

Appendix B

No. 18-1906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 29, 2019

DEBORAH S. HUNT, Clerk

WENDY DARLENE PITTS,

)

Petitioner-Appellant,

)

v.

)

ORDER

UNITED STATES OF AMERICA,

)

Respondent-Appellee.

)

)

Wendy Pitts, proceeding pro se, appeals the district court's dismissal of her 28 U.S.C. § 2255 motion to vacate, set aside, or correct her sentence. This court construes Pitts's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2).

In December 2015, a federal grand jury returned an indictment charging Pitts with filing a false claim for disaster assistance with the Federal Emergency Management Agency, in violation of 18 U.S.C. § 287. Specifically, the indictment alleged that Pitts falsely claimed in her application for assistance that she resided in a home in Detroit, Michigan, that was damaged by a storm in August 2014, while knowing that she resided in Lansing, Michigan, at the time. The government later agreed to allow Pitts to plead guilty to a misdemeanor charge of making a false writing, in violation of 18 U.S.C. § 1018. After consenting to proceed before a magistrate judge, Pitts entered her plea of guilty pursuant to a written plea agreement. On June 23, 2016, the magistrate judge sentenced Pitts to one year of probation.

Pitts filed a pro se notice of appeal, which was initially docketed in this court. However, this court later dismissed the appeal for lack of jurisdiction, explaining that jurisdiction over an appeal from the judgment of a magistrate judge lies with the district court judge. *United States v.*

No. 18-1906

- 2 -

Pitts, No. 16-1977 (6th Cir. Oct. 27, 2016) (order). *Pitts pursued her appeal to the district court*, arguing that the magistrate judge should have ordered a competency evaluation before accepting her guilty plea and that the record was insufficient to show that she made a knowing, intelligent, and voluntary plea. *The district court affirmed the judgment of the magistrate judge.* Pitts then appealed to this court. Her attorney filed a brief and a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that he had examined the record and found no non-frivolous grounds to raise on appeal. This court granted counsel's motion and affirmed the district court's judgment. *United States v. Pitts*, No. 16-2787 (6th Cir. Apr. 28, 2017) (order).

On July 18, 2017, Pitts filed a motion to vacate, set aside, or correct her sentence, arguing that she had wanted to go to trial, but her attorney insisted that she plead guilty. The government moved to dismiss Pitts's motion on the ground that she did not satisfy the custody requirement for seeking collateral relief under § 2255. The district court granted the government's motion, dismissed the motion for lack of jurisdiction, and declined to issue a COA.

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the petition was denied on procedural grounds, the petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's conclusion that Pitts fails to meet § 2255(a)'s "in custody" requirement. To obtain relief, Pitts must be in custody under the conviction or sentence that is being attacked. 28 U.S.C. § 2255(a).

The plain language of § 2255 provides only prisoners who claim a right to be released from custody an avenue to challenge their sentences: "A prisoner in custody under sentence of a [federal] court claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

United States v. Watroba, 56 F.3d 28, 29 (6th Cir. 1995) (alteration and ellipsis in original) (quoting 28 U.S.C. § 2255(a)). Here, Pitts was no longer in custody for her conviction at the

No. 18-1906

- 3 -

time she filed her § 2255 motion because her one-year term of probation had already expired. *See Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001). Thus, reasonable jurists would not disagree with the district court's rationale for dismissing her case.

For these reasons, Pitts's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

Case No. 1:15-cr-221

v.

HON. JANET T. NEFF

WENDY DARLENE PITTS,

Defendant-Movant.

ORDER

On April 24, 2018, pursuant to the government's motion, this Court dismissed Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 69) for lack of jurisdiction. Defendant has since filed a Notice of Appeal (ECF No. 77). Pursuant to 28 U.S.C. § 2253(c)(1)(B), the Court must determine whether to grant a certificate of appealability as to the issues Defendant raises. *See RULES GOVERNING § 2255 PROCEEDINGS, Rule 11.*

This Court did not reach the merits of Defendant's motion, dismissing it instead on procedural grounds. In this regard, a certificate of appealability "should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). *See also Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or

Appendix E

that the petitioner should be allowed to proceed further." *Slack, supra*. Upon review, the Court determines that reasonable jurists would not find this Court's dismissal debatable, where Defendant was not a "prisoner in custody under sentence of a court," 28 U.S.C. § 2255(a), when she filed her motion. A certificate of appealability will therefore be denied on this basis. Accordingly:

IT IS HEREBY ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue presented.

Dated: August 28, 2018

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge