APPENDIX A

Third Circuit Court of Appeals Entry of Judgment

Denying Certificate of Appealability - Second Rule 60(b)

September 9, 2019

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CLD-251 August 1, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1744**

GREGORY ALAN ROWE, Appellant

VS.

SUPERINTENDENT ALBION SCI; ET AL.

(M.D. Pa. Civ. No. 3:13-cv-02444)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied, for reasonable jurists would debate neither the District Court's February 7, 2019 order denying his "motion to reopen and/or refile his second [Federal Rule of Civil Procedure] 60(b) motion," nor the District Court's March 5, 2019 order denying his motion to reconsider its February 7, 2019 order. See Buck v. Davis, 137 S. Ct. 759, 777 (2017); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant's second Rule 60(b) motion, which specifically invoked subsection (b)(6), revolved around several decisions made by other district judges in this Circuit concerning the statutory tolling of the limitations period for filing a habeas petition. However, all but one of those decisions were made at least two years before the District Court dismissed Appellant's habeas petition as time-barred in 2016, and reasonable jurists would not debate the conclusion that the one "new" district court decision, see McGee v. Johnson, No. 1:17-cv-02746, 2018 U.S. Dist. LEXIS 12995 (D.N.J. Jan. 26, 2018), does not reflect an intervening change in the law governing Appellant's case. Accordingly, reasonable jurists would not debate that Appellant's

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second Rule 60(b) motion failed to meet the demanding standard for relief under subsection (b)(6). See Greene v. Superintendent Smithfield SCI, 882 F.3d 443, 449 n.7 (3d Cir. 2018) (explaining that relief under Rule 60(b)(6) is appropriate "only in extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur" (internal quotation marks omitted) (quoting Norris v. Brooks, 794 F.3d 401, 404 (3d Cir. 2015))); id. (indicating that these circumstances "rarely occur in the habeas context" (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005))); see also Smith v. Evans, 853 F.2d 155, 158 (3d Cir. 1988) (explaining that "a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion"), overruled on other grounds by Lizardo v. United States, 619 F.3d 273, 276-77 (3d Cir. 2010); cf. Satterfield v. Dist. Att'y Phila., 872 F.3d 152, 161, 163 (3d Cir. 2017) (indicating that an intervening change in controlling law, when coupled with "appropriate equitable circumstances" (such as a showing of actual innocence), may warrant relief under Rule 60(b)). Reasonable jurists also would not debate the conclusion that there was no reason for the District Court to grant Appellant's motion to reconsider its February 7, 2019 order. See Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (explaining that the scope of a motion to reconsider "is extremely limited," and that "[s]uch motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence").

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 9, 2019
cc: Gregory Alan Rowe
Raymond J. Tonkin, Esq.
Sarah A. Wilson
Ronald Eisenberg, Esq.

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX B

Memorandum Order denying Motion

to Alter or Amend Judgment

March 5, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY ALAN ROWE,

Petitioner,

v.

SUPT. NANCY GIROUX, *et al.*,

Respondents.

NO. 3:13-CV-02444

(JUDGE CAPUTO)

MEMORANDUM ORDER

Presently before me is a Motion to Alter or Amend Judgment (Doc. 81) filed by Petitioner Gregory Alan Rowe. In a recent Memorandum Order (Doc. 80), I denied Rowe's third Rule 60(b) Motion (Doc. 79) because the new "facts and circumstances" he raised were (1) includable in his prior appeal and (2) not actually new facts but rather arguments that I committed legal error based on district court decisions Rowe recently discovered. (*See* Doc. 80). Rowe seeks reconsideration of that Memorandum Order.

"[A] judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [ruled]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Rowe relies here on the third ground. (Doc. 81 at 2).

However, Rowe has not met the high bar for reconsideration on this ground. Rowe argues in his instant Motion that he could not have presented his new "facts and circumstances" (in reality, case law) to the Third Circuit because he filed his notice of appeal on July 23, 2018, which was before he fully discovered the case law. (*Id.* at 2, 4-5). He asserts that he could not have raised any arguments based on the case law because the Third Circuit would have deemed such arguments waived by virtue of not having raised them first in this Court. (*Id.* at 4). In essence, Rowe argues that the case law and his arguments based on it were not "includable" in his prior appeal. *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982). But they were, in fact, includable: Rowe raised his "new" case

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law (which dates from 2005 to January 26, 2018) in his second Rule 60(b) Motion, which he filed after appealing but before the Third Circuit dismissed the appeal, and which his third Rule 60(b) Motion merely recapitulates. Under nearly identical circumstances, the court in *Reardon v. Zonies* held it had no jurisdiction to consider a Rule 60(b) motion. No. CV 15-8597 (JBS-KMW), 2018 WL 3352924, at *2 (D.N.J. July 9, 2018) ("Plaintiff filed his Rule 60(b) motion shortly after he appealed the Court's Orders to the Circuit Court, but before the Third Circuit affirmed. The Rule 60(b) motion thus necessarily involves 'matters included or includable in the party's prior appeal,' and not 'matters that come to light after the appellate court has issued a decision.'" (quotation and internal citations omitted)); *see also Bernheim v. Jacobs*, 144 F. App'x 218, 223 (3d Cir. 2005) (district court had no jurisdiction to consider Rule 60(b) motion where the plaintiff's arguments were "includable" in his prior appeal "and did not turn on events that occurred after the appeal was dismissed"). Moreover, regardless of the district court decisions relied upon, all of Rowe's arguments were either included or includable in Rowe's *first* appeal in this case, which the Third Circuit dismissed on January 11, 2018. (*See* Doc. 58). Accordingly, this Court lacks jurisdiction to consider Rowe's third Rule 60(b) Motion, and reconsideration is not warranted.

Additionally, as I explained before, even if I considered Rowe's third Rule 60(b) Motion on its merits, the cases Rowe relies upon are not new facts and do not, standing alone, warrant relief from judgment in this case. *See id.*; *Martinez-McBean v. Government of Virgin Islands*, 562 F.2d 908, 912 (3d Cir. 1977) ("[L]egal error does not by itself warrant the application of Rule 60(b).").

Rowe also quarrels with the standard for granting a Rule 60(b) motion. (Doc. 81 at 6-8). He argues that the Third Circuit cases which hold legal error, standing alone, does not justify Rule 60(b) relief, *see, e.g.*, *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 173 (3d Cir. 2004), do not apply to this case for various reasons. (*See* Doc. 81 at 6-8). Rowe's arguments are without merit. "The correction of legal errors committed by the district courts is the function of the Courts of Appeals. Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)[]."

Martinez-McBean, 562 F.2d at 912. That pronouncement and those to the same effect in *Selkridge*, 360 F.3d at 173, *United States v. Fiorelli*, 377 F.3d 282, 288 (3d Cir. 2003), and *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988), are not contingent on the "full context for why each [Rule 60(b) motion] was denied" in each case as Rowe suggests (Doc. 81 at 6). The context that matters is that Rowe only alleges I committed legal error, and the Third Circuit has consistently held that is not enough to succeed on a Rule 60(b) motion. *See, e.g.*, *Bernheim v. Jacobs*, 144 F. App'x 218, 223 (3d Cir. 2005). Rowe cannot, therefore, establish that I committed legal error in so holding.

Accordingly, **NOW**, this 5th day of March, 2019, **IT IS HEREBY ORDERED THAT** Petitioner Gregory Alan Rowe's Motion to Alter or Amend Judgment (Doc. 81) is **DENIED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX C

Memorandum Order of District Court

Denying Motion to Reopen Second Rule 60(b)

Motion - February 7, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY ALAN ROWE,

Petitioner,

v.

SUPT. NANCY GIROUX, *et al.*,

Respondents.

NO. 3:13-CV-02444

(JUDGE CAPUTO)

MEMORANDUM ORDER

Presently before me is a "Motion to Reopen and/or Refile Petitioner's Second Rule 60(b) Motion that was Dismissed for Lack of Jurisdiction" (Doc. 79) filed by Petitioner Gregory Alan Rowe. I dismissed Rowe's second Rule 60(b) Motion (Doc. 71) because his appeal of the order he sought reconsideration of was pending before the Third Circuit. (*See* Doc. 76). On December 13, 2018, the Third Circuit issued a Certified Order in lieu of a Mandate (Doc. 78) denying Rowe's application for a certificate of appealability. The Third Circuit explained that "reasonable jurists would not debate the correctness" of either of my orders denying Rowe's earlier reconsideration motions. (*Id.*).

In his instant Motion, Rowe argues that "[t]he facts and circumstances underlying [his] second Rule 60(b) motion only became partially known to him on or around April 20, 2018, and fully discovered on August 10, 2018." (Doc. 79 at 2). Assuming that is the case, that means Rowe could have presented these matters to the Third Circuit in his appeal. *See Warren v. Sup't Forest SCI*, No. 17-2065, 2017 WL 5484778, at *1 (3d Cir. Aug. 10, 2017). The Motion will therefore be denied, because district courts are "without jurisdiction to alter the mandate of [the Third Circuit through Rule 60(b)] on the basis of matters included or includable in [a] prior appeal." *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982). Moreover, Rowe's arguments for reconsideration (that other courts have decided cases similar to his differently (*see* Doc. 79 at 3-5)) are "tantamount to arguing that I committed a legal error," and it is "well-established that 'a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion.'" *Selkridge v. United of Omaha Life Ins. Co.*, 237 F. Supp. 2d 600, 602

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(D.V.I. 2002) (quoting *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988)), *aff'd*, 360 F.3d 155 (3d Cir. 2004); *see also United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003). For these reasons, Rowe's Motion will be denied.

Therefore, **NOW**, this 7th day of February, 2019, **IT IS HEREBY ORDERED THAT** Petitioner Gregory Alan Rowe's Motion to Reopen and/or Refile Petitioner's Second Rule 60(b) Motion that was Dismissed for Lack of Jurisdiction (Doc. 79) is **DENIED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX D

District Court Order Dismissing

Second Rule 60(b) Motion - Lack of Jurisdiction

Dated August 31, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY ALAN ROWE

Petitioner,

v.

SUPT. NANCY GIROUX, et al.,

Respondent.

No. 3:13-CV-02444

(JUDGE CAPUTO)

ORDER

NOW, this 31st day of August, 2018, **IT IS HEREBY ORDERED** that:

(1) The Motion for Leave to Proceed in Forma Pauperis (Doc. 69) filed by Petitioner Gregory Alan Rowe is **GRANTED**.

(2) The Motion for Relief From Judgment (Doc. 71) filed by Petitioner is **DISMISSED for lack of jurisdiction.**[1]

(3) Petitioner's remaining motions, Motion to Supplement (Doc. 73), Motion to Appoint Counsel (Doc. 74), and Motion for Leave to Proceed in Forma Pauperis (Doc. 75), are also **DENIED for lack of jurisdiction**.

A. Richard Caputo
United States District Judge

[1] When an appeal is pending, the district court only has the power to "entertain and deny a Rule 60(b) motion" without the permission of the appellate court. *Venen v. Sweet*, 758 F.2d 117 (3d Cir. 1985).

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APPENDIX E

Third Circuit Court of Appeals Entry of Judgment

Denying Rehearing - Second Rule 60(b)

October 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1744

GREGORY ALAN ROWE,
Appellant

v.

SUPERINTENDENT ALBION SCI;
ATTORNEY GENERAL OF PENNSYLVANIA

(D.C. Civ. No. 3-13-cv-02444)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* As to panel rehearing only.

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circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: October 16, 2019
Lmr/cc: Gregory Alan Rowe
Raymond J. Tonkin
Sarah A. Wilson
Ronald Eisenberg