UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4-89-82(5)(DSD/FLN)
Civil No. 99-28(DSD)

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon defendant's request for a Certificate of Appealability ("COA"). For the following reasons, defendant's request is denied.

BACKGROUND

On January 15, 1993, defendant was convicted by jury trial of various drug-trafficking offenses.[1] On January 27, 1994, he was sentenced to a term of life imprisonment on count 1 of the indictment, along with concurrent terms of 120 and 360 months on the other counts of conviction. On October 5, 1995, the United States Court of Appeals for the Eighth Circuit vacated the judgment with respect to count 1, affirmed the judgment on all other counts and remanded to the district court for re-sentencing on count 1.

[1] The trial was conducted before the Honorable Diana E. Murphy, United States District Judge.

1.

FILED ______
Richard D. Sletten, CLERK
Judgment Ent'd. ______
Deputy Clerk's Initials ______

See United States v. Lambros, 65 F.3d 698, 700 (8th Cir. 1995). On February 10, 1997, defendant was re-sentenced by Senior United States District Judge Robert G. Renner to a term of 360 months imprisonment on count 1.[2] Defendant subsequently filed various motions to vacate the judgment and repeatedly sought relief from the sentence pursuant to 28 U.S.C. § 2255.[3]

On April 24, 2001, defendant filed a motion to vacate all judgments and orders issued by Judge Robert G. Renner pursuant to Fed. R. Civ. P. 60(b)(6). On March 8, 2002, this court dismissed that motion after construing it as an impermissible successive § 2255 motion. (Order of Mar. 8, 2002.) Defendant requested a COA of the dismissal of the purported Rule 60(b) motion. The court denied the request because defendant had not shown that "the issues deserve[d] further proceedings." (Order of May 29, 2002.) Defendant appealed the denial of the Rule 60 motion and COA, and the court of appeals affirmed. See United States v. Lambros, 40 Fed. Appx. 316, 2002 WL 1402099 (8th Cir. July 1, 2002), cert. denied, 537 U.S. 1135 (2003).

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[2] The case was reassigned to Judge Renner following Judge Murphy's appointment to the United States Court of Appeals for the Eighth Circuit in 1994.

[3] Defendant's first collateral attack purportedly sought relief pursuant to Fed. R. Crim. P. 33, but was construed as a § 2255 motion. Defendant's second attempt was denied both as a successive § 2255 motion and as lacking merit. Defendant's third attempt was denied for lack of jurisdiction, because defendant had failed to obtain permission from the court of appeals to file a successive habeas petition, as required by 28 U.S.C. § 2255.

Defendant then moved to vacate the judgment denying his Rule 60(b) motion due to alleged intervening changes in the law. That motion was denied as lacking merit. (Order of Oct. 23, 2003.) Defendant challenged that order by bringing a motion to alter or amend judgment pursuant Fed. R. Civ. P. 59. The court denied the motion because Rule 59 is inapplicable to judgments other than "the original judgment in [the] case." (Order of Nov. 6, 2003, citing Fed. R. Civ. P. 59(e) advisory committee's note.) Defendant now requests a COA pursuant to 28 U.S.C. § 2253.

DISCUSSION

To be eligible for a COA, an applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). The substantial showing requirement under § 2253 is a more stringent standard than the good faith and non-frivolous standard applied to applications to proceed in forma pauperis. See Kramer v. Kemna, 21 F.3d 305, 307 (8th Cir. 1994) ("[g]ood faith and lack of frivolousness, without more, do not serve as sufficient bases for issuance of a certificate"). Instead, the applicant must show that the issues to be raised on appeal are "debatable among reasonable jurists," that different courts "could resolve the issues differently," or that the issues otherwise "deserve further proceedings." Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir.)

(citing Lozado v. Deeds, 498 U.S. 430, 432 (1991) (per curiam)), cert. denied, 513 U.S. 946 (1994); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998).[4] When a district court grants a COA, it is "inform[ing] the Court of Appeals that the [applicant] presents a colorable issue worthy of an appeal." Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam).

There are several reasons why defendant's request must be denied. First, defendant now acknowledges that the past two cycles of Rule 60(b) and related motions were in fact disguised successive § 2255 motions. Defendant states that he "moves this Honorable Court pursuant to 28 U.S.C. § 2253(c)(1) which requires a Certificate of Appealability (COA) before an appeal may be taken from 'the final order in a habeas corpus proceeding.'"[5] (Def.'s Mem. Supp. Mot. COA at 1.) That admission is fatal, because this

[4] Lozado, Kemna and Flieger describe the showing necessary to obtain a certificate of probable cause, as was required under § 2253 before its amendment in 1996. At that time, Congress replaced the certificate of probable cause requirement with the current certificate of appealability requirement. Nonetheless, "[t]he same substantive standard governs the issuance of the pre-Act certificate of probable cause and the post-Act certificate of appealability." Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998).

[5] Defendant must necessarily be proceeding under 28 U.S.C. § 2253(c)(1)(B), because subsection (A) applies only to habeas actions arising out of State court process. See 28 U.S.C. § 2253 (c)(1)(A) & (B). Defendant is not challenging state action. Subsection (B) requires a COA only when an appeal is taken from "the final order in a proceeding under section 2255." Id. (emphasis added).

court lacks jurisdiction over successive § 2255 motions brought without prior authorization from the circuit court. See 28 U.S.C. § 2255; Nims v. Ault, 251 F.3d 698, 706 (8th Cir. 2001) (Bye, J., dissenting); Boykin v. Unites States, 2000 WL 1610732, at *1 (8th Cir. 2000). It is undisputed that defendant has previously moved pursuant to § 2255 and that he has not obtained authorization from the circuit court for the current round of collateral attacks. Alternatively, if this series of motions does not constitute a collateral attack on the sentence pursuant to § 2255, a COA is unnecessary and defendant's request would be denied as moot. Defendant again cites Zeitvogel for the proposition that a COA must be obtained in order to appeal the denial of a Rule 60 motion. See Zeitvogel v. Bowersox, 103 F.3d 57, 57 (8th Cir. 1996). As the court discussed in its previous order, that case does not hold that a COA is a prerequisite to an appeal from the denial of a Rule 60(b) motion. (Order of Nov. 6, 2003 at 2 n.2.)

Second, if the motions in question did not constitute an unauthorized successive § 2255 motion and a COA was for some reason required, the request would nonetheless be denied. Defendant's claims have already been considered by the court of appeals. It is not within the province of this court to review, or to authorize review of, matters decided by that body. See 28 U.S.C. § 1331; Baker v. Riss & Co., 444 F.2d 257, 259 (8th Cir. 1971) (noting limited jurisdiction of the federal courts).

5.

Finally, for the reasons stated in the court's orders of March 8, 2002, May 23, 2002, October 23, 2003 and November 6, 2003, defendant has not made a "substantial showing of the denial of a constitutional right" or presented an issue about which "'reasonable jurists could debate.'" 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

CONCLUSION

For reasons stated, **IT IS HEREBY ORDERED** that defendant's application for a Certificate of Appealability is denied.

Dated: February 20, 2004

David S. Doty, Judge
United States District Court