

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 1, 2013

Elisabeth A. Shumaker
Clerk of Court

In re: PAUL G. RAYFORD,

Movant.

No. 13-3066
(D.C. Nos. 2:11-CV-02477-CM &
2:09-CR-20143-CM-2)
(D. Kan.)

ORDER

Before **KELLY, LUCERO**, and **MATHESON**, Circuit Judges.

Paul G. Rayford, a federal prisoner appearing pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

In 2010, Mr. Rayford pleaded guilty to attempted bank robbery, carrying and using a firearm during and in relation to the attempted bank robbery, and being a felon in possession of a firearm. He was sentenced to 144 months' imprisonment. He appealed, but we granted defense counsel's motion to withdraw and dismissed the appeal. *United States v. Rayford*, 434 F. App'x 721, 722, 725 (10th Cir. 2011) (agreeing with defense counsel "that the record in this case provides no nonfrivolous basis for an appeal").

In 2011, Mr. Rayford filed a § 2255 motion, which the district court denied. This court, however, granted Mr. Rayford a certificate of appealability and thereafter reversed the district court's denial of § 2255 relief, stating:

Defendant has raised at least a facially plausible claim of ineffective assistance of counsel. The record includes evidence that, if authentic,

refutes the factual basis on which the sentencing court counted Defendant's prior offenses separately for criminal history purposes. Defendant asserts that he asked defense counsel to raise this issue before sentencing, and the record reflects that defense counsel did not raise this issue on direct appeal even after Defendant filed a pro se brief asserting he was sentenced for the two prior offenses on the same date.

United States v. Rayford, No. 12-3006, 2012 WL 3860017, at *3 (10th Cir. Sept. 6, 2012). Consequently, this court remanded for the district court to decide in the first instance whether counsel's failure to raise a criminal history calculation error during sentencing or on appeal constitutes ineffective assistance. *See id.*

Mr. Rayford then filed in the district court a pro se motion entitled Leave to Amend/Supplement § 2255, attempting to add two claims to his original § 2255 motion. Shortly thereafter, the district court appointed Mr. Rayford counsel. Counsel filed a motion to compel, asking the district court to rule on his client's pro se motion to supplement. On December 5, 2012, the district court denied the motion. Among other independent bases for denying the motion, the court concluded that Mr. Rayford's new claims exceeded the scope of the remand.

The remand remains pending. An evidentiary hearing is scheduled for April 30, 2013.

Meanwhile, Mr. Rayford has sought authorization from this court to file a second or successive § 2255 motion. In order to be entitled to authorization, he must show that he has new claims that 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).

In his current application for authorization, Mr. Rayford seeks to present two claims: (1) the Government violated his Fourth Amendment right to be free from a warrantless search by trespassing and installing global positioning system (GPS) devices on vehicles driven by him, and (2) counsel provided ineffective assistance by failing “to know the . . . illegal application of GPS.” Application at 5; *see also id.* (stating that these two claims were raised in the pro se motion to supplement). Citing *United States v. Jones*, 132 S. Ct. 945 (2012), Mr. Rayford contends his first proposed claim is based on a “new rule of law.”

In *Jones* the Supreme Court held “that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” for Fourth Amendment purposes. *Id.* at 949 (footnote omitted). In so holding, the Court explained that it was applying “an 18th-century guarantee against unreasonable searches,” *id.* at 953, and indeed, began its analysis by observing that it had “no doubt that such a physical intrusion [the Government’s physically occupying private property for the purpose of obtaining information] would have been considered a ‘search’ within the meaning of the Fourth Amendment *when it was adopted*,” *id.* at 949 (emphasis added). Under these

circumstances it appears that *Jones* did not announce a new rule of constitutional law. *See* 28 U.S.C. § 2255(h).

Mr. Rayford also contends that both his first and second proposed claims rely on “newly discovered evidence.” Specifically, he asserts that he did not know that the Government had placed GPS tracking devices on the vehicles he drove until he received the Government’s response to his § 2255 motion on June 4, 2012. But this assertion alone does not satisfy § 2255(h). He must show his new claims, that rely on the Government’s collection of evidence through GPS devices, “would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of” attempted bank robbery, carrying and using a firearm during and in relation to the attempted bank robbery, and being a felon in possession of a firearm. *Id.* This he does not attempt to demonstrate.

Mr. Rayford has failed to meet the standard for authorization in 28 U.S.C. § 2255(h). Accordingly, we deny his motion. 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



ELISABETH A. SHUMAKER, Clerk