

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 28, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: TONY JACKSON,

Movant.

No. 16-2155
(D.C. Nos. 1:04-CV-01018-LH-LAM &
1:99-CR-00381-LH-1)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **LUCERO**, Circuit Judges.

Tony Jackson, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence.¹ Because it does not appear the § 2255 motion he seeks to file requires authorization, we dismiss the motion for authorization as unnecessary.

Mr. Jackson pled guilty to possession of more than 50 grams of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(b)(1). The district court determined that he qualified as a career offender under USSG § 4B1.1 and sentenced him to 262 months in prison and 10 years of supervised release. He did not file a direct appeal.

¹ We note that despite seeking authorization, Mr. Jackson has already filed his proposed district court filing with the district court. *See Jackson v. United States*, No. 1:16-cv-00806- LH-GJF, Doc. 1 (Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255(f)(4)) (D. N.M. July 8, 2016). That motion remains pending, and the district court has ordered Mr. Jackson to supplement it by August 22 “with documentation reflecting which of his California felony convictions have been reduced to misdemeanor convictions and the date on which the reductions took place.” *See id.*, Doc. 4 (Order to Cure Deficiency) (D. N.M. July 21, 2016).

Mr. Jackson filed a § 2255 motion in 2002. The district court denied relief, and this court denied his application for a certificate of appealability and dismissed his appeal. He also filed numerous other applications for relief from the sentence imposed. None were successful, and they are not relevant to our decision here.

Mr. Jackson now seeks our authorization to file another § 2255 motion to challenge his sentence based on Proposition 47—an initiative that was approved by California voters in November 2014 and codified at Cal. Penal Code § 1170.18 (West 2014).² Proposition 47 recharacterized several categories of theft and drug-possession crimes from felonies to misdemeanors. Mr. Jackson alleges that he applied for, and was granted, such resentencing for two California felony convictions that served as predicate offenses for his career-offender designation under § 4B1.1(a); thus, he no longer has “at least two prior *felony* convictions of either a crime of violence or a controlled substance offense,” § 4B1.1(a) (emphasis added). *See* Mot. for Auth. (filed on July 15, 2016) at 8.

We have explained that “Congress placed strict limitations on ‘second or successive’ motions under § 2255, requiring that a defendant obtain circuit-court authorization before filing a second or successive motion and limiting the grounds for authorization.” *In re Weathersby*, 717 F.3d 1108, 1110 (10th Cir. 2013) (per curiam)

² Mr. Jackson’s original motion for authorization (filed on June 23, 2016) cited *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). But he did not apply those decisions to his individual circumstances or otherwise explain how they invalidate his sentence, so we asked him to file his motion on this court’s standard form and attach a proposed district court filing. In so doing, he appears to have abandoned his original claim based on *Johnson* and *Welch* in favor of a claim that he no longer qualifies as a career offender because the two predicate felonies for his designation have been downgraded to misdemeanors.

(citing 28 U.S.C. § 2255(h)). We held in *Weathersby*, however, that a subsequent § 2255 motion asserting a claim that was not ripe until after the adjudication of the defendant’s first § 2255 motion is not “second or successive” within the meaning of § 2255(h). *Id.* at 1110-11; *see also United States v. Williams*, 790 F.3d 1059, 1068 (10th Cir. 2015) (“*Weathersby* outlined a narrow exception to the bar on successive § 2255 motions for circumstances where a particular claim cannot be raised in a defendant’s initial § 2255 motion. This occurs where the factual basis for a claim does not yet exist . . . at the time of a defendant’s first motion.” (citation omitted)). Consequently, a prisoner who sought to file another § 2255 motion to challenge his enhanced sentence, which was based on state court convictions that were vacated after the conclusion of his first § 2255 proceedings, was not subject to the authorization requirements in § 2255(h). *Weathersby*, 717 F.3d at 1110-11.

We conclude that the reasoning in *Weathersby* applies equally to Mr. Jackson’s situation. Mr. Jackson alleges that he petitioned for resentencing, and the state court issued orders changing the California felony convictions that were used to enhance his federal sentence to misdemeanors. This resentencing supposedly occurred in 2015—years after his first § 2255 proceedings were finalized. Accordingly, the basis for his proposed § 2255 claim did not exist when his first § 2255 proceedings were ongoing. The proposed motion that Mr. Jackson seeks authorization to file is therefore not a “second or successive” motion and does not require our prior authorization. Consequently, we dismiss the motion for authorization as unnecessary. In so concluding,

we express no opinion on whether Mr. Jackson's new claim is timely or on whether the claim would have any merit.

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 tail.

ELISABETH A. SHUMAKER, Clerk