

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 27, 2011

Elisabeth A. Shumaker
Clerk of Court

In re:

JAMES EARL LINDSEY,

Petitioner.

No. 11-3134
(D.C. No. 5:03-CR-40011-RDR-1)
(D. Kan.)

ORDER

Before **LUCERO**, **O'BRIEN**, and **GORSUCH**, Circuit Judges.

James Earl Lindsey has filed a petition for a writ of mandamus and a motion to proceed in forma pauperis. He requests that this court direct the district court to dismiss the indictment in his already completed criminal action due to violations of the Speedy Trial Act. Because Mr. Lindsey is attempting to use mandamus to remedy his failure to file a timely appeal and to circumvent the authorization requirements for filing a second or successive 28 U.S.C. § 2255 motion, we deny the petition and the IFP motion.

Mr. Lindsey litigated this issue during his underlying criminal action by filing a motion to dismiss the indictment based on Speedy Trial Act violations. The district court denied the motion and Mr. Lindsey proceeded to trial. He was convicted by a jury of the crimes charged in the indictment in 2004. He appealed

from his conviction, although he did not raise the Speedy Trial Act issue on appeal. We affirmed his conviction. *See United States v. Lindsey*, 160 F. App'x 708, 709 (10th Cir. 2005).

Mr. Lindsey then filed a 28 U.S.C. § 2255 motion, arguing as one of his grounds for relief that his counsel rendered ineffective assistance by failing to challenge on appeal the court's ruling that his rights under the Speedy Trial Act were not violated. The district court rejected this argument as part of its denial of Mr. Lindsey's § 2255 motion. *See United States v. Lindsey*, 505 F. Supp. 2d 838, 842-44 (D. Kan. 2007). The district court explained that "a reasonably competent attorney could decide that there was no violation of the Speedy Trial Act," citing to a line of authority from the Seventh Circuit for the proposition that the Speedy Trial Act allows a district court more than 30 days to decide multiple pretrial motions. *Id.* at 843. Mr. Lindsey did not timely appeal the denial of his § 2255 motion. *See United States v. Lindsey*, 264 F. App'x 710, 710 (10th Cir. 2008).

In 2009, Mr. Lindsey filed a Fed. R. Civ. P. 60(b) motion, arguing that the district court erred in denying his § 2255 motion without an evidentiary hearing. The district court concluded that this claim required authorization under 28 U.S.C. § 2255(h) and transferred the motion to this court. Mr. Lindsey filed a motion for remand. We denied the motion in a published opinion, outlining the

*Gonzalez*¹ analysis for determining whether a Rule 60(b) motion is subject to the requirements for second or successive § 2255 motions. *See United States v. Lindsey*, 582 F.3d 1173, 1175-76 (10th Cir. 2009). Considering Mr. Lindsey's motion using this framework, we agreed with the district court's determination that Mr. Lindsey's Rule 60(b) motion required authorization from this court. *See id.*

Most recently, we denied his request for a certificate of appealability from the denial of a Rule 60(b) motion in which he asserted that the district court had failed to consider his claim that counsel was ineffective on appeal for failing to challenge the district court's Speedy Trial Act ruling. *See United States v. Lindsey*, 399 F. App'x 346, 347-48 (10th Cir. 2010). We explained that the district court had "consider[ed] Lindsey's arguments in a lengthy and detailed ruling rejecting his claims." *Id.* at 348 (citing *United States v. Lindsey*, 505 F. Supp. 2d 838, 842-43 (D. Kan. 2007)).

Mr. Lindsey now seeks to use mandamus in an attempt to get around his failure to timely appeal from the district court's denial of his § 2255 motion and to avoid the authorization requirements in § 2255(h). He argues in his mandamus petition that the district court erred in denying his § 2255 motion on the Speedy Trial Act ineffective-assistance-of counsel issue when it relied on the Seventh

¹ *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005).

Circuit authority and failed to consider the plain language of the statute. *See* Pet. at 7-9.

“The extraordinary relief of a writ of mandamus is not a substitute for an appeal, and it is not a vehicle to relieve persons of the consequences of their previous decision not to pursue available procedures and remedies.” *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994). In addition, mandamus may not be used to attack the merits of an issue that has been resolved in a prior § 2255 proceeding in an attempt to avoid the limits Congress has placed on second or successive § 2255 motions.

As we have previously explained to Mr. Lindsey, a motion can be said to bring a successive “‘claim’ if it attacks the federal court’s previous resolution of a claim *on the merits*, since alleging that the court erred in denying relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.” *Lindsey*, 582 F.3d at 1174 (quotation omitted). Because Mr. Lindsey’s mandamus petition is an attack on the merits of the district court’s previous resolution of his Speedy Trial Act ineffective-assistance-of counsel claim, Mr. Lindsey must meet the authorization standards in § 2255(h). We note, however, that Mr. Lindsey’s mandamus petition alleges no “newly discovered evidence” or “new rule of constitutional law” that would meet the standards for authorization. 28 U.S.C. § 2255(h).

We caution Mr. Lindsey that any further frivolous attempts to relitigate his Speedy Trial Act issue may lead to the imposition of sanctions, including filing restrictions. We DENY Mr. Lindsey's petition for a writ of mandamus and we DENY his IFP motion.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk