

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KALLEN E. DORSETT, JR.,	:	
Petitioner,	:	
	:	
v.	:	No. 5:12-cr-00401
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

OPINION
Motion for Relief, ECF No. 117- Dismissed

Joseph F. Leeson, Jr.
United States District Judge

September 26, 2018

In 2012, Petitioner Kallen E. Dorsett, Jr., pled guilty to drug and firearm related charges, and was sentenced to a term of imprisonment. Earlier this year, this Court denied Dorsett’s Motion to Vacate Sentence under 28 U.S.C. § 2255. Now pending is Dorsett’s motion for relief pursuant to Federal Rule of Civil Procedure 60, in which he alleges that the 2012 probable cause affidavit supporting the search warrant for his residence contained false information. He suggests that the Government withheld this evidence at the time of trial and that his guilty plea was therefore not voluntary. For the reasons set forth herein and for those contained in the Opinion denying the § 2255 motion, *see* ECF No. 111, Dorsett’s motion for relief is dismissed because, *inter alia*, the motion presents a successive collateral attack for which Dorsett did not have the permission of the Court of Appeals to file and Dorsett waived the right to attack his conviction through a motion for relief under Rule 60.

I. BACKGROUND

On August 8, 2012, an Indictment was filed against Dorsett charging him with two counts of distribution of cocaine base (“crack”) in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); with

possession with intent to distribute more than 28 grams of cocaine base (“crack”) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B); with possession with intent to distribute more than 28 grams of cocaine base (“crack”) within 1,000 feet of a school in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 860; with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); and with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

On December 3, 2012, Dorsett entered a guilty plea to all charges except possession with intent to distribute more than 28 grams of cocaine base (“crack”) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B).¹ A provision in the written Guilty Plea Agreement contained a waiver of Dorsett’s right to collaterally attack his conviction and sentence. *See* Guilty Plea Agreement ¶ 10 (“GPA”), ECF No. 39. Dorsett was sentenced to a term of imprisonment on July 1, 2014. *See* Judgment, ECF No. 68.

On March 3, 2015, Dorsett filed a Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, alleging, *inter alia*, that trial counsel was ineffective for failing to litigate Fourth Amendment claims.² Habeas Mot., ECF No. 71. In supplemental filings, Dorsett also alleged that the Government withheld *Brady*³ material (a police report regarding two uncharged⁴ drug

¹ This count was subsequently dismissed upon motion of the Government.

² Dorsett alleged that trial counsel failed to adequately investigate the “nexus” within the search warrant establishing probable cause to search his residence at 321 Pear Street, and that the affidavit was stale.

³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

⁴ The Report describes two dates that Dorsett allegedly sold crack cocaine to a confidential source (“CS”), which were mentioned in the probable cause affidavit supporting a search warrant for his residence. However, Dorsett was charged and convicted with selling drugs to an undercover police officer on two separate dates and with the drugs found during a search of his residence. *Cf.* Warrant, *with* Indictment, ECF No. 1 and Plea N.T. 93:16 – 97:20.

transactions) until two weeks before sentencing. Mot. Amend 4-5, 7-8, ECF No. 84; Ex. to Resp. Mot. Dismiss. ECF No. 87.

On March 29, 2018, this Court⁵ denied and dismissed the § 2255 motion. This Court denied Dorsett's ineffective assistance of counsel claims for lack of merit, and dismissed all other claims because Dorsett knowingly and voluntarily waived his right to collaterally attack his conviction and sentence. In deciding that enforcing the collateral-review waiver would not work a miscarriage of justice, this Court stated:

. . . this Court finds that Dorsett's claims that the affidavit was stale and that counsel was ineffective for failing to adequately investigate the "nexus" within the search warrant establishing probable cause to search 321 Pear Street are baseless. Initially, this Court finds that trial counsel filed a Motion to Suppress the search warrant. *See* ECF No. 15. This negates Dorsett's claim that counsel was ineffective for failing to investigate or challenge this evidence. Further, when Dorsett entered his guilty plea, the trial court advised him that "By pleading guilty you, in effect, would be withdrawing any pre-trial motions or requests to suppress any statements you may have made or to suppress the results of any search and seizure of your property by law enforcement officials." Plea N.T. 78:16-20. When the trial court asked: "Do you understand this?" Dorsett responded "Yes." Plea N.T. 78:21-22. Accordingly, it was Dorsett's actions, not counsel's alleged ineffectiveness, that waived the suppression arguments.

Moreover, this Court finds that because the search warrant (to search 321 Pear Street, Reading, Pennsylvania and the body of Dorsett) was supported by probable cause and was not stale,⁶ Dorsett was not prejudiced by counsel's actions or inactions. *See Osarhieme Obayagbona v. United States*, No. 15-388, 2016 U.S. Dist. LEXIS 127924, at *8 (D.N.J. Sep. 19, 2016) (holding that because counsel's attempts to suppress would have proven fruitless, the petitioner had not demonstrated prejudice to support his ineffective assistance claim). The affiant signed the probable cause affidavit on February 1, 2012, and the warrant was issued the same day. The warrant was executed in the morning of February 3, 2012, within the deadline provided in the warrant. The affidavit of probable cause describes two occasions during which a confidential source ("CS") met with Dorsett inside 321 Pear Street and, at the direction of the Reading Police, purchased quantities of crack cocaine in exchange for United States currency. One of these drug transactions occurred on November 9, 2011, and the other

⁵ On October 11, 2017, this case was reassigned to the Undersigned.

⁶ This Court has independently reviewed the search warrant and affidavit of probable cause. *See* Warrant, ECF Nos. 26-1 and 87.

within forty-eight hours prior to February 1, 2012.⁷ The CS informed police that Dorsett was known to carry firearms and that he/she was recently told that Dorsett was in possession of two handguns. The affidavit of probable stated that the CS was reliable and that his/her information had led to the arrests and the conviction of other individuals. Reading Police determined that Dorsett had a criminal history that included convictions for felony drug and firearms charges, and that Dorsett's driver's license issued on October 1, 2011, and police reports as of January 29, 2012, listed Dorsett's home address as 321 Pear Street. Upon review of the affidavit, this Court finds that it established timely probable cause to search the residence at 321 Pear Street and the body of Dorsett.⁸ *See United States v. Parker*, No. 3:13-07, 2014 U.S. Dist. LEXIS 78591, at *9 (W.D. Pa. June 10, 2014) (concluding that the affidavit, which described two drug transactions inside the place to be searched, the last of which occurred on the day before the search warrant was issued, "unquestionably provide[d] a substantial basis for finding probable cause to search"). Consequently, counsel cannot be deemed ineffective for failing to pursue suppression. *See United States v. Rashid*, No. 08-493, 2017 U.S. Dist. LEXIS 95316, at *5-6 (E.D. Pa. June 20, 2017) (concluding that because the suppression claim lacked merit, counsel was not ineffective for failing to investigate the issue). The ineffectiveness claim in this regard lacks merit and provides no basis not to enforce the collateral review waiver.

Opinion 13-14, ECF No. 111. Dorsett appealed the March 29, 2018 Order, and the matter is pending before the Third Circuit Court of Appeals. *See* ECF Nos. 115-116.

On August 10, 2018, Dorsett filed a motion for relief pursuant to Federal Rule of Civil Procedure 60(b)(3) and 60(d)(3) asserting that the 2012 probable cause affidavit supporting the search warrant for his residence contained false information. Mot., ECF No. 117. He suggests that the Government withheld this evidence until after his guilty plea and perpetrated fraud on

⁷ Dorsett complains that the Reading Police Report regarding these transactions was not provided to him until shortly before his sentencing hearing. However, the information in the report and affidavit are substantially the same. Regardless, because a probable cause determination is limited to review of the "facts contained in an affidavit" (also known as the "four corners" of the affidavit and warrant), the report would have had no impact on a motion to suppress. *See United States v. Conley*, 4 F.3d 1200, 1204 (3d Cir. 1993).

⁸ In addition to the information described above, the affidavit of probable cause also includes a declaration by the affiant describing common conduct by drug traffickers that supports each of the items to be searched for listed in Appendix A. *See* Warrant USA00104- USA00105, USA00108.

the court, rendering his guilty plea involuntary. Dorsett asks this Court to set aside his guilty plea.

II. STANDARDS OF REVIEW

A. Motions under Rule 60 of the Federal Rules of Civil Procedure

“Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.” *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b) of the Federal Rules of Civil Procedure provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). “A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” Fed. R. Civ. P. 60(c). “To prevail on a Rule 60(b)(3) motion, the moving party must establish, by clear and convincing evidence, that the adverse party engaged in fraud or other misconduct, and that this misconduct prevented the moving party from fully and fairly presenting her case.” *Doughoh v. Cisco Sys.*, 726 F. App’x 914, 915-16 (3d Cir. 2018) (internal citations omitted).

Rule 60(d)(3) allows a court to “set aside a judgment for fraud on the court.” The fraud “must be intentional, directed at the court, and committed by an officer of the court.”

Florimonte v. Borough of Dalton, No. 18-1490, 2018 U.S. App. LEXIS 24017, at *3 (3d Cir. 2018). “A finding of fraud on the court requires ‘egregious conduct’ and must be supported by ‘clear, unequivocal, and convincing evidence.’ [] The fraud must deceive the court.” *Id.* (quoting *In re Bressman*, 874 F.3d 142, 150 (3d Cir. 2017)).

B. Motions under 28 U.S.C. § 2255

Motions filed under 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution or laws of the United States or are otherwise subject to collateral attack. *Davis v. United States*, 417 U.S. 333, 343 (1974); *O’Kereke v. United States*, 307 F.3d 117, 122-23 (3d Cir. 2002). But, a “second or successive motion must [first] be certified as provided in section 2244 [28 U.S.C. § 2244] by a panel of the appropriate court of appeals....” 28 U.S.C. § 2255(h); 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”). Where a petitioner fails to obtain prior authorization from the court of appeals, the district court lacks jurisdiction. *See Pelullo v. United States*, 487 Fed. App’x 1, 2 n.2 (3d Cir. 2012); *United States v. Rodriguez*, 327 Fed. App’x 327, 329 (3d Cir. 2009) (holding that the “district courts lack jurisdiction over second or successive § 2255 motions without proper authorization from a panel of the court of appeals”). “When a second or successive habeas petition is erroneously filed in a district court without the permission of a court of appeals, the district court’s only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631.” *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002), *cert. denied* 540 U.S. 826 (2003).

III. ANALYSIS

A. **The Rule 60 motion for relief may be dismissed as a successive habeas petition.**

“When a motion is filed in a habeas case under a Rule 60(b) or 60(d) label, the district court must initially determine whether the motion is actually a ‘second or successive’ habeas petition within the meaning of § 2244(b).” *Davenport v. Brooks*, No. 06-5070, 2014 U.S. Dist. LEXIS 51047, at *10-11 (E.D. Pa. Apr. 14, 2014).

Although Dorsett asserts that there was “fraud on the court” necessitating relief under Rule 60, the alleged fraud to which he refers was committed, if at all, on the Pennsylvania Magisterial District Judge who issued the search warrant on February 1, 2012. Dorsett does not allege that any fraud was committed on the habeas court. In fact, this Court considered Dorsett’s allegations of fraud when deciding his § 2255 motion. Accordingly, the motion for relief seeks to challenge the underlying criminal proceeding and not this Court’s decision denying habeas relief. As such, the motion presents a collateral attack. *See United States v. Cone*, 525 F. App’x 823, 825 (10th Cir. 2013) (concluding that the defendant’s claim that an officer committed fraud on the state court when he secured the search warrant was a collateral attack on his conviction regardless of having captioned his motion as one for fraud on the court under Rule 60(d)(3)); *Cox v. Horn*, No. 00-5188, 2018 U.S. Dist. LEXIS 146004, at *23 (E.D. Pa. Aug. 28, 2018) (dismissing the Rule 60(b) motion as a successive § 2255 motion because the defendant, who was alleging flaws in the trial evidence, was seeking to challenge the underlying criminal proceedings and not the decision denying habeas relief); *United States v. Murin*, No. 09-279, 2017 U.S. Dist. LEXIS 211897, at *5-8 (W.D. Pa. Dec. 27, 2017) (holding that a motion under Federal Rule of Civil Procedure 60(b) is not an appropriate vehicle for a defendant to challenge his sentence because the Federal Rules of Civil Procedure do not apply in criminal cases, and

while Rule 60 can apply when used to challenge a previous habeas determination, a collateral attack on the defendant's sentence or conviction is treated as one under § 2255).

To the extent that Dorsett's ineffective assistance of counsel claims in the motion to vacate were denied on the merits, *see* Opn. 11-13, the motion to vacate was a first petition for second or successive purposes. The instant motion for relief is therefore a successive motion under § 2255. *See Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1284-85 (11th Cir. 2004) (holding that a motion under Rule 60(b) asserting an alleged fraud on the state court "is a classic successive petition claim subject to the § 2244(b)(2) restrictions"). However, Dorsett did not have permission from the Court of Appeals before filing the instant motion. Accordingly, this Court does not have jurisdiction to entertain the motion and must either dismiss the motion or transfer it to the Third Circuit Court of Appeals for consideration as a request for leave to file a successive motion. *See Robinson*, 313 F.3d at 139. For the reasons discussed herein,⁹ this Court finds that it is in the "interest of justice" to dismiss the Rule 60 motion for relief.

B. Dorsett waived the right to file the instant Rule 60 motion for relief.

Even if the Rule 60 motion for relief is not construed as a second or successive § 2255 petition, the motion is nevertheless subject to dismissal based on the collateral-attack waiver in Dorsett's Guilty Plea Agreement. *See United States v. Morgan*, No. 12-23, 2018 U.S. Dist. LEXIS 126426, at *16 (E.D. Pa. July 27, 2018) (denying the defendant's Rule 60(b) motion because even if it was not a second or successive § 2255 motion, the defendant was not entitled

⁹ As explained in subsection B, Dorsett waived the right to file a Rule 60 motion challenging his conviction. Moreover, the motion is without merit. *See Reardon v. Leason*, 465 F. App'x 208, 210 (3d Cir. 2012) (holding that a defendant may not rely on Rule 60(d)(3), to allege fraud upon the state court in the underlying criminal proceeding). Contrary to Dorsett's suggestion, there is no evidence of fraud, nor any contradiction in the police reports and the probable cause affidavit. He has therefore fails to provide clear and convincing evidence of fraud.

to relief because the claims he was raising were not covered exceptions in the appellate waiver provision). Notably, not all of Dorsett's habeas claims were decided on the merits. Most of the claims were dismissed because Dorsett knowingly and voluntarily waived his right to collaterally attack his conviction or sentence. For this reason, the motion to vacate is not considered a "first" petition for second or successive purposes, and the instant motion for relief is not a successive § 2255 motion. *See United States v. Eziolisa*, No. 3:10-cr-39, 2013 U.S. Dist. LEXIS 126132, at *10 (S.D. Ohio Sep. 4, 2013) (concluding that where the merits of the defendant's habeas claims were not reviewed because the defendant waived his right to file a collateral attack in his guilty plea agreement, the subsequent motion under Rule 60(b) was not a successive § 2255 motion). If the Rule 60 motion for relief is not a successive motion under § 2255, this Court has jurisdiction to consider the merits of the motion.

Nevertheless, for the reasons set forth in the Opinion dated March 29, 2018, holding that Dorsett waived the right to collaterally attack his conviction and sentence, Dorsett also waived his right to file the instant motion for relief under Rule 60. *See* Opn. 7-10. The waiver provision in Dorsett's Guilty Plea Agreement provided:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 29 U.S.C. § 2255, or any other provision of law.

GPA ¶ 10 (emphasis added). As previously determined, this waiver was knowing and voluntary. *See* Opn. 7-10. Dorsett does not present any new allegations to change this conclusion. Rather, the Rule 60 motion for relief is based on essentially the same evidence and arguments considered by this Court upon review of the § 2255 motion. *See, e.g.* Opn. 14 n.13 (rejecting Dorsett's complaints that the Reading Police Report regarding the drug transactions was not provided to

him until shortly before his sentencing hearing because (1) the information in the report and the probable cause affidavit, which Dorsett had well in advance of his guilty plea, were substantially the same, and (2) a probable cause determination is limited to review of the four corners of the affidavit and warrant, and therefore would not be impacted by the police report); Opn. 18 and n.19 (concluding that Dorsett's *Brady* claim was based on a police report regarding two uncharged drug transactions, but that the evidence was not "material either to guilt or to punishment" as required by *Brady*).

Further, nothing in the instant Rule 60 motion for relief alters this Court's conclusion that the waiver provision is enforceable. *See* Opn. 11-18. For the reasons stated in the March 29, 2018 Opinion, this Court holds that enforcing the collateral review waiver will not work a miscarriage of justice. *See id.* Consequently, Dorsett waived the right to file the instant motion for relief under Rule 60 by clearly waiving his right to file any collateral attack, whether under § 2255 or some "other provision of law." *See United States v. Dilone*, No. 3:12-CR-170, 2017 U.S. Dist. LEXIS 189141, at *21 n.3 (M.D. Pa. Nov. 15, 2017) (holding that the defendant, as part of his plea agreement, waived the right to bring the Rule 60(b) motion, which "contained substantively the same argument as his § 2255"); *United States v. Mortimer*, No. 05-186, 2007 U.S. Dist. LEXIS 24734, at *4 (W.D. Pa. Apr. 3, 2007) (holding that it was irrelevant whether the court construed the motion under Rule 60(b) or § 2255 because the defendant "clearly and unambiguously waived his right to file any collateral proceeding attacking his conviction or sentence"). This also warrants dismissal of the Rule 60 motion for relief.

IV. CONCLUSION

Depending on whether the Opinion dated March 29, 2018, denying and dismissing Dorsett's § 2255 motion is considered a "first" motion for second or successive purposes, this

Court may be without jurisdiction to decide the instant motion for relief. Regardless, the motion for relief is also subject to dismissal because Dorsett waived his right to file a motion under Rule 60 collaterally attacking his conviction. The Rule 60 motion for relief is a collateral attack because it alleges fraud on the state court, not during the federal habeas proceedings. This alleged fraud was considered and rejected by this Court when reviewing the § 2255 motion to vacate. Enforcing the waiver therefore does not work a miscarriage of justice. Dorsett has not offered any new evidence or argument that would alter this Court's previous conclusions. For all these reasons, the Rule 60 motion for relief is dismissed.

A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge