

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeal
Tenth Circuit

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

MARK E. SELLS,

Defendant - Appellant.

No. 22-5114
(D.C. No. 4:04-CR-00057-TCK-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH, PHILLIPS, and MORITZ**, Circuit Judges.

Mark E. Sells, a pro se Oklahoma prisoner, seeks to challenge the dismissal of his motion to vacate his state conviction and sentence. He also seeks to appeal the denial of his motions for appointment of counsel and for “confession of judgement [sic] on his motion to vacate,” R. at 168. To appeal, however, Sells must obtain a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal a “final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court”). Because reasonable jurists would not debate the district court’s decision, we deny a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

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I

In 2004, police searched Sells' residence after receiving reports that someone fired shots into his parents' home. During the search, police found a pipe-bomb, firearms, and ammunition. Sells was charged in federal court with possession of an unregistered destructive device, and he moved to suppress evidence seized during the search. When the district court denied in part his motion to suppress, Sells entered a conditional guilty plea and was sentenced to 30 months in prison, followed by 3 years' supervised release, though he reserved his right to appeal the denial of his motion to suppress. *See United States v. Sells*, 463 F.3d 1148, 1153 (10th Cir. 2006). We affirmed. *See id.* at 1162.

Also in 2004, Sells was charged in Oklahoma state court with two counts of shooting with intent to kill. He was convicted by an Oklahoma jury on one count of shooting with intent to kill, for which he was sentenced to 35 years in prison, and one count of assault with a dangerous weapon, for which he was sentenced to a consecutive 8-year term. His state convictions and sentences were affirmed on direct appeal, and he did not seek certiorari review.

Sells completed his federal prison term in 2006, and his term of supervised release ended in 2009. He was transferred into state custody, and in 2020 filed a habeas petition under 28 U.S.C. § 2254. The district court denied the petition on timeliness grounds, and we denied a COA. *See Sells v. Crow*, 853 F. App'x 278, 281-83 (10th Cir. 2021). Shortly thereafter, Sells filed a 28 U.S.C. § 2255 motion. The district court granted the government's motion to dismiss the § 2255 motion after determining Mr. Sells was ineligible for § 2255 relief because he was no longer in federal custody and he had

waived his right to collaterally attack his conviction in his plea agreement. *See United States v. Sells*, No. 04-CR-57, 2021 WL 5496857, at *2-3 (N.D. Okla. Nov. 23, 2021).

Sells then filed a motion styled under 18 U.S.C. §§ 3145(b) & 3742(a)(3), urging the district court to vacate the Oklahoma trial court's criminal judgment for lack of subject matter jurisdiction.¹ He also moved for appointment of counsel and for "confession of judgement [sic] on his motion to vacate," R. at 168. The district court determined that Sells' attempt to vacate the state criminal judgment had to be brought via a § 2254 petition rather than in his federal criminal case. Alternatively, to the extent Sells sought relief under § 2255, the district court ruled it lacked jurisdiction to consider the motion because Sells was no longer in federal custody, he had already filed a § 2255 motion, and he did not obtain authorization from this court to bring a second or successive § 2255 motion. Accordingly, the district court dismissed his motion to vacate, denied his other motions as moot, and later denied a COA.

II

As an initial matter, Sells disputes the district court's characterization of his motion as seeking habeas relief. He says he styled his motion as one under §§ 3145(b) & 3742(a)(3) and the district court should have treated it as such. But "[i]t is the relief sought, not the pleading's title, that determines whether the pleading is [seeking habeas relief]." *In re Cline*, 531 F.3d 1249, 1253 (10th Cir. 2008) (brackets and internal

¹ 18 U.S.C. § 3145(b) governs review of federal detention orders, while 18 U.S.C. § 3742(a)(3) provides for review of federal sentences exceeding the applicable guideline range.

quotation marks omitted). Sells moved the district court “to vacate Washington County, Oklahoma’s illegal Detention Order,” which he asserted was “made without subject-matter jurisdiction.” R. at 137. Citing *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), he claimed “Oklahoma’s illegal prosecution, conviction, and illegal detention of [him was] without subject-matter jurisdiction” because he is an Indian and the events underlying his prosecution occurred on Indian lands. See R. at 139 (internal quotation marks omitted). He therefore sought “to be immediately released from the custody of the Oklahoma Department of Corrections.” *Id.* at 152. These arguments are properly characterized as seeking habeas relief because Sells challenged his confinement and sought to be immediately released. See *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) (“In this circuit, a prisoner who challenges the fact or duration of his confinement and seeks immediate release or a shortened period of confinement, must do so through an application for habeas corpus.”). And, because his detention arises out of process issued by the state court, he is required to obtain a COA. See 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) (recognizing § 2253(c)(1)(A)’s COA requirement applies “to matters flowing from a state court detention order”).²

III

To obtain a COA, Sells 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

² Sells’ reliance on *Castro v. United States*, 540 U.S. 375 (2003), is misplaced because he had already filed a § 2254 petition. See *id.* at 383 (prohibiting courts from characterizing a pleading as a *first* § 2255 motion without warning the prisoner of the consequences of doing so and allowing the prisoner to withdraw or amend the pleading).

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). If reasonable jurists could not debate the district court’s procedural ruling, there is no need to consider the constitutional question. *See id.* at 485.

The district court determined that to the extent Sells sought relief under § 2254, he could not proceed in his federal criminal case, but must instead initiate a new § 2254 proceeding and pay the required filing fee. Alternatively, to the extent he sought relief under § 2255, the district court ruled it lacked jurisdiction to adjudicate the motion because Sells was no longer in federal custody after having served his federal sentence and completing his term of supervised release. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994) (§ 2255 movant failed to satisfy in-custody requirement where he filed his motion after completing his prison term and period of supervised release expired). The district court also observed that Sells had already filed a § 2255 motion but he did not obtain circuit-court authorization to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2255(h). Because reasonable jurists could not debate these rulings, we deny a COA and dismiss this matter. All outstanding motions are denied as moot.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

V.

MARK E. SELLS,

Defendant.

Case No. 04-CR-57-TCK

ORDER

Before the Court is the Motion to Vacate Washington County, Oklahoma's Illegal Detention Order; Motion for Appointment of Counsel; and Motion for Confession of Judgment, filed by Mark E. Sells (Defendant) (Docs. 65, 67, 68); and the United States (Government) Motion to Dismiss Defendant's Motions Challenging State Court Judgment (Doc. 70). Defendant's Motion to Vacate seeks to challenge his state-court detention pursuant to 18 U.S.C. §§ 3145 and 3742. Defendant appears to argue that this Court has "original jurisdiction" over his prosecution because the Government had prosecuted Defendant for events that transpired on March 10 and 11, 2004, and thus, Defendant contends, this Court has the authority to review and vacate his custody under a state-court judgment for the events that transpired over the same dates. (Doc. 65 at 1). To that end, Defendant argues that this Court should vacate the Washington County, Oklahoma detention order because that court lacked subject matter jurisdiction to make such an order. (*Id.*) In its Motion to Dismiss Sells' Motion to Vacate, the Government assumes, without arguing as much, that Defendant's Motion to Vacate is made pursuant to 28 U.S.C. § 2255. (Doc. 70 at 4). Because Defendant is no longer in federal custody, the Government argues, Defendant is not eligible for relief under § 2255. (*Id.*)

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In 2004, Defendant shot two .223-caliber bullets into his parents' headboard while they were sleeping. *United States v. Sells*, 463 F.3d 1148, 1151 (10th Cir. 2006). His father reported to deputies that his son had threatened his life the previous day and warned them that the son had numerous firearms at his own residence. (*Id.*) at 1152. After surveillance revealed Defendant carrying a deer rifle, a flak jacket and an AR-15 with a scope, officers obtained a Tulsa County search warrant for Defendant's home, which described the items to be searched for and seized as "any .223-caliber Firearm or rifle, .223-caliber ammunition, footwear, clothing, any other related fruits, instrumentalities and evidence of the crime." (*Id.*)

When officers executed the warrant, they found a loaded .223-caliber AR-15 rifle 'right off the bat.' Subsequently, they found a hidden compartment containing thousands of rounds of ammunition, including .223-caliber ammunition. (*Id.*) Officers also spotted a pipe bomb in the compartment and called ATF to defuse it. (*Id.*)

After a federal grand jury charged Defendant with possession of the pipe bomb, he moved to suppress all evidence seized from his home, arguing that the warrant was overbroad and that the officers had improperly conducted a general search. (*Id.*) at 1153. This Court granted the motion in part but—pursuant to the plain view doctrine—denied it with respect to the seizure of the .223 rifle and ammunition specified in the warrant and redacted warrant, as well as the shotgun shells, pipe bomb and related items. (*Id.*)

Subsequently, Defendant entered a conditional guilty plea in which he reserved his right to appeal the Court's denial of his suppression motion, but explicitly waived his "right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. §2255, except for claims based on ineffective assistance of counsel which challenge the guilty plea or [the post-conviction rights] waiver." (Doc. 19). This Court sentenced him to 30 months in prison. 463 F.3d at 1153. Defendant

has completed his federal court sentence, his supervised release has been terminated, and he has been released from federal custody.

Defendant also received a 35-year sentence in the District Court of Washington County, Oklahoma for shooting with intent to kill, and a consecutive eight-year state sentence for assault and battery with a dangerous weapon. Defendant is currently serving his sentence under the state-court judgment, and it is this state-court sentence that Defendant now moves this Court to vacate.

In July 2021, Defendant moved to vacate his state-court conviction pursuant to 18 U.S.C. § 2255, arguing that the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), rendered invalid the state search warrant that led to his federal conviction, and reasserting an argument that the searching officers had exceeded the scope of the warrant and conducted a general search. (Docs. 50, 51). This Court denied his motions. (Dkt. # 60). Now, Defendant has again submitted multiple filings in this completed federal case, seeking to challenge his detention under the state-court judgment in Washington County based, in part, on *McGirt*. (Docs. 65–68).

While Defendant styles his Motion to Vacate as seeking relief pursuant to 18 U.S.C. §§ 3145 and 3742, the Court construes his Motion to Vacate as seeking relief under 28 U.S.C. § 2254 because the substance of Defendant's Motion is to challenge his custody under a state-court judgment. *See Castro v. United States*, 540 U.S. 375, 381 (2003) ("Federal courts sometimes will ignore the legal label that a pro se litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category."). To the extent that Defendant's Motion is construed as seeking relief under § 2254, Defendant cannot seek that relief through a motion filed in his federal criminal case. Instead, Defendant must file a § 2254 petition and pay the \$5 filing

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fee. *See* Local Rule LCvCR3-1(c).¹ Even assuming that Defendant's Motion could be construed as seeking relief under § 2255, this Court lacks jurisdiction to adjudicate the Motion for two reasons. First, Defendant is no longer in custody because his federal incarceration has been completed, his supervised release has been terminated, and he has been released from federal custody. *See* 28 U.S.C. § 2255(a); *United States v. Channon*, 2022 WL 6872077, at *2 (10th Cir. 2022). Second, Defendant has not sought or obtained permission from the Tenth Circuit to file a second or successive § 2255 Motion, as is required by 28 U.S.C. §§ 2244 and 2255(h). Accordingly, Defendant's Motion to Vacate detention order in Washington County, Oklahoma (Doc. 65) is **DENIED**, and Government's Motion to Dismiss (Doc. 70) is **GRANTED**. Additionally, Defendant's motions to appoint counsel and to confess judgment (Docs. 67, 68) are **DENIED** as moot.

ENTERED this 13th day of December, 2022.


TERENCE C. KERN
United States District Judge

1. The Court notes that Defendant has previously filed a petition for writ of habeas corpus in this Court and, thus, should be familiar with the proper procedure for filing such a petition. *See Sells v. Crowe*, No. 20-CV-323-CVE-CDL (N.D. Okla. Jul. 6, 2020).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 5, 2023

Christopher M. Wolpert
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UNITED STATES OF AMERICA,

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MARK E. SELLS,

Defendant - Appellant.

No. 22-5114
(D.C. No. 4:04-CR-00057-TCK-1)
(N.D. Okla.)

ORDER

Before **TYMKOVICH, PHILLIPS, 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



CHRISTOPHER M. WOLPERT, Clerk

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