presentation of the defense case-in-chief.

Furthermore, the Supreme Court has rejected the argument that "the trial itself is the transaction or occurrence that counts" under Rule 15(c)(1)(B). *Mayle*, 545 U.S. at 660 (internal quotation marks omitted). Because a habeas petitioner must "state the facts supporting each ground," Habeas Corpus Rule 2(b)(2), the Court concluded that "[e]ach separate congeries [i.e., collection] of facts supporting the grounds for relief . . .

would delineate an 'occurrence.'" *Mayle*, 545 U.S. at 661. The collection of facts set forth in the Original Motion does not suggest that Henthorn's ineffectiveness claim included any of the conduct alleged in the Untimely Categories. Each of the Untimely Categories involves a discrete collection of supporting facts and thus—despite not being labelled as such—amount to a new claim of ineffectiveness or, at the very least, a new theory of ineffectiveness. To relate back, however, a proposed amendment must "not seek to add a new claim or to insert a new theory into the case." *Roe*, 913 F.3d at 1296 (internal quotation marks omitted).[4]

Henthorn argues that the government had fair notice of the Untimely Categories because it filed a motion to strike the supplemental motion, and the district court made what turned out to be a preliminary finding that relation back was appropriate and set the matter for an evidentiary hearing. But the type of notice contemplated in the case Henthorn relies on in support of this argument, *United States v. Santarelli*, 929 F.3d 95, 101 (3d Cir. 2019), concerns whether the pleading sought to be amended provided the notice. As our discussion makes plain, the Original Motion did not do so.

Henthorn's final argument is that Habeas Corpus Rule 8(c)'s requirement that a district court appoint counsel to represent a qualified moving party in advance of an evidentiary hearing becomes meaningless "if an appointed attorney is unreasonably

[4] The Original Motion alleged that Truman excluded Henthorn from participating in the defense by telling Henthorn not to speak to him during trial and by not asking the Marshals for a working pen Henthorn could use. Assuming those allegations concern Truman's representation prior to the prosecution resting, they have nothing to do with any of the Untimely Categories and therefore are an insufficient factual anchor for purposes of the relation-back doctrine.

limited in his/her ability to make meaningful arguments which will assist the court in determining the [§ 2255] motion." COA Appl. at 27. He contends appointed counsel should be able to develop issues that "were 'advanced in obscure fashion by the pro se defendant.'" *Id.* (quoting *United States v. Leopard*, 170 F.3d 1013, 1018 (10th Cir. 1999)). However, we see nothing unreasonable in applying the relation-back doctrine to filings by appointed counsel. *See Leopard*, 170 F.3d at 1018 (recognizing that appointed counsel's development of issues initially raised by a pro se defendant is subject to analysis of their "procedural merit").

IV. CONCLUSION

We conclude that reasonable jurists would not debate the correctness of the district court's ruling that the Untimely Categories do not relate back to the Original Motion. Accordingly, we deny Henthorn's application for a COA and dismiss this matter.

Entered for the Court

Gregory A. Phillips
Circuit Judge