

October 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

KIRK IRVING KOSKELLA,

Movant.

No. 08-4127
(D.C. No. 2:00-CR-00594-DB-1)
(D. Utah)
(D.C. No. EP-08-CA-203-KC)
(W.D. Tex.)

ORDER

Before **KELLY, MURPHY, and HOLMES**, Circuit Judges.

Movant Kirk Irving Koskella, a federal prisoner appearing pro se, has filed a motion for remand relating to his latest attempt to file an unauthorized second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. We deny the motion for remand, deny all his other pending motions, dismiss the matter, and warn Mr. Koskella that any future application for authorization to file a second or successive habeas motion will be deemed denied thirty days after filing, unless this court otherwise orders, and that future frivolous filings may subject him to additional sanctions, including monetary sanctions.

Mr. Koskella pleaded guilty in 2000 to conspiracy to defraud the Internal Revenue Service and wire fraud. In connection with his guilty plea, he signed a plea agreement that included a waiver of his right to file an appeal or to file any

challenge to his sentence in any collateral motion, writ or other procedure, including a § 2255 motion. *United States v. Koskella*, No. 2:00-CR-00594 (D. Utah), R., Doc. 5, at 4 para. 10.

Post-Conviction Motions. We recount only a few of Mr. Koskella's most relevant post-convictions motions.¹ After sentencing, Mr. Koskella appealed the trial court's restitution order, and, in December 2004, this court reversed and remanded for resentencing. *United States v. Koskella*, 118 F. App'x 422, 423-24 (10th Cir. 2004) (ruling that district court erred in delegating responsibility for determining restitution payment schedule to the Bureau of Prisons and Probation Office). Immediately upon receipt of the order, Mr. Koskella filed his first § 2255 motion, demanding the district court comply with this court's resentencing order and demanding immediate release from custody.

¹ Mr. Koskella is a repetitive and frequent filer of motions in the Utah district court, where he was sentenced, and in the California and Texas district courts, where he has been and is incarcerated, challenging his plea agreement, conviction, sentencing, resentencing and conditions of confinement. The Utah district court has listed a portion of Mr. Koskella's numerous, repetitive, frivolous and abusive filings in that court in a recent order imposing strict filing restrictions on him. See *United States v. Koskella*, No. 2:00-CR-00594-DB, slip op. at 1 (D. Utah, Apr. 15, 2008) (unpublished order). The district court for the Western District of Texas recently recounted some of his most recent frivolous filings in that court. See *Koskella v. Bragg*, No. EP-08-CA-120-DB, 2008 WL 2219297, at *1 and nn.1-6 (W.D. Tex. May 23, 2008) (unpublished order). In addition, he has attempted to file three motions, captioned as 28 U.S.C. § 2241 motions, in California, all dismissed for lack of jurisdiction. See *Koskella v. Woodring*, No. 2:07-cv-2851-MMM-FMO (C.D. Cal. May 11, 2007) (unpublished order); *Koskella v. Woodring*, No.2: 06-cv-6901-MMM-FMO (C.D. Cal. Nov. 20, 2006) (unpublished order); *Koskella v. Woodring*, No. 2:06-cv-3159-MMM-FMO (C.D. Cal. Jun. 1, 2006) (unpublished order).

The district court issued an order resentencing Mr. Koskella in compliance with the Tenth Circuit's order and offering him an opportunity to withdraw his § 2255 motion. *See United States v. Koskella*, No. 2:00-CR-00594-JTG, slip. op. at 4-5 (D. Utah Feb. 28, 2005) (unpublished order). The court explained that Mr. Koskella was not entitled to release and that, if he proceeded with his § 2255 motion, he would be barred from filing any second § 2255 motion except in very limited circumstances. *See* 28 U.S.C. § 2255(h) (requiring federal prisoners to obtain authorization from the appropriate circuit court in order to file a second or successive § 2255 motion). Mr. Koskella first appealed that order, then withdrew his appeal and simply filed another § 2255 motion. The district court denied that § 2255 motion, along with Mr. Koskella's other twenty-one pending motions. This court denied him a certificate of appealability. *United States v. Koskella*, 198 F. App'x 780, 781-82 (10th Cir. 2006) (holding that Mr. Koskella's waiver of his right to file a § 2255 motion was valid and enforceable under *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc)).

Mr. Koskella attempted to file numerous motions in 2007 that the district court ruled were unauthorized second or successive § 2255 motions. It transferred the motions to this court so that Mr. Koskella could seek authorization. We denied authorization as to all but one claim for theft of legal papers, which we remanded because it was not a cognizable § 2255 claim.

Koskella v. United States, No. 07-4103, slip op. at 5 (10th Cir. Jun. 28, 2007) (unpublished order).

Motion at Issue. In June 2008, Mr. Koskella, who is currently incarcerated at FCI La Tuna in Anthony, Texas, filed a motion in the district court for the Western District of Texas, captioned as an application for a 28 U.S.C. § 2241 writ of habeas corpus. Mr. Koskella sought to present four claims: (1) his plea agreement is void; (2) he was not present at resentencing, thus the sentencing court lost jurisdiction to sentence him; (3) “[n]ewly [d]iscovered [e]vidence and admissions by the [United States] Attorney of actual innocence”; and (4) “new case law on Actual Innocence, proof of perjury by Government witnesses.”

Koskella v. Bragg, No. EP-08-CA-203-KC (W. D. Tex.). R. Doc. 1, at 5. All four claims repeated – indeed simply incorporated by reference – claims that Mr. Koskella had only recently presented in a prior § 2241 motion filed in April 2008, which the same district court had denied. *See Koskella v. Bragg*, No. EP-08-CA-120-DB, 2008 WL 2219297, at *1 (W.D. Tex. May 23, 2008) (unpublished order) (dismissing motion for lack of jurisdiction). The district court ruled Mr. Koskella’s latest motion constituted an unauthorized second or successive § 2255 motion and transferred the matter to this court. *Koskella v. Bragg*, No. EP-08-203-KC, 2008 WL 2704312, at *1-2 (W. D. Tex. June 24, 2008) (unpublished order).

Mr. Koskella has filed a motion asking this court to remand the matter back to the district court so it can rule on his proposed motion. He argues the district court abused its discretion in transferring his motion to this court, that his conviction and plea agreement are void, and that the district court must hold a hearing, irrespective of whether his claims are cognizable under § 2241 or § 2255. He is incorrect.

All of Mr. Koskella's claims challenge his conviction, sentence and the validity of his plea agreement. Thus, the district court was correct to characterize his claims as being cognizable only under § 2255. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (holding that a post-conviction claim is, in substance, a successive habeas claim if it asserts or reasserts a substantive challenge to the validity of the conviction or sentence); *United States v. Eccleston*, 521 F.3d 1249, 1253 (10th Cir. 2008), *petition for cert. filed*, (U.S. July 12, 2008) (No. 08-6163) (“A challenge to the propriety of the federal conviction or sentence itself – such as whether [defendant] was misled when he pleaded guilty or whether the sentence violated his plea bargain – must proceed under § 2255, not § 2241 . . .”); *see also United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (“It is the relief sought, not [the] pleading's title, that determines whether the pleading is a § 2255 motion.”).

Further, the district court did not abuse its discretion in transferring his unauthorized second or successive § 2255 motion to this court. A district court

does not have jurisdiction to address the merits of a second or successive § 2255 motion unless and until the circuit court has granted the required authorization. *Nelson*, 465 F.3d at 1148. “When a second or successive . . . § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so under [28 U.S.C.] § 1631, or it may dismiss the motion . . . for lack of jurisdiction.” *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008).

As has repeatedly been explained to Mr. Koskella, to obtain authorization to file a second or successive § 2255 motion, he must demonstrate that his proposed claims either depend on “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense,” § 2255(h)(1), or rely upon “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” § 2255(h)(2).

Mr. Koskella has not sought authorization, nor does he assert or otherwise demonstrate that his claims meet the authorization standards set forth in § 2255(h). Therefore, he is prohibited from pursuing his claims in district court and there is no basis for remanding the matter to the district court. Accordingly, the motion for remand is denied.

Sanctions. Mr. Koskella waived his right to file any § 2255 motion challenging his conviction and sentence as part of his plea agreement. Moreover, this court and several district courts have repeatedly explained to Mr. Koskella that he may not file a second or successive § 2255 motion without first seeking and obtaining authorization from this court. Nonetheless, Mr. Koskella has repeatedly attempted to file motions in the Utah, Texas, and California district courts which were, regardless of how he captioned them, unauthorized § 2255 motions.

We therefore impose the following sanction: Any further applications filed by Mr. Koskella in this court either for authorization to file any additional collateral attacks on his federal conviction and sentence, or seeking to remand an unauthorized second or successive habeas motion that was transferred to this court, will be deemed denied on the thirtieth day unless this court otherwise orders. We warn Mr. Koskella that, if, despite this sanction, he persists in filing unauthorized second or successive habeas claims, frivolous motions for remand, or otherwise fails to comply with the authorization requirements set forth in § 2255(h), we may consider additional sanctions, including monetary sanctions.

Accordingly, the motion for remand is DENIED, and the matter is TERMINATED. Mr. Koskella's Emergency Motion for Summary Disposition, filed August 11, 2008; his Emergency Ex Parte Motion for Entry of Judgment and Release from Custody, filed September 4, 2008; his Renewed Emergency Motion

for Summary Disposition, filed September 12, 2008; and his Judicial Notice and Objection to Belated Service, filed September 22, 2008, and any other pending motions he has filed in this court, are DENIED. Any future motion by Mr. Koskella for authorization to file a second or successive § 2255 motion will be deemed denied on the thirtieth day unless this court otherwise orders.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk