No. 23-5105

United States Court of Appeals
for the Sixth Circuit

MARK STINSON, SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 2:21-cv-02065 (Fowlkes, J.)

BRIEF FOR RESPONDENT-APPELLEE UNITED STATES

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APPENDIX "A"

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STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the briefs and record below adequately set forth the facts and legal issues in this appeal. The United States, therefore, does not believe that the decisional process would be significantly aided by oral argument.

STATEMENT OF JURISDICTION

This is a 28 U.S.C. § 2255 case brought by *pro se* Petitioner-Appellant Mark Stinson. The district court dismissed his petition in 2021. (R. 7, Order.) In 2023, Stinson moved to reconsider the dismissal order. (R. 10, Mot. For Reconsideration.) The district court denied that motion on January 30, 2023, and Stinson filed a notice of appeal on February 6, 2023. (R. 11, Order Denying Mot. For Reconsideration; R. 12, Not. of Appeal.)

Under 28 U.S.C. § 2253(c)(1)(B), an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2255 "unless a circuit justice or judge issues a certificate of appealability." Because Stinson has not sought or obtained a certificate of appealability in this case, this Court lacks jurisdiction over this appeal, as discussed more fully below.

ISSUES PRESENTED

I. Does this Court have jurisdiction?

II. If so, did the district court abuse its discretion by denying Stinson's Federal Rule of Civil Procedure 60(b) motion?

III. Alternatively, is Stinson entitled to permission to file a second or successive § 2255 motion?

STATEMENT OF THE CASE

Stinson is a prolific *pro se* filer who has filed dozens of appeals in this Court since 2016. Stinson's criminal case became final years ago, and he has already completed his 75-month prison sentence and begun his term of his supervised release. He has filed multiple post-conviction motions challenging the judgment in his case. All those motions have been unsuccessful. This appeal stems from Stinson's motion to reconsider a district court's order dismissing a 28 U.S.C. § 2255 motion that Stinson filed while his first § 2255 motion was pending.

In 2017, a jury convicted Stinson of conspiring to defraud the United States, willfully failing to collect and pay payroll taxes, and willfully making false statements. (W.D. Tenn. Case 16-cr-20247, R. 85, Jury Verdict, PageID 308-11). In March 2018, the district court sentenced Stinson to 75 months of imprisonment, two years of supervised release, and approximately $2.8 million in restitution. (W.D. Tenn. Case 16-cr-20247, R. 114, Am. J. in a Crim. Case, PageID 530-33, 536.)

Stinson appealed, challenging the district court's denial of his motion to sever two counts. *United States v. Stinson*, No. 18-5272, 2019 WL 276240 (6th Cir. Jan. 22, 2019). The Sixth Circuit affirmed the district court's ruling and noted that there was "overwhelming evidence of Stinson's guilt on all of the counts" and that any error, if present, was harmless. *Id.* at *2. Stinson did not seek certiorari.

While his case was pending on direct appeal, in November 2018, Stinson filed his first of four 28 U.S.C. § 2255 cases in the district court, case number W.D. Tenn. 18-cv-02807. (W.D. Tenn. 18-cv-02807, R. 1, Pet., PageID 1-19.) That case will be referred to as "the 2018 Case." In the 2018 Case, Stinson was represented by new counsel, Larry Charles Miller. (*Id.* at PageID 19.) In the petition, Stinson alleged that his trial counsel had provided ineffective assistance of counsel in multiple ways, including failing to call certain witnesses to testify. (*Id.* at PageID 2-4). The United States responded, asserting that the § 2255 petition was meritless and providing an affidavit from Stinson's trial counsel setting forth information about his work on the case. (W.D. Tenn. 18-cv-02807, R. 9, Gov't Resp. to § 2255 Petition.)

A short time later, in February 2019, Stinson filed a 28 U.S.C. § 2241 habeas petition in the Eastern District of Arkansas, where he was incarcerated, complaining of ineffective assistance of counsel. (E.D. Ark., 19-cv-00016-BSM.) That petition and the related appeals were unsuccessful.

Stinson then turned his attention back to the Western District of Tennessee. In late 2020, after the § 2255 motion in the 2018 Case was fully briefed but before it was decided, Stinson filed a second § 2255 motion in that case *pro se*, although he was represented by counsel in that matter. (W.D. Tenn. 18-cv-02807, R. 19, *Pro Se* Mot., filed 11/23/2020.)

About ten weeks later, in February 2021, while his first § 2255 motion was still pending in the 2018 case, Stinson (acting *pro se*) filed another 28 U.S.C. § 2255 motion in the district court, initiating a new case, number W.D. Tenn. 21-cv-02065. (R. 1, *Pro Se* Motion under 28 U.S.C. § 2255.) That will be referred to as "the 2021 Case," and it is the subject of the present appeal. His motion was almost identical to the *pro se* § 2255 motion he had filed in the 2018 Case a few months before. The *pro se* § 2255 motion filed in the 2021 Case (docket entry 1 in that case) appears to be a photocopy of the *pro se* § 2255 motion filed in the 2018 Case (docket entry number 19 in that case), with minor additions and a new signature page. The claims in those two *pro se* motions are also very similar to the claims in the § 2255 motion that was filed by Stinson's counsel. (W.D. Tenn. 18-cv-02807, R. 1, Pet.) The United States responded in the 2021 Case in March 2021. (R. 6, Gov't's Resp.)

In the 2021 Case, on March 3, 2021, the district court entered an order noting that Stinson already had a § 2255 proceeding in progress (the 2018 Case), that Stinson had filed a *pro se* § 2255 motion in that proceeding (the 2018 Case), and that "the issues raised in [Stinson's] Second § 2255 Motion are similar to those in the *pro se* amended [Motion] filed in [the 2018 Case]." (R. 7, Order Dismissing Case No. 21-2065 and Directing that All Filings Be Made in Case No. 18-2807, at PageID 48.) It ruled:

> Prisoners are entitled to file only one motion under 28 U.S.C. § 2255. 28 U.S.C. § 2244(a). Because Case No. 18-2807 remains pending, Stinson is not entitled to file a new § 2255 motion addressing his conviction and sentence in Case No. 16-20247. Therefore, the Court **DISMISSES** Case No. 21-2065 without prejudice to Stinson's right to raise his claims in Case No. 18-2807. Judgment in Case No. 21-2065 shall be entered for the Government.
>
> All filings concerning Stinson's conviction and sentence in Case No. 16-20247 must be made only in Case No. 18-2807. Because Stinson is represented by counsel, he is not entitled to make *pro se* filings.

(*Id.*) On the same day, the district court also entered judgment in favor of the United States in the 2021 Case. (R. 8, J.)

Two months later, on May 3, 2021, the district court denied the § 2255 motion filed in the 2018 Case, denied a certificate of appealability, certified that an appeal would not be taken in good faith, and denying leave to proceed *in forma pauperis*. (W.D. Tenn. 18-cv-02807, R. 23, Order, PageID 165-87). The order addressed Stinson's allegations thoroughly. (*Id.*) Stinson sought to appeal that decision, and this Court denied a certificate of appealability in Sixth Circuit Case No. 21-5335.

Stinson filed another § 2255 petition in a third district court case in August 2021, W.D. Tenn. 21-cv-02526, and then a fourth in August 2022, W.D. Tenn. 22-cv-02575. Those were unsuccessful.

Much later, in January 2023, Stinson filed a *pro se* motion to reconsider the March 3, 2021 Order issued in the 2021 case. (R. 10, Mot. for Expedited

Reconsideration.) The motion mentions Federal Rules of Civil Procedure 59(e) and 60. The district court issued an order denying the motion for reconsideration. It stated:

> The Court has dismissed this motion pursuant to 28 U.S.C. § 2255 filed by Movant, Mark Stinson, because, at the time, Stinson had another pending § 2255 motion. On January 26, 2023, Stinson filed a Motion for Expedited Reconsideration. (ECF No. 10.) This motion is identical to motions Stinson filed in his other § 2255 cases, all of which [] have been denied. The pending motion is DENIED.

(R. 11, Order, PageID 66.) One week later, Stinson filed a notice of appeal, seeking to challenge the district court's denial of his motion to reconsider.[1] (R. 12, Notice of Appeal.) That notice initiated the present appeal. Stinson has not sought a certificate of appealability with respect to this appeal.

[1] On the same day, Stinson filed a motion to disqualify the district judge, stating that he had filed a civil suit against the judge. (R. 13, Mot. to Disqualify Judge, PageID 73.) The district court denied the motion to disqualify, stating that it lacked jurisdiction over the motion because the case was on appeal and that there was no basis to disqualify the judge. (R. 15, Order Denying Mot. to Disqualify Judge, PageID 81.) Stinson filed a notice of appeal the same day (R. 16, Notice of Appeal), leading to Sixth Circuit Case Number 23-5120, which was dismissed on April 27, 2023 for want of prosecution (R. 20, Order of USCA).

SUMMARY OF THE ARGUMENT

Because Stinson has not obtained a certificate of appealability in this appeal in a 28 U.S.C. § 2255 proceeding, this Court lacks jurisdiction over the present appeal and should dismiss it on that basis.

If this Court considers the merits of the appeal, it should affirm the district court's decision to deny Stinson's motion to reconsider its order of dismissal. The order of dismissal appropriately directed Stinson to file any new motions in the § 2255 case that was already pending, and Stinson's motion to reconsider did not raise any grounds for disturbing that order.

Finally, if this Court construes Stinson's appeal as a request for permission to pursue a second or successive § 2255 motion, it should deny Stinson's request because his claim does not meet the strict gatekeeping standards governing such motions.

ARGUMENT

A. Standard of review

A ruling on a motion to reconsider under Federal Rule of Civil Procedure 60(b) is reviewed for abuse of discretion. *Hood v. Hood*, 59 F.3d 40, 42 (6th Cir. 1995) (per curiam). When assessing such a ruling, this Court bears in mind that the trial court's discretion is "especially broad" in the Rule 60(b)(6) context "due to the underlying equitable principles involved." *West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015). This Court can affirm on any basis supported by the record. *Clark v. United States*, 764 F.3d 653, 660-61 (6th Cir. 2014).

B. Analysis

1. This Court lacks jurisdiction because Stinson failed to obtain a certificate of appealability.

To appeal an order in a § 2255 proceeding, the petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Because Stinson failed to obtain a certificate, this Court lacks jurisdiction. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007) (citing *Miller-El* for the proposition that this Court "lack[s] jurisdiction to hear a habeas appeal without a certificate of appealability"). Like the present case, *Hardin* involved a § 2255 petitioner who sought to appeal the district court's denial of a Rule 60(b) motion. The Court joined eight other circuits in holding that "a

certificate of appealability [is] a prerequisite for a habeas petitioner's appeal of the denial of a Rule 60(b) motion." *Hardin*, 481 F.3d at 926 (citing cases). And although a petitioner can seek such a certificate from the district court or the Court of Appeals, there is a particular sequence of events required—he must "apply first to the district court" for the certificate. *Wilson v. United States*, 287 F. App'x 490, 493 (6th Cir. 2008) (citation and internal quotation marks omitted); *see* Fed. R. App. P. 22(b)(1) ("If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.")

This Court should therefore dismiss the appeal for lack of jurisdiction. *See Wilson*, 287 F. App'x. at 495 (dismissing appeal in similar circumstances). Alternatively, this Court could remand the case to the district court to determine whether a certificate of appealability is appropriate in this case. *See Hardin*, 481 F.3d at 926 (remanding case).

2. If the district court's decision is reviewed, it should be affirmed because it was not an abuse of discretion.

If this Court considers the merits of the appeal, it should affirm the district court's order denying the motion for reconsideration. The underlying order dismissing the § 2255 petition (entered in 2021) is not up for review, because Stinson's 2023 motion for reconsideration did not toll the time to appeal from that order. *See Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 263 n.7

(1978). The denial of the motion for reconsideration is reviewed only for abuse of discretion. *Id.*

The district court did not abuse its discretion when it denied Stinson's motion, which refers to Federal Rules of Civil Procedure 59(e) and 60(b). Regardless of which rule applied, denial of the motion was appropriate.

If it is considered to be a Rule 59(e) motion, the motion was untimely. That rule requires that a motion to alter or amend a judgment "must be filed no later than 28 days after the entry of the judgment," and, under Federal Rule of Civil Procedure 6(b)(2), that deadline cannot be extended. Stinson missed that 28-day period by more than a year—the dismissal order was in 2021, and Stinson's motion was filed in 2023.

His motion would fare no better under Rule 60(b). Under that rule, a court can grant a party relief from a final judgment for one of several defined reasons, including mistake or inadvertence, newly discovered evidence, fraud, or a defect in the judgment. Fed. R. Civ. P. 60(b)(1)-(5). Under Rule 60(b)(6), a court can grant relief "for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). However, Rule 60(b)(6) should apply "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) (citation omitted).

Stinson's motion did not provide grounds for relief under any of those grounds. It noted the district court's statement that, because he was represented by counsel, he was not entitled to make *pro se* filings. (R. 10, Mot. to Reconsider, PageID 53.) That was an accurate statement by the district court. *See United States v. Flowers*, 428 F. App'x 526, 530 (6th Cir. 2011).

The motion also made the following arguments:

(1) The district court should have held an evidentiary hearing. (R. 10, Mot. to Reconsider, PageID 53.)

(2) The district court should reconsider its order because of "newly discovered evidence from the IRS stating that the movant only owes $190,761.45, instead of the $2,834,000.73, that the government and IRS claimed." (*Id.*)

(3) "The government illegally superseded the charges." (*Id.* at PageID 56.)

None of these arguments satisfies the Rule 60(b) standard or has any merit at all.

As to the first argument, the district court was not required to hold an evidentiary hearing. In the case at issue, the district court instructed Stinson to direct his filings to his already pending § 2255 case, the 2018 Case. And in the 2018 case, the order disposing of the case correctly noted that "no hearing is

required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." (W.D. Tenn. 18-cv-02807, R. 23, Order, at PageID 170.) After a thorough review of Stinson's allegations, the district court determined that "every claim asserted is without merit" and denied a certificate of appealability. (*Id.* at PageID 185.) The Sixth Circuit also denied a certificate of appealability, stating that reasonable jurists could not debate the district court's conclusions on Stinson's claims. *Stinson v. United States*, 2022 WL 1314397, at *2, *3 (6th Cir. Feb. 8, 2022). The court's decision not to hold a hearing in the 2021 case—a later-filed case raising the same arguments—was appropriate and did not provide grounds for Rule 60(b) relief.

The "newly discovered evidence" did not satisfy Rule 60(b), either. It consisted of a 2022 letter from the IRS to Stinson stating that it "accept[s] his proposal to pay the amount [he] owe[s] by Feb. 21, 2023." (R. 10-1, Ex. A to Mot. to Reconsider, PageID 62.) It also states that "the current balance due for the tax periods shown above," which are five tax periods in 2011 and 2012, "is $190,761.45." (*Id.*) The exhibit also contains a copy of the judgment in Stinson's criminal case. Stinson does not purport to explain how his owing that amount for only five tax periods is meant to upset the district court's restitution order. The offense conduct extended well beyond the tax periods listed—it stretched from

approximately 2005 to 2015. *See Stinson v. United States*, No. 18-cv-02807, 2021 WL 8316018, at *2 (W.D. Tenn. May 3, 2021) (stating that Count 1 alleged that Stinson conspired to defraud the United States between approximately January 2005 and January 2015). The letter from the IRS that appears to relate to the restitution payments Stinson has in progress does not justify relief.

Finally, as to the statement that the government "illegally superseded the charges," it was offered without explanation, and it was nothing new. Stinson had alleged in the § 2255 petition that had initiated the 2021 Case that the "gov[ernment] superseded the indictment after the trial." (R. 1, Pet., PageID 3.)

Stinson's motion contained other statements that largely rehashed the same arguments that had been rejected multiple times. As the district court's order denying the motion stated, "This motion is identical to motions Stinson filed in his other § 2255 cases, all of which . . . have been denied." (R. 11, Order, PageID 66.)

Like Stinson's dozens of other filings, the motion for reconsideration was meritless. The district court did not abuse its discretion when it denied that motion. Moreover, although it is not at issue in this appeal, the underlying 2021 order appropriately instructed Stinson that filings should be directed to the pre-existing § 2255 case and dismissed the duplicative case.

3. Alternatively, if the appeal is considered to be a request for permission to file a second or successive petition, it should be denied.

Finally, to the extent that Stinson's motion for reconsideration seeks to challenge the district court's resolution of his § 2255 motion, this Court can construe his appeal as a request for permission to file a successive § 2255 motion. *See In re Nailor*, 487 F.3d 1018, 1023 (6th Cir. 2007).

Under § 2255(h), this Court can authorize a second or successive § 2255 motion only if the motion contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Stinson's claim meets neither of those conditions. He does not identify a new, retroactive rule of constitutional law that would apply to his case.

He did attach the 2022 letter from the IRS that was discussed above, but that is not new evidence "that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," as is required under § 2255(h).

In addition to the exhibit attached to his motion for reconsideration, Stinson has also attached exhibits to his appellate brief, namely: (A) an email message

from 2019 with the subject line "Computer Search" that simply says, "Mr. Miller; I found no record of any report or of any case record or documentation. Tom," (B) a 2019 affidavit from a tax preparer, Corey Young, stating that he was prepared to testify on behalf of Mark Stinson at the time of his trial; that, in his opinion, Stinson was not trying to do anything illegal; and that Stinson's trial counsel told him that he did not need to testify; and (C) a 2017 document that appears to be part of the jury verdict form; and (D) a 2013 document from the IRS listing certain transactions. (Stinson's Opening Br., ECF 7, Exs. A-D.)

Those documents do not satisfy the standard, though. They are not new—Exhibits C and D display dates before 2018, when Stinson filed his first § 2255 petition, and the other two are dated in 2019, when his first § 2255 case was still pending. (His first § 2255 motion was denied in May 2021, W.D. Tenn. 18-02807, R. 23, Order.) His allegation that his counsel was ineffective for failing to call Young as a witness was addressed in the 2018 Case. *See Stinson v. United States*, No. 18-cv-02807, 2021 WL 8316018, at *9-10 (W.D. Tenn. May 3, 2021). And they do not raise a meaningful question about his guilt, of which there was "overwhelming evidence," much less satisfy the standard in § 2255(h). *United States v. Stinson*, No. 18-5272, 2019 WL 276240, at *2 (6th Cir. Jan. 22, 2019).

This Court should decline to authorize a successive § 2255.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or affirm the district court's order. If Stinson's Rule 60(b) motion is construed as a request for permission to file a second or successive § 2255 motion, it should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The brief contains 3,548 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. Microsoft Word 2016 is the word-processing software that I used to prepare this brief.

/s/ Mary H. Morris
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, pursuant to Sixth Circuit Rules 28(b) & 30(g), hereby designates the following filings in the district court's record as entries that are relevant to this appeal:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY #	PAGE ID #
W.D. Tenn. No. 2:16-cr-20247			
Jury Verdict	12/08/2017	85	308-311
Amended Judgment	03/08/2018	114	530-536
W.D. Tenn. No. 2:18-cv-02807			
Petition	11/20/2018	1	1-21
Gov't Response to §2255 Petition	04/04/2019	9	32-52
Pro Se Motion	11/23/2020	19	129-152
Order	05/03/2021	23	165-187
W.D. Tenn. No. 2:21-cr-02065			
Pro Se Motion	02/01/2021	1	1-22
Gov't Response	03/02/2021	6	37-46
Order	03/03/2021	7	47-48
Judgment	03/03/2021	8	49
Motion for Reconsideration & Exhibits	01/26/2023	10	52-65
Order Denying Motion for Reconsideration	01/30/2023	11	66
Notice of Appeal	02/06/2023	12	67-68
Motion to Disqualify Judge	02/06/2023	13	69-78
Order Denying Motion to Disqualify Judge	02/08/2023	15	81-82
Notice of Appeal	02/08/2023	16	83-86
Order of USCA	04/27/2023	20	92-93
W.D. Tenn. No. 2:21-cv-02526			
Pro Se Motion	08/16/2021	1	1-26
W.D. Tenn. No. 2:22-cv-02575			
Pro Se Motion	08/30/2022	1	1-54
E.D. Ark. No. 19-cv-00016			
Pro Se Motion	02/12/2019	1	1-7

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for the United States was served upon Mark Stinson by filing with the Court's CM/ECF system this date: May 5, 2023.

/s/ Mary H. Morris
Assistant United States Attorney