FILED
United States Court of Appeals
Tenth Circuit

September 14, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: LAWRENCE L. MAYES,

Movant.

No. 12-6231
(D.C. No. 5:09-CV-00484-C)
(W.D. Okla.)

ORDER

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

Lawrence L. Mayes, an Oklahoma state prisoner appearing pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus application challenging his 2005 conviction of robbery with a firearm. In order to file a second or successive § 2254 habeas application in the district court, Mr. Mayes must first obtain our authorization. *See* 28 U.S.C. § 2244(b)(3). We deny authorization.

On July 22, 2005, Mr. Mayes was convicted by an Oklahoma state jury of one count of robbery with a firearm (Case No. CF-2003-3169, Okla. Cnty. Dist. Ct.) (the "Jury Case"). He was sentenced to 45 years' imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed his conviction but reduced his sentence to 35 years. On May 6, 2009, Mr. Mayes filed a § 2254 application in federal district court complaining that the state trial court erred in instructing the jury and that the OCCA violated his due process rights in arbitrarily reducing his 45-year

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sentence to 35 years. The district court dismissed that application as untimely, and we denied Mr. Mayes a certificate of appealability ("COA"). *See Mayes v. Province*, 353 F. App'x 100, 101 (10th Cir. 2009).

Also on July 22, 2005, Mr. Mayes pleaded guilty to robbery with a dangerous weapon in another Oklahoma state case (Case No. CF-2002-6331, Okla. Cnty. Dist. Ct.) (the "Plea Case") and was sentenced to 20 years' imprisonment, to run concurrently with the sentence he received in his Jury Case. He did not appeal from that conviction. On October 26, 2009, Mr. Mayes filed a pro se § 2254 habeas application asserting he received ineffective assistance of counsel with regard to taking an appeal in his Plea Case. In relevant part, he alleged that at the time he entered his guilty plea and was sentenced, he was taking medication that affected his ability to understand the proceedings, that he was not taking certain medications he was supposed to, and that his attorney had informed the judge that she had become increasingly unable to communicate with him due to his diminished mental capacity. Mr. Mayes argued that his attorney provided ineffective assistance by failing to consult with him about taking an appeal based on his diminished capacity. The district court dismissed his § 2254 application as untimely, and we denied Mr. Mayes a COA. *See Mayes v. Province*, 376 F. App'x 815, 817 (10th Cir. 2010).

Next, on three occasions in 2011, Mr. Mayes unsuccessfully sought authorization from this court to file a second or successive § 2254 application regarding his convictions. To obtain authorization, a state prisoner must make a

prima facie showing that a proposed claim relies on (A) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (B) new facts that "could not have been discovered previously through the exercise of due diligence" and that "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C).

We denied Mr. Mayes's first request because he had admitted that his proposed claim—that he was incompetent at the time of his trial and plea—was not founded on new evidence or a new rule of constitutional law. *See In re Mayes*, No. 11-6015, slip op. at 1 (10th Cir. Jan. 31, 2011) (unpublished order). We denied his second request on the ground that evidence he submitted in support of his claim to have been incompetent at the time of his trial and plea was not new and did not establish that no reasonable factfinder would have found him guilty, and on the ground that other evidence referred to in his motion was not attached to the motion and, in any event, was not new. *See In re Mayes*, No. 11-6152, slip op. at 2-3 (10th Cir. June 14, 2011) (unpublished order). And we denied his third request, which concerned his competency, allegedly improper contact between the judge and jury, and an error regarding witnesses, on the ground that the new evidence he relied on—the State's brief in his direct appeal—was neither new nor sufficient to show he

was not guilty. *See In re Mayes*, No. 11-6255, slip op. at 2 (10th Cir. Oct. 24, 2011) (unpublished order). We also warned Mr. Mayes that "any further effort by him to begin a collateral attack on his conviction without satisfying the authorization standards of § 2244(b) may lead to the imposition of sanctions." *Id.*

In his present application for authorization, Mr. Mayes seeks permission to file a § 2254 application regarding his Jury Case. He asserts that he now has evidence that he was incompetent at the time of his trial and during his direct appeal. In support, he has attached mental health records allegedly documenting that, while awaiting trial in 2005 and throughout his direct appeal, which was decided in September 2006, he was seen numerous times for suicide attempts, was given powerful psychotropic drugs, and was under the care of mental health professionals. He also has attached a 2005 sentencing transcript that includes some discussion of his mental health at the time. He claims this evidence was "[p]reviously unavailable due to trial and appellate counsel ineffectiveness," Mot. at 6, and further states that "[b]ut for counsel's ineffectiveness, these medical records would have been used to establish that [he] was in fact incompetent to stand trial," *id.* at 6a. But he has not explained how the alleged ineffective assistance of counsel in 2005 and 2006 prevented him from previously discovering these medical records or the sentencing transcript "through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). He therefore has not satisfied his statutory burden with regard to new evidence, and he does not rely on any new rule of constitutional law. Accordingly, we **DENY** his

motion for authorization to file a second or successive § 2254 habeas corpus application. 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).

Further, Mr. Mayes has not heeded our prior warning regarding the filing of further motions for authorization to file a second or successive § 2254 application that do not meet the standards of § 2244. Hence, we now **ORDER** that any further applications Mr. Mayes files for leave to file additional collateral challenges to his conviction in the Jury Case will be deemed denied on the thirtieth day unless this court orders otherwise. *See Berryhill v. Evans*, 466 F.3d 934, 936 (10th Cir. 2006) (describing similar sanction imposed on litigant after fourth unsuccessful request for authorization to file a second or successive § 2254 application concerning same convictions).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk