

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

December 14, 2011

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

In re:

BONARD RAY DENINNO,

Movant.

No. 11-6311
(D.C. Nos. 5:97-CV-00656-T &
5:93-CR-00055-T-1)
(W.D. Okla.)

ORDER

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

Bonard Ray Deninno has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because Mr. Deninno has not met the requisite conditions for authorization, we deny the motion.

In 1993, Mr. Deninno was convicted by a jury of four counts related to the manufacture and distribution of methamphetamine. He was sentenced to 360 months' imprisonment on the charges for conspiracy to manufacture methamphetamine and possession with intent to distribute methamphetamine; 120 months' imprisonment on the charge of possession of a precursor chemical with intent to manufacture a controlled substance; and 240 months' imprisonment

on the charge of maintaining a place for the purpose of manufacturing a controlled substance. All sentences were set to run concurrently.

Mr. Deninno appealed his convictions and sentences and this court affirmed. *See United States v. Deninno*, 29 F.3d 572, 575 (10th Cir. 1994). In 1997, Mr. Deninno filed his first § 2255 motion alleging various claims of ineffective assistance of counsel. The district court denied the motion and this court denied Mr. Deninno's request for a certificate of appealability. *See United States v. Deninno*, No. 97-6347, 1998 WL 792064, at *1 (10th Cir. Oct. 15, 1998).

In 2000, Mr. Deninno filed a motion for a new trial, which the district court construed as an attempt to seek relief pursuant to § 2255 and transferred the matter to this court for authorization. This court subsequently denied Mr. Deninno's request for authorization.

In 2005, Mr. Deninno filed a motion seeking reconsideration of his sentence under 18 U.S.C. § 3582(c) and seeking relief under Federal Rule Civil Procedure 60(b). The district court concluded that Mr. Deninno was not entitled to relief under either § 3582(c) or Rule 60(b). The district court further concluded that to the extent Mr. Deninno was attempting to seek relief pursuant to § 2255, his motion should be transferred to this court for authorization. Mr. Deninno filed an appeal from the transfer order, which was dismissed for lack

of jurisdiction. He did not file a motion for authorization so this court dismissed the matter.

Mr. Deninno now seeks authorization to file a second or successive § 2255 motion. In order to be entitled to authorization, Mr. Deninno must show that his claims rely on:

(1) 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, or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Mr. Deninno argues that he has newly discovered evidence of his innocence. His new evidence is an affidavit from one of his alleged co-conspirators, Michael Stanberry, who entered a guilty plea and testified against Mr. Deninno at trial. Mr. Stanberry was sentenced to a 95-month term of imprisonment for his involvement in the conspiracy and he has completed his term of imprisonment.

In the affidavit, Mr. Stanberry essentially recants his trial testimony, stating that Mr. Deninno was only “a user of methamphetamine,” he “did not obtain any methamphetamine” from Mr. Deninno, and there was no plan to distribute or manufacture methamphetamine with any of the co-defendants. Mot. for Auth.,

App. A, at ¶¶ 2, 3, 8. Mr. Deninno contends that this evidence rebuts the trial testimony that he had gathered in a hotel room with the other co-conspirators for the purpose of manufacturing and distributing methamphetamine. He asserts that this evidence shows that he was only in the hotel room for the purpose of consuming methamphetamine for his personal use.

First, we note that “[r]ecantation of testimony given under oath at trial is not looked upon with favor. Indeed, such is generally looked upon with downright suspicion.” *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980).

But even assuming the affidavit’s contents to be true, the affidavit does not entitle Mr. Deninno to authorization because “viewed in light of the evidence as a whole,” it would not be “sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense.”

28 U.S.C. § 2255(h)(1).

Mr. Stanberry was not the only individual who testified at trial. There was ample evidence from the testimony of three other alleged co-conspirators, as well as expert witnesses, that Mr. Deninno was engaged in the manufacture and distribution of methamphetamine. As we explained in Mr. Deninno’s direct appeal:

The evidence supporting Mr. Deninno’s guilt is overwhelming. Four individuals testified that at the request of Mr. Deninno they came to Oklahoma City and brought with them the glassware and

chemicals to manufacture methamphetamine. According to the testimony, Mr. Deninno knew how to manufacture methamphetamine. Two of the individuals testified they worked all night in a motel room extracting ephedrine to start the process of manufacturing methamphetamine. Mr. Deninno periodically checked on their progress throughout the evening correcting them when mistakes were made. The next morning, Mr. Deninno gave one of the witnesses \$1,000 and instructions to purchase the necessary equipment and other essential chemicals for the continued manufacture of methamphetamine.

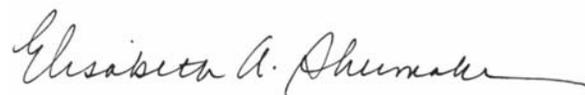
When the search warrant was executed, the agents found in the motel room a methamphetamine lab and 1.8 liters of a liquid precursor containing detectable amounts of methamphetamine. Additionally, 8.5 grams of methamphetamine were found in Mr. Deninno's luggage. Expert witnesses testified the equipment found in the motel room was a methamphetamine lab and further testified that methamphetamine was in the process of being "cooked" at this lab in the motel room.

Deninno, 29 F.3d at 576. Even taking Mr. Stanberry's affidavit as true, Mr. Deninno has failed to overcome the other significant evidence at trial and therefore he has failed to make a sufficient showing to meet the standard for authorization in § 2255(h)(1).

Accordingly, we DENY the motion for authorization. This denial of authorization "shall not be 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,

A handwritten signature in cursive script that reads "Elisabeth A. Shumaker". The signature is written in black ink and has a long, sweeping horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk