

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 the motion of defendant John Gregory Lambros to vacate a judgment due to intervening change in controlling law. After a review of the file, record and proceedings in the matter and for the reasons stated, defendant's motion 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

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

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Judgment Ent'd. _____
Deputy Clerk's Initials _____

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with respect to count 1, affirmed the judgment on all other counts and remanded to the district court for re-sentencing on count 1. 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 on count 1 and on several occasions unsuccessfully 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 by Judge Robert G. Renner pursuant to Fed. R. Civ. P. 60(b)(6). On March 8, 2002, this court dismissed defendant's Rule 60(b) action and related motions after construing the action as an impermissible successive § 2255 motion. (Order of March 8, 2002.) Defendant then moved for a certificate of appealability ("COA") of the dismissal of the purported Rule 60(b) motion. The court denied the motion for a COA, finding that defendant failed to demonstrate that "the issues deserve[d] further

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 to 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.

proceedings." (Order of May 29, 2002.) Defendant appealed the denial of the Rule 60 motion and COA and the Court of Appeals affirmed in an unpublished opinion "[f]or the reasons stated by the district court." See United States v. Lambros, 40 Fed. Appx. 316, 2002 WL 1402099 (8th Cir. July 1, 2002) cert. denied.

Defendant now apparently moves the court to vacate its judgment denying his Rule 60(b) motion due to alleged intervening changes in the law. However, in the concluding section of defendant's memorandum in support of the motion, he states, "[m]ovant is only requesting this court ... grant Movant Lambros a certificate of appealability." Because the court finds no basis in law for either form of relief, defendant's motion is denied.

DISCUSSION

Although it not entirely clear from defendant's memoranda, it appears his argument is twofold. First, he contends that the court improperly dismissed his Rule 60(b) motion after construing it as a successive § 2255 motion. Second, he asserts that the court improperly denied his motion for a COA and in so doing, deprived the Court of Appeals of jurisdiction over his appeal.

Defendant notes that district courts in the Eighth Circuit, as in most other circuits, have long construed Rule 60 motions filed after unsuccessful § 2255 motions as impermissible successive § 2255 motions. See Blair v. Armontrout, 976 F.2d 1130, 1134 (8th

Cir. 1992); see also Rodriguez v. Mitchell, 252 F.3d 191, 199-200 (2nd Cir. 2001) (citing cases from the 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th circuits following that practice). Defendant points out that one month after this court dismissed his Rule 60 motion, the United States Supreme Court granted certiorari to consider whether district courts may dismiss Rule 60 motions as successive § 2255 motions as a matter of course. See Abdur'Rahman v. Bell, 535 U.S. 1016, 1016 (2002). Approximately one month after certiorari was granted in Abdur'Rahman, this court denied defendant's motion for a COA on the denial of his Rule 60(b) motion.

Defendant contends that, based on the grant of certiorari in Abdur'Rahman, his appeal of the dismissal of the Rule 60(b) motion presented an issue that was debatable among reasonable jurists and therefore was deserving of a COA. That argument fails, however, because the United States Supreme Court subsequently dismissed the writ of certiorari in Abdur'Rahman as improvidently granted. See Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) reh'g denied, 123 S. Ct. 594 (2003).

Defendant also cites Boyd v. United States, 304 F.3d 813 (8th Cir. 2002) cert. denied, 123 S. Ct. 1642 (2003), as new and controlling law that is contrary to the court's dismissal of his Rule 60(b) motion. In Boyd, the Eighth Circuit set out a "uniform procedure" for district courts "dealing with purported Rule 60(b) motions following the dismissal of habeas petitions." Id. at 814.

The district court is "encouraged" to file the purported Rule 60(b) motion "and then conduct[] a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under ... 28 U.S.C. § 2255." Id. If the court construes the action as a successive § 2255 motion, it may either dismiss the action or transfer it to the Court of Appeals. See id.

The court's dismissal of defendant's purported Rule 60(b) motion predated Boyd by approximately four months. (Order of March 8, 2002.) Nonetheless, the court followed the procedure set forth in Boyd by permitting the motion to be filed and conducting a limited initial review from which it concluded the motion was a successive habeas action. (Order of March 8, 2002.) Based on that determination, the action was dismissed. (Id.) The court finds that nothing in Boyd would require a different result.

Defendant's appeal of the court's dismissal of the Rule 60(b) motion was unsuccessful. See United States v. Lambros, 40 Fed. Appx. 316, 2002 WL 1402099 (8th Cir. July 1, 2002) cert. denied, 123 S. Ct. 1255. Defendant now asserts that the decision of the Court of Appeals was infirm because this court denied his motion for a COA. As the United States Supreme Court recently held, absent a COA, "courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." See Miller-El v. Cokerell, 123 S. Ct. 1029, 1039 (2003). On that basis, defendant seeks to bring

his purported Rule 60(b) motion back before the Court of Appeals, where it has already been found wanting.

It is clear from defendant's previous appeal that his action cannot succeed. See Lambros, 2002 WL 1402099, at *1. While a COA is a jurisdictional prerequisite to an appeal from the denial of a habeas petition, the Court of Appeals considered defendant's motion as a Rule 60(b) action when it affirmed the district court's dismissal. See id. (stating "Lambros appeals the district court's denial of his motion under Federal Rule of Civil Procedure 60(b)(6)"). Thus, a certificate of appealability was not required to confer jurisdiction upon the Court of Appeals. Moreover, the Eighth Circuit cited the reasons stated by this court as the basis of its affirming opinion. See id. Among those reasons was the court's finding that the motion was without merit. (Order of March 8, 2002, n. 2.)

In short, if defendant's previous motion was a proper Rule 60(b) motion, the Court of Appeals had jurisdiction to affirm the dismissal without a COA. If it was instead a disguised successive habeas petition, it necessarily failed for want of permission from the Court of Appeals.⁴ See 28 U.S.C. § 2255. Because the court

⁴ 28 U.S.C. § 2255 states, "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals...."

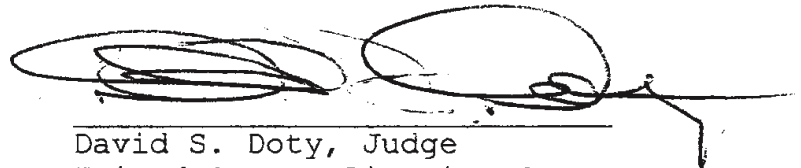
finds no intervening change of law requiring it to vacate its dismissal of defendant's purported Rule 60(b) motion or its denial of defendant's motion for COA, the present motion is denied.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to vacate judgment due to intervening change in controlling law [Doc. No. 261] is denied.
2. Defendant's motion offering clarification of facts, record and evidence [Doc. No. 267] is denied as moot.

Dated: October 23, 2003



David S. Doty, Judge
United States District Court

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