APPENDIX

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASON BROOKS,

Petitioner - Appellant,

v.

MATTHEW HANSON, Warden, Sterling Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 18-1356
(D.C. No. 1:18-CV-01940-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Jason Brooks, a Colorado state prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas application. We deny a COA and dismiss this matter.

In 2010, Brooks pled guilty to four counts of securities fraud. He was sentenced to 32 years' imprisonment and ordered to pay approximately $5 million in restitution. In July 2015, after unsuccessfully pursuing an initial habeas action on grounds not pertinent

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

here, Brooks received a notice from a state court clerk informing him that his restitution order was subject to a monthly interest charge under Colo. Rev. Stat. § 18-1.3-603(4). As a result, Brooks filed a state post-conviction motion in which he raised claims of ineffective assistance of counsel and breach of his plea agreement. Both claims rested on the failure to tell him about the interest charge prior to his guilty plea. The trial court denied relief because it determined that his claims were untimely and procedurally barred. Brooks bypassed further direct review in the state courts, and instead asked this court to authorize the filing of a second or successive habeas petition. Although this court denied authorization, we noted that if Brooks's claims were based on events occurring after his first petition was denied, his petition would not be second or successive.

Brooks returned to state court and filed another motion for post-conviction relief. This time, he claimed that the interest charge made his sentence illegal. The trial court denied the motion because Brooks failed to raise any new issues. Brooks appealed to the Colorado Court of Appeals.

But before Brooks's appeal was decided, he filed a second habeas action in which he argued that the state violated his due process rights when it added interest to the restitution and thereby breached the plea agreement. The district court concluded that Brooks's application was not second or successive because it arose after his first habeas action had concluded. Nonetheless, the court dismissed the claim because it had been defaulted in state court on an independent and adequate state procedural ground and was procedurally barred. *See Brooks v. Archuleta*, No. 16-cv-00895-GPG, 2016 WL

8914532, at *3 (D. Colo. July 26, 2016). This court denied Brooks's request for a COA and dismissed his appeal.

Since then, Brooks has filed numerous motions in district court under Rule 60(b) of the Federal Rules of Civil Procedure related to the interest charge under the Colorado statute. Each motion was construed as second or successive and dismissed for lack of jurisdiction. And just as many times, this court has denied Brooks's requests for a COA and dismissed his appeals. Brooks has also filed several unsuccessful motions for authorization in this court concerning the interest charge.

Most recently, Brooks filed a third habeas action in district court in which he again raised an alleged due process violation arising from a breach of the plea agreement. The court concluded that its previous order in *Brooks*, which denied the application because the claim had been defaulted in state court on an independent and adequate state procedural ground, was a disposition on the merits. Therefore, the court dismissed the third application as second or successive, filed without authorization from this court. Brooks seeks a COA to appeal from the court's order.

To appeal, Brooks must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). Where, as here, a district court has dismissed a filing on procedural grounds, for a COA to issue, the movant must show both "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). We bypass the constitutional question because we can easily dispose of this matter based on the procedural one. *See id.* at 485.

The district court properly characterized Brooks's § 2254 motion as second or successive. His previous motion was dismissed due to state procedural default. Because that disposition was on the merits, the current application is successive. *See Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005); *Carter v. United States*, 150 F.3d 202, 205-06 (2d Cir. 1998) (per curiam); *see also Parkhurst v. Wilson*, 525 F. App'x 736, 737 (10th Cir. 2013); *Hill v. Daniels*, 504 F. App'x 683, 688 (10th Cir. 2012); *Schwartz v. Neal*, 228 F. App'x 814, 816 (10th Cir. 2007) (per curiam); *cf. Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995) (concluding that dismissal based on procedural default was on the merits under pre-AEDPA successive petition doctrine). Absent prior authorization from this court, the district court lacked jurisdiction to hear Brooks's current application. 28 U.S.C. § 2244(b)(3).

No reasonable jurist could debate the district court's dismissal on procedural grounds. Therefore, we deny Brooks's application for a COA and dismiss his appeal. Brooks's request to proceed in forma pauperis is denied and we remind him of his responsibility to immediately pay the unpaid balance of the appellate filing fee.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01940-GPG

JASON BROOKS,

Applicant,

v.

MATTHEW HANSON, Warden, Sterling Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER OF DISMISSAL

Applicant, Jason Brooks, is a prisoner in the custody of the Colorado Department of Corrections. Mr. Brooks has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1). The Court must construe the application liberally because Mr. Brooks is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the action will be dismissed.

Mr. Brooks asserts one claim challenging the validity of his guilty plea and conviction in Weld County District Court case number 09CR959. Mr. Brooks alleges he agreed to plead guilty to a number of counts of securities fraud and to pay restitution in the amount of $5,751,956.18. He was sentenced to thirty-two years in prison. He contends his constitutional right to due process has been violated and his conviction should be vacated because the state breached the plea agreement by imposing post-judgment

interest on the stipulated amount of restitution he agreed to pay.

Mr. Brooks has filed two prior habeas corpus actions pursuant to 28 U.S.C. § 2254 challenging the validity of his conviction and sentence in Weld County District Court case number 09CR959. *See Brooks v. Archuleta*, No. 14-cv-02276-CBS (D. Colo. May 14), *appeal dismissed*, No. 15-1209, 621 F. App'x 921 (10th Cir. July 22, 2015); *Brooks v. Archuleta*, No. 16-cv-00895-LTB (D. Colo. July 26, 2016), *appeal dismissed*, No. 16-1344, 681 F. App'x 705 (10th Cir. Mar. 13, 2017). In case number 14-cv-02276-CBS, Mr. Brooks' cognizable federal constitutional claims were dismissed either for lack of substantive merit or because the claims had been defaulted in state court on an independent and adequate state procedural ground and were procedurally barred. In case number 16-cv-00895-LTB, Mr. Brooks raised the same claim he is asserting in the instant action - that he was denied due process when the state breached his plea agreement by imposing post-judgment interest on the stipulated amount of restitution he agreed to pay. The Court determined case number 16-cv-00895-LTB was not a second or successive application because the decision to enforce the state law post-judgment interest provision was a newly accrued claim based on events that occurred after case number 14-cv-02276-CBS had concluded. However, case number 16-cv-00895-LTB was dismissed because the due process claim had been defaulted in state court on an independent and adequate state procedural ground and was procedurally barred.

Mr. Brooks contends the instant action is not a second or successive application because, according to him, case number 16-cv-00895-LTB was dismissed for failure to exhaust state remedies. He is mistaken. To reiterate, case number 16-cv-00895-LTB

was dismissed because the due process claim Mr. Brooks asserted was defaulted in state court on an independent and adequate state procedural ground and was procedurally barred. Such a dismissal constitutes a disposition on the merits. *See Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005) (finding that § 2254 application denied on state procedural default grounds constitutes a disposition on the merits, thus rendering a subsequent § 2254 application second or successive); *Schwartz v. Neal*, 228 F. App'x 814, 816 (10th Cir. 2007) (per curiam) (same). Therefore, the instant application is a second or successive application.

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Mr. Brooks must apply to the United States Court of Appeals for the Tenth Circuit for an order authorizing this Court to consider his second or successive claim. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam). In the absence of such authorization, the Court lacks jurisdiction to consider the merits of the claims asserted in a second or successive § 2254 application. *See id.* at 1251. An applicant seeking authorization to file a second or successive application for a writ of habeas corpus pursuant to § 2254 must demonstrate that any claim he seeks to raise is based on "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. § 2244(b)(2)(A); or that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, 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." 28 U.S.C. §

2244(b)(2)(B).

Mr. Brooks does not allege that he has obtained authorization from the Tenth Circuit to file a second or successive § 2254 application and the Court rejects his argument that such authorization is not needed. Therefore, the Court must either dismiss the second or successive claim for lack of jurisdiction or, if it is in the interest of justice, transfer the application to the Tenth Circuit pursuant to 28 U.S.C. § 1631. *In re Cline*, 531 F.3d at 1252. The factors to be

> considered in deciding whether a transfer is in the interest of justice include whether the claims would be time barred if filed anew in the proper forum, whether the claims alleged are likely to have merit, and whether the claims were filed in good faith or if, on the other hand, it was clear at the time of filing that the court lacked the requisite jurisdiction.

Id. at 1251. When "there is no risk that a meritorious successive claim will be lost absent a § 1631 transfer, a district court does not abuse its discretion if it concludes it is not in the interest of justice to transfer the matter." *Id.* at 1252.

Mr. Brooks fails to demonstrate that his second or successive due process claim is based on a new rule of constitutional law. He also fails to demonstrate that his second or successive due process claim is based on newly discovered evidence of a constitutional violation. In fact, it is apparent that the factual basis for Mr. Brooks' due process claim was available when he filed case number 16-cv-00895-LTB because Mr. Brooks raised the same due process claim in that case. Therefore, because there is no risk that a meritorious second or successive claim will be lost absent a transfer, the Court finds that a transfer is not in the interest of justice. *See id.* Instead, the second or successive due process claim will be dismissed for lack of jurisdiction.

Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he also must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the habeas corpus application (ECF No. 1) is denied and the action is dismissed for lack of jurisdiction. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 8th day of August, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

APPENDIX C

16CA0755 Peo v Brooks 06-29-2017

COLORADO COURT OF APPEALS

DATE FILED: June 29, 2017

Court of Appeals No. 16CA0755
Weld County District Court No. 09CR959
Honorable Julie C. Hoskins, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jason Trevor Brooks,

Defendant-Appellant.

ORDER AFFIRMED

Division A
Opinion by JUDGE NIETO*
Loeb, C.J., and Vogt*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 29, 2017

Cynthia H. Coffman, Attorney General, Ethan E. Zweig, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Jason Trevor Brooks, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 Defendant, Jason Trevor Brooks, appeals the district court order denying his fifth postconviction motion. Because we perceive no error in the court's order, we affirm.

I. Background

¶ 2 In 2010, defendant pleaded guilty to four counts of securities fraud, all class 3 felonies, and agreed to pay over five million dollars in restitution. In exchange, the prosecution dismissed the other twenty-two counts in the indictment and agreed to a sentencing cap of thirty-six years in prison. The district court accepted the plea, sentenced defendant to an aggregate term of thirty-two years in prison, and ordered defendant to pay $5,132,352.46 in restitution.

¶ 3 In February 2011, defendant filed his first Crim. P. 35(c) motion alleging that his Crim. P. 11 advisement was defective and that he received ineffective assistance from his plea counsel. The district court denied that motion without a hearing, and a division of this court affirmed that denial. *See People v. Brooks*, (Colo. App. No. 12CA1781, Mar. 6, 2014) (not published pursuant to C.A.R. 35(f)).

¶ 4 Between May 2014 and August 2015, defendant filed three more postconviction motions alleging, among other things, that he

was not properly advised of mandatory parole, his counsel was ineffective for not advising him that the restitution he agreed to pay would be subject to interest, and that the terms of the plea agreement were breached by the imposition of interest on the amount of restitution he agreed to pay. In written orders, the district court summarily denied each of those motions.

¶ 5 Defendant's latest motion, filed in March 2016 and captioned "Motion to Correct an Illegal Sentence Pursuant to Crim. P. 35(a)," alleges that (1) his sentence is illegal because interest on his restitution was going to be assessed starting on September 12, 2015, and not from the date of his conviction as required by statute, and (2) his plea was illegally induced because he was not advised when he agreed to pay restitution that he would have to pay interest on it. The district court denied this motion in a written order finding that defendant was not raising any new issues and that his sentence was not illegal.

¶ 6 Defendant now appeals the district court's order summarily denying his motion. Reviewing the district court's summary denial of defendant's postconviction motion de novo, *see People v. Gardner*, 250 P.3d 1262, 1266 (Colo. App. 2010), we perceive no error.

II. Defendant's Sentence Is Not Illegal

¶ 7 Defendant contends that his sentence is illegal. Specifically, he argues that, although he was ordered to pay restitution when he was sentenced in April 2010, the Colorado Judicial Branch notified him in July 2015 that he would be charged interest beginning September 12, 2015. Therefore, because the restitution statute requires him to pay interest from the date the restitution order is entered and restitution is a mandatory part of his sentence, he argues that the court's failure to assess interest from the date the restitution order was entered renders his sentence is illegal. We are not persuaded.

¶ 8 We agree with defendant that the order assessing restitution is a part of his sentence, *see People v. Dunlap*, 222 P.3d 364, 368 (Colo. App. 2009), and that the restitution statute applicable to him required that he pay interest on the restitution amount from the date the restitution order was entered. *See* § 18-1.3-603(4)(b)(I), C.R.S. 2010. But defendant's argument fails to recognize that pursuant to section 18-1.3-603(4)(b), C.R.S. 2010, "[a]ny order for restitution made pursuant to this section *shall also be deemed to order* that . . . . [t]he defendant owes interest from the date of the

entry of the order . . . ." Thus, reading the statute in its entirety, it is clear that when the district court ordered defendant to pay restitution at his sentencing hearing, it also ordered that he pay interest on the restitution from that date forward. Therefore, notwithstanding that defendant received a letter from the Colorado Judicial Branch telling him that interest would be assessed beginning September 12, 2015, defendant's sentence already included an order that he pay interest on the restitution from the date of his sentencing. Thus, contrary to defendant's argument, his sentence is not illegal. *Cf. People v. Wenzinger*, 155 P.3d 415, 418 (Colo. App. 2006) (a sentence is illegal if it is inconsistent with the statutory scheme).

¶ 9 Moreover, while the letter defendant relies on states that interest of one percent per month will be added to his current restitution balance beginning on September 12, 2015, that letter also says that, "[i]n addition, interest may be added from the date the order for restitution was entered." Thus, even though the letter mentions September 12, 2015, as the date the assessment of interest will begin, nothing in the letter forecloses the possibility

that interest will also be assessed from the date the restitution order was entered.

¶ 10 Accordingly, the district court did not err in summarily denying defendant's illegal sentence claim. *See People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005) (no error in summary denial of postconviction motion when the motion, files, and record clearly establish that the defendant is not entitled to relief).

III. Defendant's Challenge to His Plea's Validity Is Successive

¶ 11 To the extent defendant's motion alleges that his plea was unknowing, involuntary, or unintelligent because he was not advised that he would have to pay interest on the stipulated restitution amount, such a claim is properly construed as a Crim. P. 35(c) claim. *See People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006) (the substance of a postconviction motion determines whether it falls under Crim. P. 35(c) or Crim. P. 35(a)); *People v. Dawson*, 89 P.3d 447, 449 (Colo. App. 2003) (a challenge to a plea's validity after sentencing is cognizable under Crim. P. 35(c)). And, subject to certain exceptions not applicable here, Crim. P. 35(c)(3)(VI) and (VII) require a district court to deny a Crim. P. 35(c) motion if the issues raised therein either were raised and resolved,

or could have been raised, in a prior appeal or postconviction proceeding. *See People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996) ("Rule 35 proceedings are intended to prevent injustices after conviction and sentencing, not to provide perpetual review.").

¶ 12 Here, defendant's claim that his plea is invalid is similar to, if not identical to, the claim he raised in his August 2015 postconviction motion. Therefore, because this claim either was, or could have been, raised in that previous postconviction motion, the district court was required to deny it in accordance with Crim. P. 35(c)(3)(VI) and (VII). *See People v. Vondra*, 240 P.3d 493, 494-95 (Colo. App. 2010).

¶ 13 The order is affirmed.

CHIEF JUDGE LOEB and JUDGE VOGT concur.

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit

January 25, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASON BROOKS,

Petitioner - Appellant,

v.

MATTHEW HANSON, Warden, Sterling Correctional Facility, et al.,

Respondents - Appellees.

No. 18-1356

ORDER

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX E

DISTRICT COURT, WELD COUNTY, COLORADO
Court Address: 901 9th Avenue, Greeley, CO 80631
Mail Address: P.O. Box 2038, Greeley, CO 80632

PEOPLE OF THE STATE OF COLORADO, Plaintiff

v.

JASON BROOKS, Defendant

COURT USE ONLY

Case Number: 09CR959

Division 12

ORDER TO SET STATUS CONFERENCE

THIS MATTER comes before the court on Defendant's *Petition for Postconviction Relief Pursuant to Crim. P. 35(c)* filed August 10, 2015.

AND THE COURT having reviewed the file and being apprised therein hereby finds as follows:

1. Defendant raises issues of ineffective assistance of counsel. The allegations raised in Defendant's motion are specific, and if true, raise an issue of whether restitution interest can be ordered or whether there is other relief under C.R. Crim. P. 35(c).

2. The clerk shall set the matter for a status conference to determine whether Defendant seeks appointment of counsel. The Court shall further set a briefing schedule at the status conference.

3. Defendant shall notify the Court within 14 days of this motion, whether he is requesting a writ or, in the alternative, chooses to appear by telephone for the status conference.

THEREFORE, the Court ORDERS the Clerk of Court to set the matter for a status conference to address the aforementioned issues.

CASE CONTINUED FOR STATUS ON 11-13-15 @ 11:30 AM

Dated: October 5, 2015

SO ORDERED BY THE COURT:

Timothy G. Kems
District Court Judge

DISTRICT COURT SEAL WELD COUNTY, COLORADO

1708240038 0368 83-1012 7

APPENDIX F

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 520 West Colfax Ave Denver, Colorado 80204	
PEOPLE OF THE STATE OF COLORADO Plaintiff v. **JASON BROOKS** Defendant	**▲COURT USE ONLY▲** Case Number: 09CR959 Courtroom: 11

ORDER REGARDING INTEREST ON RESTITUTION

Defendant filed a "Motion for Postconviction Relief Pursuant to Rule 35(c)" alleging two grounds:

1) His counsel was ineffective for failing to advise him that post-judgment interest would be imposed on the amount ordered for restitution.

2) His plea agreement was breached by the imposition of post-judgment interest.

The Court finds first that the motion is untimely. Section 16-5-402(a), C.R.S. provides a three year window in which to collaterally attack a felony conviction. That time period begins upon issuance of the mandate following a direct appeal. *People v. Hampton,* 856 P.2d 441 (Colo. App. 1992). Mr. Brooks was sentenced April 27, 2010, and filed a direct appeal of his conviction. Thereafter, he sought dismissal of the appeal, which was granted, the mandate issuing February 10, 2011. Therefore, the very latest it could be argued that Defendant could file the claims raised herein was February 10, 2014.

The Court can find no justifiable excuse or excusable neglect as set forth in his motion.

Additionally, the Court finds that the claims herein are procedurally barred based upon the defendant filing at least three other postconviction motions challenging his conviction and/or

his sentence; February 16, 2011 (supplemental filed July 5, 2011); May 16, 2014, and July 17, 2014.

Furthermore, the Court finds it is without legal authority to modify this portion of the sentence. C.R.S. § 18-1.3-603(4)(b) states "[a]ny order for restitution made pursuant to this section shall also be deemed to order that: [t]he defendant owes interest from the date of the entry of the order at the rate of twelve percent per annum . . . ." "This statute mandates that restitution orders require defendants to pay 'interest from the date of the entry of the order at the rate of twelve percent per annum,' in order to 'encourage expeditious payment of the restitution order.'" *People v. Cardenas*, 262 P.3d 913, 914 (Colo. App. 2011) (citing *Roberts v. People*, 130 P.3d 1005, 1009 (Colo. 2006)).

For the reasons stated herein, Defendant's Motion is hereby DENIED.

Dated: January 13, 2016

Julie C. Hoskins
District Court Judge