FILED
United States Court of Appeals
Tenth Circuit

July 30, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: CHARLES ELLWOOD GWATHNEY, Movant.	No. 08-2145 (D.C. No.1:07-CV-899-WJ-LAM) (D. N.M.)

ORDER

Before **GORSUCH**, **EBEL**, and **HOLMES**, Circuit Judges.

Charles Ellwood Gwathney, a federal prisoner appearing pro se, has filed a motion for remand challenging the transfer to this court of a Fed. R. Civ. P. 59(e) motion he filed in district court. We deny the motion for remand and dismiss the matter.

In September 2007, Mr. Gwathney filed a 28 U.S.C. § 2255 motion. The motion was referred to a magistrate judge who prepared a report with proposed findings and a recommendation that the motion be denied. Mr. Gwathney filed objections to the magistrate judge's report, which the district court considered but ultimately rejected. The district court adopted the magistrate judge's proposed findings and recommended disposition and entered judgment denying the § 2255 motion.

Mr. Gwathney then filed a motion for reconsideration pursuant to Rule 59(e), which the district court initially construed as a Fed. R. Civ. P. 60(b) motion because it was not filed within ten days after entry of judgment as required by Rule 59(e). The district court concluded in that same order, however, that the motion was actually an attempt to file a second or successive § 2255 motion without the proper authorization. The district court then transferred the motion to this court in order for Mr. Gwathney to seek authorization. Mr. Gwathney now argues that his motion was transferred in error and that it should be remanded back to the district court.

In his motion for remand, Mr. Gwathney states that he submitted a Rule 59(e) motion[1] asking the district court to "reconsider its ruling on [his] Fourth Amendment claim **using relevant standard of authority**, and also rule on the entire claim which was illegal seizure and the absen[ce] of **MIRANDA WARNING**." Mot. for Remand at 2. He further states that he "believes he submitted a 'true' 59(e) in compliance with this court's decision in *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006) and the Supreme Court's decision in *Gonzale[z] v. Crosby*, 545 U.S. 524 [(2005)] . . . ." *Id.* at 3.

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[1] Mr. Gwathney continues to characterize his motion for reconsideration as one filed under Rule 59(e) as opposed to Rule 60(b). The analysis is the same for determining whether a Rule 59(e) motion or Rule 60(b) motion is a second or successive motion. *See Spitznas v. Boone*, 464 F.3d 1213, 1215-16 (10th Cir. 2006) (Rule 60(b) motion); *United States v. Pedraza*, 466 F.3d 932, 933 (10th Cir. 2006) (Rule 59(e) motion). Accordingly, for the purposes of this order only we will use Rule 59(e) and Rule 60(b) interchangeably.

In *Spitznas*, we explained that:

> Under *Gonzalez*, a 60(b) motion is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction. Conversely, it is a 'true' 60(b) motion if it either (1) challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application; or (2) challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition.

464 F.3d at 1215-16. Although *Spitznas* involved a 60(b) motion filed in a 28 U.S.C. § 2254 habeas case, we noted that the procedure for determining whether a 60(b) motion was second or successive was the same whether the 60(b) was presented in a § 2254 or a § 2255 case. *See id*. at 1216.

In his Rule 59(e) motion, Mr. Gwathney argued that the district court erred by using irrelevant Tenth Circuit authority when it ruled on his objections to the magistrate judge's recommended disposition. Mot. for Reconsideration at 1-2. He asserted also that "[t]he District Court obviously overlooked Gwath[n]ey's claim of the absen[ce] of Miranda Warning which was argued in his objections along with the Fourth Amendment claim." *Id*. at 3. He asked the district court to reconsider its ruling denying his § 2255 motion "using Relevant Authority, and to include the Fifth Amendment claim." *Id*. at 4.

Mr. Gwathney's argument that the district court failed to apply relevant authority to his Fourth Amendment claim is an attempt to "assert or reassert a federal basis for relief from [his] underlying conviction" by "challenging the

[district court's] previous ruling on the merits of that claim." *Spitznas*, 464 F.3d at 1216 (describing an example of a Rule 60(b) motion that should be treated as second or successive § 2255 motion or § 2254 habeas petition).

Mr. Gwathney's argument that the district court overlooked his claim that he was not given a Miranda warning appears at first blush to be a "challenge[] [to] a defect in the integrity of the federal habeas proceeding," which would be a "true" 60(b) motion. *See id*. at 1215-16. Neither Mr. Gwathney's initial § 2255 motion or his memorandum in support of his § 2255 motion, however, include a claim that his constitutional rights were violated because he was not given a Miranda warning (or that his counsel was ineffective for failing to raise such a claim). Mr. Gwathney first referenced this issue in his objections to the magistrate judge's proposed findings and recommended disposition.

This situation is almost identical to the situation in *Spitznas* where the petitioner argued in his Rule 60(b) motion that the district court had failed to address one of his claims. 464 F.3d at 1226. In fact, the petitioner in *Spitznas* had raised the issue for the first time in his objections to the magistrate judge's report and recommendation. *Id*. Because this was a new claim that had not been part of petitioner's original habeas petition, we concluded that its initial assertion as part of the objections to the magistrate's report constituted a second or successive petition and that the "reassertion of that claim in [the] Rule 60(b)

motion . . . is itself in reality a second attempt to assert a successive habeas claim." *Id*.

Because Mr. Gwathney's Rule 59(e) motion is an attempt to challenge the merits of the district court's disposition of his § 2255 motion and to raise a new claim of constitutional error that was omitted from his initial § 2255 motion, we agree with the district court's conclusion that the motion constituted an attempt to file second or successive § 2255 claims. The district court therefore properly transferred the motion to this court and there is no basis for remanding the matter to the district court.

Mr. Gwathney has not sought authorization to file his second or successive claims nor does he assert that his claims meet the authorization standards set forth in 28 U.S.C. § 2255(h). He is therefore prohibited from pursuing his claims in district court.

The motion for remand is DENIED, and the matter is TERMINATED.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk