

December 29, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

RON ALONZO BANKS,

Movant.

No. 10-8110

ORDER

Before **BRISCOE**, Chief Judge, **EBEL**, and **KELLY**, Circuit Judges.

Ron Alonzo Banks, a federal prisoner appearing pro se, has moved for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction. Before a federal prisoner may file a second or successive motion under § 2255, he must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

Mr. Banks was convicted in 2005 of five counts of cocaine-related offenses and one count of carrying a firearm during and in relation to a drug-trafficking offense. The district court sentenced him to 151 months for the drug charges and 60 months for the firearm charge, to run consecutively. His convictions and sentences were affirmed on direct appeal. *United States v. Banks*, 451 F.3d 721, 724 (10th Cir. 2006). Mr. Banks was subsequently resentenced, based on

Kimbrough v. United States, 552 U.S. 85 (2007), reducing his sentence on the drug counts from 151 months to 120 months. *See United States v. Banks*, 332 F. App'x 482, 483-84 (10th Cir. 2009) (affirming district court's resentencing).

Mr. Banks filed a § 2255 motion in June 2007, challenging his conviction, asserting claims of ineffective assistance of counsel. He raised numerous ineffective assistance of counsel claims, insufficiency of evidence, and a sentencing challenge. Among his ineffective assistance of counsel claims were claims that his counsel failed to challenge the district court's jurisdiction over him as a member of the United States Air Force; failed to protect his constitutional rights as a service member during his proffer with the Assistant United States Attorney; failed to move to suppress statements he made at his bond hearing because he believed that a superior officer had ordered him to cooperate with law enforcement; and failed to argue on appeal that a government witness offered perjured testimony. The district court denied the § 2255 motion, and this court denied Mr. Banks a certificate of appealability. *United States v. Banks*, 355 F. App'x 123, 127 (10th Cir. 2009).

To obtain authorization to file a second or successive § 2255 motion, a federal prisoner 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). In his motion for authorization, Mr. Banks seeks to present a claim of prosecutorial misconduct in obtaining his conviction. As he argued in his first § 2255 motion, he claims that he was ordered by a JAG officer, who was working in concert with the U.S. Attorney’s Office, to cooperate with the government and to provide a proffer to the Assistant U.S. Attorney, and that the United States then used his proffer to amend the indictment against him.

Although Mr. Banks claims that he has not previously raised these arguments, he did raise these arguments in his prior § 2255 motion. He now argues these claims are supported by new evidence. As support, he cites to (1) a July 27, 2007, affidavit from First Sergeant John Balderaz, which states that when he transported Mr. Banks from county jail to the Air Force base, they went directly to the Legal Office to have a conference with the base attorney, Captain Heavner, to discuss the conditions of his release, and that Mr. Banks was notified he was restricted to base and was required to attend all appointments concerning the conditions of his release, Mot. for Auth. at 6, 10 (first page of unnumbered supplemental memorandum), and Ex. B; and (2) responses from the Department of the Air Force to Mr. Banks’s Freedom of Information Act requests, which state that they do not have records relating to any of Mr. Banks’s pre-trial restriction or confinement orders, *id.* at Ex. C1-C5.

Sergeant Balderaz's 2007 affidavit is not new evidence; the content of his testimony was available and discoverable by Mr. Banks at the time of his trial, appeal and first § 2255 motion. Similarly, the letters responding to Mr. Banks's FOIA requests are not new evidence; Mr. Banks could have made these requests at the time of his trial, appeal, and first § 2255 motion. Moreover, Mr. Banks has failed to show how any of this purported new evidence is sufficient to "establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense." § 2255(h)(1).

Because Mr. Banks's proposed claims do not meet the requirements for authorization under § 2255(h), his motion for authorization is DENIED. This denial of authorization is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk