No. 18-3090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 07, 2018
DEBORAH S. HUNT, Clerk

KENNETH A. WHITE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Kenneth A. White, a federal prisoner proceeding pro se, appeals a district court order denying his Federal Rule of Civil Procedure 60(b)(6) motion for relief from the district court's order denying his motion to vacate, set aside, or correct sentence filed under 28 U.S.C. § 2255. White requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

In 2014, a jury found White guilty of conspiracy to defraud the government with respect to claims, in violation of 18 U.S.C. § 286; and six counts of aiding and abetting false, fictitious, or fraudulent claims, in violation of 18 U.S.C. §§ 2 and 287. He was sentenced to serve a total of 155 months of imprisonment followed by a total of three years of supervised release and to pay restitution of $342,365.60. The judgment provided that White's sentence was to be served consecutively to a federal sentence previously imposed in 2010. This court affirmed White's convictions and sentences, concluding that he was not denied due process based on pre-indictment delay, his consecutive sentences were supported by sufficient findings, and his sentences were properly enhanced for the use of sophisticated means to commit his offenses. *United States v. White*, No. 15-3379 (6th Cir. Mar. 22, 2016) (unpublished). The United States Supreme Court denied certiorari.

In 2016, White filed a motion to vacate under § 2255, raising the following grounds for relief: (1) he was denied a speedy trial; (2) he was denied effective assistance of trial counsel because counsel failed to raise speedy-trial and pre-indictment-delay issues; and (3) he was denied due process and equal protection due to prosecutorial misconduct in the form of pre-indictment delay, trial delay, and withholding of evidence. The district court denied White's motion and denied a certificate of appealability. This court denied a certificate of appealability, concluding that reasonable jurists would debate neither the district court's denial of White's pre-indictment-delay claim, which "was rejected on direct appeal" and did not "go to the fairness of the trial process or to the accuracy of the ultimate result," nor the district court's denial of his ineffective-assistance-of-trial-counsel claim. *White v. United States*, No. 17-3466, slip op. at 2-3 (6th Cir. Oct. 4, 2017) (unpublished).

White subsequently filed the current Rule 60(b)(6) motion for relief from the district court's order denying his § 2255 motion to vacate. In that motion, White reiterated his arguments that he was denied a speedy trial and due process due to pre-indictment delay and that counsel was ineffective for failing to raise speedy-trial and pre-indictment-delay issues. White argued that the district court misinterpreted the arguments that he raised in his motion to vacate and did not consider that the 2014 criminal charges were included in a global plea offer made in 2011 and that after the district court granted his motion to withdraw his global plea, he was not indicted for those charges until 2014, which was more than thirty days after his arrest in 2010 and the withdrawal of his global guilty plea in 2011. He argued that his case was "extraordinary within the meaning of Rule 60(b)(6)" because there was a risk of injustice to him in that he faces an additional nine years of imprisonment as a result of the 2014 convictions; a risk "of undermining public confidence in the justice system and the risks of injustice in other cases" in that the prosecutor vindictively prosecuted his 2014 case five years after the charges could have been brought because White is African-American and the prosecutor sought consecutive sentences; his ineffective-assistance-of-trial-counsel claim has "probable merit"; "the government does not have a strong interest in the finality of the judgment" denying his motion to

vacate; and he "has diligently pursued relief on his ineffective-assistance-of-counsel claim as connected to his speedy-trial issue." The district court denied White's motion.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, "[a] 'court of appeals should limit its examination [at the [certificate of appealability] stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

Rule 60(b) permits a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any of five enumerated reasons. Rule 60(b)(6), a residual clause, permits relief for "any other reason that justifies relief." A Rule 60(b)(6) motion must demonstrate "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

The district court determined that White's Rule 60(b)(6) motion reiterated "the merits of the three claims he made in his § 2255" motion; that this court considered and rejected those claims when denying his application for a certificate of appealability; that the law-of-the-case doctrine precluded review of this court's "ruling on those same" claims; and that White failed to show that any of the recognized exceptions to the law-of-the-case doctrine would permit review of this court's prior decision. The district court also noted that White did not demonstrate any "extraordinary circumstances" that would justify relief under Rule 60(b)(6).

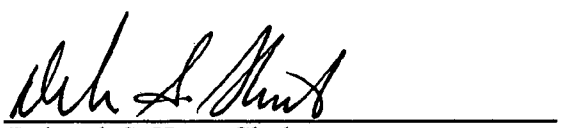
Reasonable jurists would not debate the district court's denial of White's Rule 60(b)(6) motion for relief from judgment. *See Miller-El*, 537 U.S. at 327. Rather than demonstrating any

"extraordinary circumstances," which "rarely occur in the habeas context," to warrant relief under Rule 60(b)(6), *see Gonzalez*, 545 U.S. at 535 (quoting *Ackermann*, 340 U.S. at 199), White simply reiterates the same unsuccessful arguments that he asserted in his direct appeal, motion to vacate, and application for a certificate of appealability. Reiteration of a previously rejected argument does not warrant Rule 60(b) relief. *See Johnson v. Dellatifa*, 357 F.3d 539, 543 (6th Cir. 2004). And contrary to White's contention, the district court was well aware of the procedural history of his case and his speedy-trial and pre-indictment-delay arguments when ruling on his motion to vacate.

Moreover, White continues to press issues that this court has already decided against him. The law-of-the-case doctrine "precludes reconsideration of issues decided at an earlier stage of the case." *Yeschick v. Mineta*, 675 F.3d 622, 633 (6th Cir. 2012) (quoting *Caldwell v. City of Louisville*, 200 F. App'x 430, 433 (6th Cir. 2006)). Although an exception to the law-of-the-case doctrine allows a court to revisit a prior ruling when certain circumstances are present, *see Entm't Prods., Inc. v. Shelby County*, 721 F.3d 729, 742 (6th Cir. 2013) (quoting *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009)), none of those circumstances apply here. As White merely re-argues previously raised and denied claims, he has demonstrated no "extraordinary circumstances" entitling him to relief under Rule 60(b)(6). *See Gonzalez*, 545 U.S. at 535 (quoting *Ackermann*, 340 U.S. at 199).

Accordingly, the application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 18-3090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 31, 2018
DEBORAH S. HUNT, Clerk

KENNETH A. WHITE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Kenneth A. White, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-3090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 15, 2018
DEBORAH S. HUNT, Clerk

KENNETH A. WHITE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Kenneth A. White petitions for rehearing en banc of this court's order entered on June 7, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH A. WHITE, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
2018 U.S. Dist. LEXIS 5706
CASE NO. 1:14-CR-185
January 11, 2018, Decided
January 11, 2018, Filed

Editorial Information: Prior History

White v. United States, 2017 U.S. Dist. LEXIS 56785 (N.D. Ohio, Apr. 13, 2017)

Counsel For United States of America, Plaintiff: Vasile C. Katsaros, LEAD ATTORNEY, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: JAMES S. GWIN, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JAMES S. GWIN

Opinion

OPINION & ORDER

[Resolving Docs. 201, 202]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendant Kenneth A. White seeks relief under Federal Rule of Civil Procedure 60(b)(6) from final judgment of his 28 U.S.C. § 2255 petition.1 White also moves for the Court to recuse itself from considering his Rule 60(b)(6) motion.2 For the following reasons the Court **DENIES** the motion for recusal and **DENIES** the Rule 60(b)(6) motion.

I. BACKGROUND

In Fall 2010, while the government was investigating White's tax fraud, the United States indicted White for unrelated federal crimes.3 In that 2010 case, White initially accepted a global plea agreement that also encompassed his tax fraud offenses. But White then withdrew his guilty plea.

After withdrawing from the 2010 case plea deal, White went to trial before United States District Judge Solomon Oliver on two other non-tax federal cases. A jury convicted White of conspiracy to commit bank and wire fraud; bank fraud; wire fraud; false statements on a loan application; and failure to appear on February 10, 2012.4

In this completely separate case, on May 28, 2014, a federal grand jury charged White with conspiracy to defraud the government, in violation of 18 U.S.C. § 286, and making false, fictitious, or fraudulent claims to the IRS, in violation of 18 U.S.C. § 287(a).5

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On July 16, 2014, the Court granted White's motion to continue the trial, and White waived his speedy trial rights.6 Repeating what he had done in the two earlier federal criminal cases, after first pleading guilty,7 White moved to withdraw his guilty plea.8 The Court granted the withdrawal motion,9 and White went to trial. On October 31, 2014, a jury convicted White of conspiracy and making false claims.10 The Court sentenced White to 155 months in prison to run consecutively to Judge Oliver's 2012 sentence.11

When sentencing White, the Court considered the fact that this case involved an intended loss of $1,995,687 and an actual loss of $342,365.60.12 The Court also considered that White had a criminal history that included felonious assault, a large number of theft convictions, and at least three federal bank fraud convictions involving large amounts of money.13

White appealed to the Sixth Circuit.14 In his Sixth Circuit direct appeal, White argued that "his due-process rights were violated when the government delayed prosecution from 2010 to 2014, that the district court failed to make any findings to support its decisions to impose consecutive sentences, and that the district court improperly applied the two-level sophisticated-means enhancement."15 The Sixth Circuit affirmed White's conviction and sentence.16

White next filed a § 2255 petition.17 In the habeas petition, White argued that (1) his right to a speedy trial was violated; (2) the delay of his tax fraud indictment violated his due process and equal protection rights; and (3) his counsel was ineffective for failing to properly litigate his pre-indictment delay or speedy trial claims.18 On April 13, 2017, the Court denied habeas relief and denied a certificate of appealability.19

White then applied for a Sixth Circuit certificate of appealability.20 On October 4, 2017, the Sixth Circuit denied the application.21 The Sixth Circuit held that "reasonable jurists would not debate the district court's rejection of" White's three claims in his § 2255 petition.22 The Sixth Circuit further held that "the district court's opinion carefully and correctly set[] out the facts and law governing the issues raised and clearly set[] forth the reasons underlying the decision."23

White now files the instant motion for Rule 60(b)(6) relief and the motion for recusal.24 In his Rule 60(b)(6) motion, White argues the merits of the three claims he made in his § 2255 petition.25 White also moves for the Court to recuse itself from considering his Rule 60(b)(6) motion due to the Court's role in sentencing White and the Court's role in ruling on White's habeas petition arguments.26 White also states that the Court is biased against him for being African American.27 The government filed an opposition to both motions.28

II. DISCUSSION

A. Motion to Recuse

The Court denies White's motion to recuse itself from considering his Rule 60(b)(6) motion.

Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A judge can be disqualified on the basis of prejudice or bias only if this prejudice or bias is personal or extrajudicial.29 A bias or prejudice is personal or extrajudicial if it "emanates from some source other than participation in the proceedings."30

White's arguments for recusal fail. The Court's participation in deciding White's sentencing and habeas petition is not a personal or extrajudicial bias. White further fails to explain how the Court may be biased against him for being African American.

B. Rule 60(b)(6) Motion

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The Court denies White's motion for relief from the Court's final judgment on his § 2255 petition.

Federal Rule of Civil Procedure 60(b) permits courts to relieve a party from an order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Courts avoid granting relief from judgments due to "public policy favoring finality of judgments and termination of litigation."31 In particular, courts use Rule 60(b)(6) only in exceptional or extraordinary circumstances, and only as a residual clause in cases that are not covered under the first five subsections of Rule 60(b).32

The Court cannot change the Sixth Circuit's holding under the law-of the-case doctrine. Under the law-of-the-case doctrine, "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation."33 The complementary mandate rule "requires lower courts to adhere to the commands of a superior court."34

The Sixth Circuit considered and ruled on White's bases for Rule 60(b)(6) relief when the Sixth Circuit considered and decided White's application for a certificate of appealability.35 This Court has no authority to overrule the Sixth Circuit's ruling on those same arguments.

White also fails to show why the Court should depart from the law-of-the-case doctrine. The Sixth Circuit has permitted departure from the doctrine in "limited circumstances," such as "where there is substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice."36

White's arguments on "extraordinary circumstances" fail to make any of these showings. His arguments are grounded in the merits of his claims (which, as explained, this Court cannot re-review) and his own diligence in pursuing them.37 Thus, White's Rule 60(b)(6) motion is denied.

III. CONCLUSION

Accordingly, this Court **DENIES** the motion for recusal and **DENIES** the petition for Rule 60(b)(6) relief from judgment.

IT IS SO ORDERED

Dated: January 11, 2018

/s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

Footnotes

1

Doc. 202.

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2

Doc. 201.
3

Docket No. 09-cr-17, Doc. 95 (making false statements in loan applications); Docket No. 10-cr-442, Doc. 1 (conspiracy to defraud automobile finance and mortgage companies and wire fraud).
4

Docket No. 09-cr-17, Doc. 179.
5

Doc. 1.
6

Doc. 36.
7

Doc. 39.
8

Doc. 45.
9

Doc. 52.
10

Doc. 92.
11

Doc. 127.
12

Doc. 147 at 19:16-17, 32:12-18.
13

Id. at 33:3-9; *see also* Doc. 122 at 12-22.
14

Doc. 128.
15

Doc. 163 at 2.
16

Doc. 164.
17

Doc. 178.
18

Id. at 5.
19

Doc. 191.
20

Doc. 193.

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21

Doc. 200.
22

Id. at 2-3.
23

Id. at 3.
24

Docs. 201, 202.
25

See Doc. 202.
26

Doc. 201.
27

Id. at 3.
28

Doc. 205.
29

United States v. Hartsel, 199 F.3d 812, 820 (6th Cir. 1999).
30

Youn v. Track, Inc., 324 F.3d 409, 423 (6th Cir. 2003).
31

McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc., 298 F.3d 586, 592 (6th Cir. 2002) (quoting *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001)).
32

See Blue Diamond Coal, 249 F.3d at 524.
33

United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994) (citing *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993)).
34

Id. (citing *Bell*, 988 F.2d at 251).
35

See Doc. 200 at 2-3.
36

Moored, 38 F.3d at 1421 (citations and internal quotation marks omitted).
37

See Doc. 202 at 14-22.

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