

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

July 22, 2016

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re: ARMOND DAVIS ROSS,

Movant.

No. 16-5106
(D.C. No. 4:08-CV-00475-TCK-TLW)
(N.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **GORSUCH** and **McHUGH**, Circuit Judges.

Armond Davis Ross, an Oklahoma state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application challenging his 2005 convictions for first-degree rape, lewd molestation of a child under sixteen, and procuring a minor for participation in pornography. We deny his motion for authorization.

We may authorize a claim only if the prisoner has not raised it in a prior § 2254 application, *see* 28 U.S.C. § 2244(b)(1), and only if the prisoner makes a prima facie showing that his claim satisfies the authorization requirements, *see id.* § 2244(b)(3)(C). Those requirements provide that a proposed successive claim must rely on (1) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (2) 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.” *Id.* § 2244(b)(2). A prima facie showing sufficient for authorization is made when “it appears reasonably likely that the application satisfies the stringent requirements” in § 2244(b). *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (internal quotation marks omitted).

This is the second motion for authorization Mr. Ross has filed in 2016 and the third motion in the past 13 months (he also filed a motion for authorization in June of 2015). In this motion, he seeks authorization to bring claims alleging: (1) actual innocence; (2) violations of due process and equal protection; and (3) the state court lacked jurisdiction to try his case.

Mr. Ross contends that his first proposed claim relies on a new rule of law and newly discovered evidence. But he does not cite to any new rule of law in his motion. *See* Mot. for Auth. at 9. As for his new evidence, he asserts that there is a private investigator who recorded a state witness “braging[sic] about perjury in trial, stealing property and framing defendant.” *Id.* He also alleges that there was evidence presented to a grand jury in 2016 that state witnesses “had been caught stealing defendant[’s] property before trial, and running an under-aged[sic] prostitution ring from defendant[’s] house when he was in California, unaware, and police covered it up.” *Id.* But Mr. Ross does not attach any transcripts of the alleged recordings from the private investigator or any copies of the alleged evidence presented to the grand jury. Mr. Ross’s bare

statements without any evidentiary support are insufficient to make a prima facie showing that he meets the standards for authorization in § 2244(b).

For his second proposed claim, he asserts that “state courts refused access to court for a hearing, refused to comply with [Tenth Circuit] or U.S. Supreme Court holdings” and the police “with-held[sic] [*Brady*] materials from [the] defense and court.” Mot. for Auth. at 10(A). He contends that this claim relies on newly discovered evidence, but he does not identify that evidence. Instead, when asked to describe the evidence he states: “Grand-jury and claims uncontested in post-conviction, motion for funding and other post-trial motions.” *Id.* Referencing other proceedings or filings he has made in other courts is not sufficient to meet his prima facie showing that he has newly discovered evidence. We will not sift through the record of the proceedings in state court and the district court to try to find support for his claim. *Cf. Phillips v. James*, 422 F.3d 1075, 1081 (10th Cir. 2005) (“Plaintiffs do not direct us to the location in the voluminous record where we can find support for their proposition Absent such, we will not sift through the record to find support for this argument.”).

Mr. Ross contends his third proposed claim relies on a new rule of constitutional law announced in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). That case involved an excessive force claim and the proper test for determining whether the use of force was unreasonable. *See id.* at 2470. Assuming without deciding that *Kingsley* involves a new rule of constitutional law, it has not been made retroactive to cases on collateral review by the Supreme Court. And, it does not appear to bear any relevance to Mr. Ross’s claim

that the state court lacked jurisdiction to try his case. Mr. Ross also makes the conclusory assertion that this claim relies on “newly discovered evidence,” but he provides no further information to support that statement. Mot. for Auth. at 10(B). He has not made a prima facie showing that he is entitled to authorization on this claim.

Mr. Ross has failed to meet the standards for authorization in § 2244(b). 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). Because this is the third motion for authorization Mr. Ross has filed in just over a year, we caution him that if he files a future motion for authorization concerning the same underlying convictions in which he presents arguments in favor of authorization substantially similar to those presented here or in his two earlier motions, the Clerk shall dismiss the motion for authorization without further notice.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk