

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN 8 1999

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MURRAY FRANCIS HARDESTY,

Defendant-Appellant.

No. 98-3045
(D.C. No. 96-CV-3510-JWL)
(D. Kan.)

ORDER AND JUDGMENT *

Before **TACHA** , **BARRETT** , and **MURPHY** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Defendant Murray Francis Hardesty appeals from the denial of his motion pursuant to 28 U.S.C. § 2255 filed pro se in the district court. Defendant is counseled on appeal. Because a certificate of appealability (COA) has not been granted, we construe defendant's notice of appeal as an application for a COA. The court will issue a COA when the applicant makes a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Defendant asserts that the district court erred by not holding an evidentiary hearing before deciding his § 2255 motion, and by relying in part on the affidavit of his former counsel (that was submitted by the government with its response to his motion) to conclude that his claims of ineffective assistance of counsel had no merit.

Defendant has a right to an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255. We review the district court's denial of a § 2255 motion without an evidentiary hearing for abuse of discretion. See United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992). Rule 7(b) of the Rules Governing Section 2255 Proceedings makes clear that affidavits may be added to the district court record. Defendant has not shown that the district court improperly decided his § 2255 motion, and has not established that it abused its discretion by denying him an evidentiary hearing.

Defendant's request for oral argument is denied. A certificate of appealability is denied and the appeal is DISMISSED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge