FILED
United States Court of Appeals
Tenth Circuit

January 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VICTOR LOPEZ,

Petitioner - Appellant,

v.

STERLING CORRECTIONAL FACILITY, et al.,

Respondents - Appellees.

No. 18-1337

VICTOR LOPEZ,

Petitioner - Appellant,

v.

STERLING CORRECTIONAL FACILITY, et al.,

Respondents - Appellees.

No. 18-1338

ORDER

Before **MATHESON**, **KELLY**, and **McHUGH**, 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

FILED
United States Court of Appeals
Tenth Circuit

December 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VICTOR LOPEZ,

Petitioner - Appellant,

v.

STERLING CORRECTIONAL FACILITY; CYNTHIA COFFMAN, the Attorney General of the State of Colorado,

Respondents - Appellees.

No. 18-1337
(D.C. No. 1:17-CV-03121-LTB)
(D. Colo.)

VICTOR LOPEZ,

Petitioner - Appellant,

v.

STERLING CORRECTIONAL FACILITY; CYNTHIA COFFMAN, the Attorney General of the State of Colorado,

Respondents - Appellees.

No. 18-1338
(D.C. No. 1:17-CV-03120-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **KELLY**, and **McHUGH**, Circuit Judges.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

In Case No. 18-1337, Victor Lopez, a Colorado prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas application. In Case No. 18-1338, Lopez seeks a COA to appeal the court's denial of his motion for reconsideration.

Lopez is currently serving a lengthy prison sentence for his conviction on rape charges. Following unsuccessful efforts to challenge his conviction and sentence in the state court, he filed a 28 U.S.C. § 2254 federal habeas petition, which was denied. We denied a COA. *See Lopez v. Trani*, 628 F.3d 1228, 1232 (10th Cir. 2010).

In 2017, Lopez filed a second § 2254 petition in which he argued that the state court wrongly enhanced his sentence based on a prior conviction that had been dismissed. The district court concluded that the petition was an unauthorized second or successive § 2254 petition over which it lacked jurisdiction. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(A). The court also denied Lopez's motion to reconsider.

Case No. 18-1337

To appeal, Lopez must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). Where, as here, a district court has dismissed the filing on procedural grounds—Lopez's failure to obtain authorization from this court to file a second or successive habeas petition—to obtain a COA he 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).

In Case No. 18-1337, Lopez fails to address the grounds for the district court's dismissal—that the court lacked jurisdiction to consider the application because it was subject to the restrictions on second or successive § 2254 applications. Instead, Lopez focuses on the merits of his claims, which we need not address because we can dispose of this matter based on the procedural ruling. *See Slack*, 529 U.S. at 485. Because no reasonable jurist could debate the court's procedural decision, we deny a COA.[1]

Case No. 18-1338

As to Case No. 18-1338, the district court construed Lopez's motion for reconsideration as a true Rule 59(e) motion because it did not in substance or effect assert or reassert a federal basis for relief from the petitioner's underlying conviction. *See Gonzales v. Crosby*, 545 U.S. 524, 532, 533, 538 (2005); *see also United States v. Pedraza*, 466 F.3d 932, 933 (10th Cir. 2006). Still, Lopez must obtain a COA to appeal. *See Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006). A COA may issue "if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

Grounds for relief under Rule 59(e) "include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d

[1] The district court dismissed Lopez's § 2254 application on the alternative ground that he was no longer in custody pursuant to the judgment he says was wrongly used to enhance his sentence. We do not reach the not-in-custody issue because no reasonable jurist could debate the court's procedural decision that the application was second or successive.

1005, 1012 (10th Cir. 2000). Here, the district court determined that Lopez failed to meet this test; rather, the motion repeated arguments the court previously considered and rejected.

"In cases like this one, where the decision appealed from involves a procedural ruling of the district court, a COA may only issue if 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." *Spitznas*, 464 F.3d at 1225 (internal quotation marks omitted). Because no reasonable jurist could debate the court's procedural decision, we deny a COA.

Conclusion

We deny COAs in Case Nos. 18-1337 and 18-1338 and dismiss these matters. We deny Lopez's motions to proceed in forma pauperis on appeal because he has failed to demonstrate "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-03121-GPG

VICTOR LOPEZ,

Applicant,

v.

STERLING CORRECTIONAL FAC, and
CYNTHIA COFFMAN, The Attorney General of the State of Colorado,

Respondents.

ORDER OF DISMISSAL

Applicant, Victor Lopez, is a prisoner in the custody of the Colorado Department of Corrections ("CDOC") at the Correctional Facility in Sterling, Colorado. He has filed, *pro se*, an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Application"). (ECF No. 1). Applicant has paid the required $5.00 filing fee. (ECF No. 3).

In the Application, the Applicant states that he pleaded guilty in El Paso County District Court Case No. 88CR2849 ("Case No. 88CR2849") to a class 4 felony charge of vehicle theft. (ECF No. 1 at 2). Applicant indicates that the judgment of conviction entered on September 7, 1989 and that he was sentenced to five years of probation. (*Id.* at 1-2). Applicant further indicates that his sentence of probation was "revoked in [sic] July 17, 2000, 6 years DOC and used to in hance [sic] Habitual statue [sic] 64 years." (*Id.* at 2). Applicant acknowledges, however, that he is currently imprisoned under a different sentence from El Paso County District Court Case No. 99CR4527 ("Case No. 99CR4527"). (*Id.*).

ATT A

Applicant presents two issues for this Court's consideration in his current Application. First, he claims that his Fifth and Fourteenth Amendment due process rights were violated when the trial court failed to order that Case No. 88CR2849 was dismissed as part of the plea agreement in a subsequent case against him in El Paso County District Court Case No. 96CR3544 ("Case No. 96CR3544") and when Case No. 88CR2849 was then used to enhance his current sentence in Case No. 99CR4527. (ECF No. 1 at 7-8). Applicant's second claim alleges that the Colorado Court of Appeals violated his Fifth, Fourteenth, and Eighth Amendment rights when it failed to rule that the trial court erred by failing to order Case No. 88CR2849 was dismissed prior to sentencing in Case No. 99CR4527. (*Id.* at 8-10).

The Rules Governing Section 2254 Cases in the United States District Court require that a habeas application be examined and if it plainly appears from the application and any attached exhibits that the applicant is not entitled to relief, the application shall be dismissed. Rule 4, RULES GOVERNING SECTION 2254 CASES. The Court must construe the Application liberally because Applicant 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 for lack of jurisdiction.

For a federal court to have subject matter jurisdiction over a habeas proceeding, the applicant must be "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a); *accord Maleng v. Cook,* 490 U.S. 488, 490-91 (1989). "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." *Hensley v. Municipal Court,* 411 U.S.

345, 351 (1973). As indicated, the custody requirement is jurisdictional. *See McCormick v. Kline,* 572 F.3d 841, 848 (10th Cir. 2009). Thus, a prisoner seeking habeas corpus relief must be in custody pursuant to the conviction or sentence under attack at the time the habeas corpus application is filed. *See Maleng,* 490 U.S. at 490-91 ("[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of habeas attack upon it."). It is Applicant's burden to establish that the custody requirement is satisfied. *See United States v. Bustillos,* 31 F.3d 931, 933 (10th Cir. 1994) (stating that a defendant seeking habeas corpus relief bears the burden of demonstrating jurisdiction by affirmatively alleging he or she is in custody).

Here, Applicant directly challenges the validity of his conviction and sentence in Case No. 88CR2849. (ECF No. 1 at 1-2). However, it is clear from the relevant dates and information set out in the Application that Applicant discharged his sentence in the conviction under attack, so that he was not in custody pursuant to the judgment in Case No. 88CR2849 at the time he filed the Application. (*Id.*). The Court, however, recognizes that Applicant may satisfy the "in custody" requirement if the Application is construed as challenging the validity of his conviction or sentence in Case No. 99CR4527 because Applicant alleges the current sentence he is serving in Case No. 99CR4527 was enhanced by his conviction in Case No. 88CR2849. *See Lackawanna County District Attorney v. Coss,* 532 U.S. 394, 401-02 (2001) (finding that an applicant could satisfy the "in custody" requirement if he was attacking a current sentence that the state court enhanced based on a prior allegedly invalid conviction). However, even liberally construing the Application as a challenge to Applicant's current sentence in Case No. 99CR4527, the Application must be dismissed.

Applicant has already filed an unsuccessful § 2254 habeas application challenging his conviction and sentence concerning Case No. 99CR4527. In prior his Application concerning Case No. 99CR4527, this Court dismissed three of the twenty-four claims raised by the Applicant based on a failure to raise a valid constitutional claim and dismissed the remainder of the claims as time-barred. *Victor Lopez v. Travis Trani, Warden, et al.,* Civil Action No. 09-cv-01551-ZLW (D. Colo. Feb. 9, 2010). In denying the Applicant a certificate of appealability in conjunction with his appeal of the dismissal in Civil Action No. 09-cv-01551-ZLW, the Court of Appeals for the Tenth Circuit "thoroughly review[ed]" Applicant's arguments and the record on appeal, and concluded "that reasonable jurists would not find it debatable whether any of Applicant's numerous substantive claims state a valid ground for habeas relief." *Victor Lopez v. Travis Trani, Warden, et al.,* 628 F.3d 1228, 1231 (10th Cir. 2010). The appellate court "likewise [saw] no constitutional error in the state courts' rejection of these various arguments in the proceedings before them." *Id.* at 1231-32. Therefore, to the extent the instant Application could be construed as a challenge to the validity of Applicant's current sentence, it is a second or successive application. *See Gonzalez v. Crosby,* 545 U.S. 524, 529-30 (2005) (the restrictions on a second or successive habeas application under 28 U.S.C. § 2244(b) apply where a court acts pursuant to a prisoner's application for a writ of habeas corpus, with an application for habeas relief being defined as a filing that contains one or more claims that assert a federal basis for relief from a state court's judgment of conviction).

Because Applicant's prior request for habeas corpus relief as to his conviction and sentence in Case No. 99CR4527 has been considered and no valid claim for habeas relief or constitutional error found, Applicant is required to obtain authorization from the

Court of Appeals for the Tenth Circuit before filing a second or successive habeas application concerning his conviction and sentence in Case No. 99CR4527. Since Applicant did not receive authorization from the Tenth Circuit before filing the current Application (ECF No. 1 at 4), the requirements of 28 U.S.C. § 2244(b)(3) have not been met and the Court lacks jurisdiction to consider his claims as they may apply to Case No. 99CR4527. *See Burton v. Stewart,* 549 U.S. 147, 153 (2007) (if a federal habeas applicant does not seek or obtain authorization to file a second or successive application, a district court has no jurisdiction to consider it).

The Tenth Circuit has indicated that "[w]hen a second or successive § 2254 or § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so under § 1631, or it may dismiss the motion or petition for lack of jurisdiction." *In re Cline,* 531 F.3d 1249, 1252 (10th Cir. 2008). The federal appellate court has further stated that "[f]actors 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 (citing *Trujillo v. Willliams,* 465 F.3d 1210, 1223 n.16 (10th Cir. 2006)). "Where 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 to [the Tenth Circuit] for authorization." *Id.* at 1252 (citing *Phillips v. Seiter,* 173 F.3d 609, 610 (7th Cir. 1999)).

Upon examination of the Application, the record in this case, and the record in Applicant's previous habeas case, the Court finds that none of the relevant factors favor a

369 U.S. 438 (1962). If Applicant files a notice of appeal he must also 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.

DATED at Denver, Colorado, this 13th day of August, 2018.

BY THE COURT:

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-03120-LTB

VICTOR LOPEZ,

Applicant,

v.

STERLING CORRECTIONAL FAC, and
CYNTHIA COFFMAN, The Attorney General of the State of Colorado,

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION

Applicant, Victor Lopez, is a prisoner in the custody of the Colorado Department of Corrections ("CDOC") at the Correctional Facility in Sterling, Colorado. He has filed, *pro se*, a motion titled "To Reverse The Judgement (sic)" (ECF No. 6). Applicant asks the Court to reconsider and vacate the Order of Dismissal (ECF No. 4) and the Judgment (ECF No. 5) entered in this action on August 13, 2018. The Court must construe the motion liberally because Applicant 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). For the reasons discussed below, the motion will be denied.

With regard to Applicant's motion, a litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment

must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). The Court will consider the request to reverse the judgment pursuant to Rule 59(e) because it was filed within twenty-eight days after the Judgment was entered in this action. *See Van Skiver*, 952 F.2d at 1243 (stating that motion to reconsider filed within ten-day limit for filing a Rule 59(e) motion under prior version of that rule should be construed as a Rule 59(e) motion).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) also is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

The Court dismissed the instant habeas corpus action without prejudice for lack of jurisdiction because it is clear from the face of the Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Application") filed by the Applicant that he is no longer in custody pursuant to the judgment in El Paso County District Court Case No. 89CR2015 ("Case No. 89CR2015") which is the judgment he states he is challenging in the Application. For a federal court to have subject matter jurisdiction over a habeas proceeding, the applicant must be "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a); *accord Maleng v. Cook,* 490 U.S. 488, 490-91 (1989) ("[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of habeas attack upon it."). In his request that the judgment in this action be reversed, Applicant does not allege or argue that he is in custody pursuant to the

judgment in Case No. 89CR2015. It is Applicant's burden to establish that the custody requirement is satisfied. *See United States v. Bustillos,* 31 F.3d 931, 933 (10th Cir. 1994) (stating that a defendant seeking habeas corpus relief bears the burden of demonstrating jurisdiction by affirmatively alleging he or she is in custody).

Further, while Applicant may be considered in custody based on the sentence he is currently serving pursuant to the judgment in El Paso County District Court Case No. 99CR4527 ("Case No. 99CR4527") for purposes of filing a federal habeas corpus application since Applicant alleges his sentence in Case No. 99CR4527 was enhanced by his conviction in Case No. 89CR2015, the Application he filed in this action would constitute an unauthorized second or successive application with regard to Case No. 99CR4527. *See Victor Lopez v. Travis Trani, Warden, et al.,* 628 F.3d 1228, 1231-32 (10th Cir. 2010) (the Court of Appeals for the Tenth Circuit "thoroughly review[ed]" Applicant's arguments and the record on appeal, and concluded "that reasonable jurists would not find it debatable whether any of Applicant's numerous substantive claims state a valid ground for habeas relief" and "likewise [saw] no constitutional error in the state courts' rejection of these various arguments in the proceedings before them."). Applicant does not present any plausible facts or argument that the Application in this action is not a second or successive application. Since Applicant did not receive authorization from the Tenth Circuit before filing the current Application (ECF No. 1 at 4), the requirements of 28 U.S.C. § 2244(b)(3) have not been met and the Court lacks jurisdiction to consider his claims as they may apply to Case No. 99CR4527. *See Burton v. Stewart,* 549 U.S. 147, 153 (2007) (if a federal habeas applicant does not seek or obtain authorization to file a second or successive application, a district court has no jurisdiction to consider it).

Applicant alternatively requests that the Court transfer the Application to the Court

of Appeals for the Tenth Circuit, arguing that he should be allowed to file a second or successive application under the actual innocence and miscarriage of justice exceptions found in *Schlup v. Delo*, 513 U.S. 298 (1995). While the Court recognizes that a prisoner may attack a current sentence that a state court enhanced based on a prior allegedly invalid conviction, the prisoner must demonstrate he has obtained "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." *See Lackawanna County District Attorney v. Coss,* 532 U.S. 394, 405 (2001). The Court of Appeals for the Tenth Circuit has held that "[c]ases involving a fundamental miscarriage of justice 'are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime.'" *Gilbert v. Scott,* 941 F.2d 1065, 1068 n.2 (10th Cir. 1991) (citing *McClesky v. Zant,* 499 U.S. 467, 494 (1991)). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623-24 (1998) (citation omitted).

Here, Applicant acknowledges in the Application that he pleaded guilty to the charge of first degree trespass in Case No. 89CR2015, that he was sentenced to three years of probation under a judgment of conviction on September 7, 1989, and that the probation was subsequently revoked. (ECF No. 1 at 1-2). In his request for reconsideration, Applicant does not allege any plausible facts or present other compelling evidence that he is actually innocent of first degree trespass in Case No. 89CR2015. Instead, he contends that Case No. 89CR2015 was dismissed as part of a plea agreement in the later criminal action against him in El Paso County District Court Case No. 96CR3544. Such a claim appears to assert legal insufficiency rather than factual innocence and, thus, does not provide a basis for the Court to reconsider its finding that

transfer of the instant action to the Court of Appeals for the Tenth Circuit is not in the interest of justice. *See* 28 U.S.C. § 2244(b)(2) (providing that a second or successive § 2254 application can proceed only if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or new evidence of actual innocence of the underlying offense).

Upon consideration of the motion to reconsider and the entire file, the Court finds that Applicant fails to demonstrate any reason why the Court should reconsider and vacate the order dismissing this action. The Application is a second or successive application that requires authorization from the United States Court of Appeals for the Tenth Circuit before it may be filed in this Court. *See* 28 U.S.C. § 2244(b)(3)(A). Therefore, the request to reconsider will be denied. Accordingly, it is

ORDERED that the motion titled "To Reverse The Judgement (sic)" (ECF No. 6) is DENIED.

DATED at Denver, Colorado, this 28th day of August, 2018.

BY THE COURT:

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

Additional material from this filing is available in the Clerk's Office.