

No. 17-1002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 18, 2017

DEBORAH S. HUNT, Clerk

BENJAMIN PRESTON FOREMAN,)
)
Petitioner-Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

ORDER

Before: GIBBONS, SUTTON, and THAPAR, Circuit Judges.

Benjamin Preston Foreman petitions for rehearing en banc of this court's order entered on June 23, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 17-1002

UNITED STATES COURT OF APPEALS
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BENJAMIN PRESTON FOREMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Benjamin Preston Foreman, a pro se federal prisoner, applies for a certificate of appealability (“COA”) to appeal the district court’s order denying three of his motions in his 28 U.S.C. § 2255 proceeding: one to set aside the judgment in light of judicial fraud; another seeking judicial disqualification; and a third for relief from judgment due to mistake of law. *See* 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(2).

In the first motion at issue here, Foreman asked the district court to set aside its judgment denying his § 2255 motion based on “fraud by the court.” The fraud, Foreman alleged, was that the district court: failed to consider several affidavits that he had submitted in support of his ineffective-assistance habeas claim; failed to order the government to respond to his § 2255 motion; failed to hold an evidentiary hearing on his § 2255 motion; and distorted the record in denying his § 2255 motion. Although Foreman cited Federal Rule of Civil Procedure 60(d)(1), the district court believed that he meant Rule 60(b)(3), which deals with fraud. His next motion sought judicial disqualification, and Foreman cited the alleged fraud described above. The third motion is a Federal Rule of Civil Procedure 60(b)(1) motion for relief from judgment due to a mistake of law. The alleged mistake of law has to do with a putative policy change by the Department of Justice stating that prosecutors should, in some cases, not enforce plea waivers of the right to effective assistance of counsel. In a single order, the district court denied these

motions. The court ruled that Foreman's motion for relief based on judicial fraud was time-barred, without merit, and an attempted end-run around the strictures for filing second or successive § 2255 motions; that his motion to disqualify was dubious; and that his mistake-of-law motion for relief failed to show a mistake of law and was untimely.

We "will not entertain an appeal from the denial of a Rule 60(b) motion in [a § 2255] proceeding unless the petitioner first obtains a COA." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). To obtain COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, to merit a COA to appeal the denial of a Rule 60(b) motion, a movant must "show that reasonable jurists could debate that the [motion] could have been resolved differently or that the claims raised deserved further review." *Johnson*, 605 F.3d at 339.

Taking Foreman's motion for disqualification first, no reasonable jurist could debate the district court's denial, as he cited no bias or partiality by the court. See *Liteky v. United States*, 510 U.S. 540, 555 (1994).

As for Foreman's two Rule 60 motions, that rule provides relief from judgment under certain circumstances, including for fraud or mistake or, indeed, any reason that justifies relief. Fed. R. Civ. P. 60(b)(1), (3), (6). But, as the district court held, motions under Rule 60(b)(1) and (b)(3) must be filed within one year after the relevant order or judgment, Fed. R. Civ. P. 60(c), and Foreman's motions were filed more than six years after the district court denied his § 2255 motion in 2010. And even if his motions were considered under Rule 60(b)(6), the catch-all provision, no reasonable jurist could debate the district court's decision, as Foreman showed no "exceptional or extraordinary circumstances" justifying relief. *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990).

In his COA application, Foreman maintains that the district court improperly converted his motion under Rule 60(d)(1) to a Rule 60(b)(3) motion. Rule 60(d) is known as the rule's savings clause, and subsection (1) permits "what has been historically known simply as an independent action in equity to obtain relief from a judgment," *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259, 1263 (6th Cir. 1987) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2868, at 237-38 (1973)). But "[w]here the adverse party is not

prejudiced[,] an independent action for relief may be treated as a 60(b) motion, and conversely, a 60(b) motion may be treated as the institution of an independent action.” *Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir. 2011) (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 81 n. 7 (5th Cir.1970)). “Moreover, an independent action is ‘available only to prevent a grave miscarriage of justice.’” *Id.* (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)). Thus, no reasonable jurist could debate the district court’s handling or denial of Foreman’s motion.

Accordingly, Foreman’s COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BENJAMIN PRESTON FOREMAN,

Movant,

File No. 1:08-cv-1115

v.

HON. ROBERT HOLMES BELL

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

Movant filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (ECF No. 1.) On July 19, 2010, this Court denied the motion. (ECF No. 13.) Movant filed a motion to reopen the case (ECF Nos. 56, 65), which the Court construed as a second or successive § 2255 motion, and transferred the matter to the Sixth Circuit Court of Appeals (ECF No. 67). Twice, the Sixth Circuit denied Movant's motion for authorization to file a second or successive § 2255 petition. (ECF Nos. 71, 73.) The matter is before the Court on Plaintiff's motion to set aside judgment (ECF No. 75), "motion for partial disqualification of U.S. District Court Judge Robert H. Bell" (ECF No. 76), and motion to grant Rule 60(b)(1) (ECF No. 77).

I. Motion to Set Aside § 2255 Denial

Movant requests the Court to set aside its denial, under Federal Rule of Civil Procedure 60(d)(1), because of the Court's misrepresentation and fraud. It appears that Movant's ground for relief from judgment is Rule 60(b)(3), fraud, misrepresentation, or

misconduct by an opposing party. Movant argues that the Court made a material misrepresentation when it failed to consider three sworn affidavits submitted with his memorandum of law. A Rule 60(b) motion for fraud, misrepresentation, or misconduct must be made “no more than one year after the entry of the judgment or order or date of the proceeding.” Fed. R. Civ. P. 60(c). On July 19, 2010, the Court entered its order denying Movant’s motion to vacate, set aside, or correct his sentence under § 2255. Movant did not file his motion to set aside until September 12, 2016, which was well past the one-year filing deadline. Therefore, this motion is time-barred.

Alternatively, Rule 60(b)(6) provides for the correction of a judgment “for any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(6). But this applies “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) (citing *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985), *cert. denied*, 474 U.S. 1104 (1986)). Extraordinary circumstances are rare, and a change in decisional law is usually not an extraordinary circumstance meriting relief under the Rule. *Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005). It appears that Movant’s claim of judicial bias could be an extraordinary circumstance, however, as discussed below, that argument does not have merit.

Motions brought under 60(b)(6) shall be made “within a reasonable time,” a limit determined on a case-by-case basis by the length and circumstances of the delay in filing, prejudice to the opposing party, and any circumstances warranting equitable relief. *Olle v.*

Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990); Fed. R. Civ. P. 60(c)(1). Motions filed under Rule 60(b)(6) are untimely where more than three years have passed between the time the motion was filed and judgment was entered. *See U.S. v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003) (four years); *Blachy v. Butcher*, 129 F. App'x 173, 179 (2005) (three years); *Ohio Cas. Ins. Co. v. Pulliam*, No. 96-6522, 1999 WL 455336, at *3-4 (6th Cir. June 23, 1999) (three years).

In this case, Movant brought the motion for relief from judgment six years after the Court dismissed his petition, and he does not explain his delay. Even if Movant had shown an extraordinary circumstance, his motion would still be time-barred.

Moreover, a proper Rule 60(b) motion “attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” *Id.* at 532. Movant argues that the Court failed to consider three sworn affidavits from his mother, brother, and girlfriend (ECF No. 5-4), and ignored his sworn statements of coercion for his plea (ECF No. 5-3). Movant is seeking to attack the substance of this Court’s denial of his § 2255 motion on the merits, rather than a defect in the proceedings, which is not proper under Rule 60. Further, the affidavits were attached as proposed exhibits to Movant’s motion for leave to file excess pages, which the Court denied. (ECF No. 13.) Therefore, the affidavits were not part of the record, and the Court properly did not consider them.

Nonetheless, the Court ruled on the merits of Movant’s § 2255 motion. It reviewed Movant’s claim of ineffective assistance of counsel, including the claim that his attorney failed to prepare sentencing guidelines and adequately discuss sentencing exposure. (ECF

No. 75.) In the mother's affidavit, she asserts that the attorney did not tell Movant that a plea hearing was scheduled and did not explain his sentencing exposure or prepare sentencing guidelines. (ECF No. 5-4.) The Court considered this argument on its merits, and determined that it directly contradicted Movant's testimony at the plea hearing, and that his claims for ineffective assistance of counsel did not have merit. (ECF No. 12.) Also, the affidavit of Movant's brother does not provide facts or concrete information regarding counsel's ineffectiveness. (ECF 5-5.) In addition, his girlfriend's affidavit claims that the prosecutor did not fulfill his oral promise. (*Id.*) But this contradicts the written plea agreement and the Movant's testimony at the plea hearing. The Court considered Movant's argument that the plea agreement was invalid because the government promised to introduce a motion to reduce Movant's sentence. Based upon the written plea agreement and Movant's testimony at the plea hearing, the Court found that his claim did not have merit. (ECF No. 12.) The affidavits, which do not provide any new information or facts, do not change the Court's analysis of the merits of Movant's original arguments.

Further, on two occasions, the Sixth Circuit denied Movant's motion for authorization to file a second or successive § 2255 motion. (ECF Nos. 71, 73.) Movant first filed a motion to reopen his § 2255 case in response to a new Department of Justice internal policy and Kentucky Supreme Court opinion. (Order, ECF No. 71.) He then filed a motion for authorization to file a second of successive § 2255 motion in response to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). (Order, ECF No. 73.) But Movant raised the same argument in his previous second or successive

§ 2255 motion, *see In re: Foreman*, 15-1950 (6th Cir. Mar. 28, 2016) (order), so the motion failed. *See* 28 U.S.C. § 2244(b)(1). Further, the Sixth Circuit found that *Johnson* did not affect Movant's sentence. (ECF No. 73.) As a result, Movant filed his motion to set aside in an attempt to end-run around the Sixth Circuit's denials. For the reasons stated above, his motion is denied.

II. Motion for Partial Disqualification

Movant also filed a motion to disqualify Judge Bell under 28 U.S.C. § 455. (ECF No. 76.) Movant argues that this Court cannot preside in a fair and impartial manner because it committed fraud when it dismissed Movant's original § 2255 motion. A district court judge is required to recuse himself "only if a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Strory*, 716 F.2d 1088, 1091 (6th Cir. 1983) (quoting *Trotter v. Int'l Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1144 (9th Cir. 1983)). This is an objective standard, and is not based on the subjective view of a party. *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *Liteky v. United States*, 510 U.S. 540, 552 (1994). Almost invariably, rulings are proper grounds for appeal, not for recusal. *Id.* Opinions formed by the judge on the basis of facts introduced do not constitute a basis for a bias or partiality motion unless they display deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.*

Here, the Court carefully reviewed each of Movant's eight claims for relief, and found

that Movant waived the right to challenge his sentence by direct appeal and by collateral attack in his plea agreement. (ECF No. 12, PageID.226.) This was clear from both the terms of his plea agreement and his testimony at the plea hearing, where he stated under oath that he understood that he was waiving this right. (*Id.* at PageID.226-27.) Because the waiver was valid, it barred his right to challenge his conviction under § 2255. (*Id.* at PageID.234.) The Court formed an opinion based on the facts presented, and did not display deep-seated favoritism or antagonism. Therefore, Movant's motion for partial disqualification is without merit, and is denied.

III. Motion to Grant Rule 60(b)(1)

Movant also brings a Rule 60(b)(1) motion based upon a mistake in law. (ECF No. 77.) Movant raises this claim in reliance on the Department of Justice's new policy that it would no longer enforce previously executed waivers of claims of ineffective assistance of counsel. Movant argues that the Court has not ruled on the merits as to Exhibit A, Movant's memorandum of law. (ECF No. 5-1.) Along with the above-mentioned affidavits, this exhibit was attached to Movant's motion for leave to file excess pages, which the Court denied. (ECF No. 13.)

For the same reasons as Movant's Rule 60 motion for misrepresentation, this motion is also time-barred. A Rule 60(b) motion for mistake of law must be made "no more than one year after the entry of the judgment or order or date of the proceeding." Fed. R. Civ. P. 60(c). The Court entered its order denying Movant's motion to vacate, set aside, or correct his sentence under § 2255 on July 19, 2010. Movant did not file his motion to set aside until

September 26, 2016, well past the one-year deadline. In the alternative, there are no extraordinary circumstances present to justify relief under Rule 60(b)(6). Likewise, Movant filed the motion 6 years after the Court dismissed his petition, so the motion is untimely. *See Dailide*, 316 F.3d at 618, *Blachy*, 129 F. App'x at 179, *Pulliam*, 1999 WL 455336 at *3-4.

Further, there is no mistake in law. In *Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001), the Sixth Circuit held that a collateral-attack waiver foreclosed the right to bring a § 2255 petition based on a claim of ineffective assistance of counsel. When a defendant “knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring[ing] a claim of ineffective assistance of counsel based on 28 U.S.C. § 2255.” *Id.* This Court held that Movant knowingly and voluntarily waived his right to collaterally attack his sentence. (ECF No. 12, PageID.227.) Because of Movant’s valid waiver, the Court properly held that he is barred from raising an ineffective assistance of counsel claim under § 2255.

[In addition, Movant claims that the Court did not rule on the merits of its ineffective assistance of counsel claims because of Movant’s waiver. Yet the Court examined Movant’s claim of ineffective assistance of counsel because it may have affected the validity of his plea agreement. The Court concluded that the claim contradicted the record, and was “without merit.” (ECF No. 12, PageID.232.) Accordingly,

IT IS HEREBY ORDERED that Movant’s motion for relief from judgment under Fed. R. Civ. P. 60(b) (ECF No. 75) is **DENIED**.

IT IS FURTHER ORDERED that Movant's motion for partial disqualification of Judge Bell (ECF No. 76) is **DENIED**.

IT IS FURTHER ORDERED that Movant's motion to grant Rule 60(b)(1) (ECF No. 77) is **DENIED**.

Dated: October 18, 2016

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE