United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3064 **September Term, 2018**

FILED ON: MARCH 25, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

FRASER VERRUSIO,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cr-00064-1)

Before: SRINIVASAN and WILKINS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. *See* FED. R. APP. P. 36(a)(2); D.C. CIR. R. 34(j). We have afforded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the decisions of the District Court be **AFFIRMED**.

On February 10, 2011, a jury convicted Appellant Fraser Verrusio of receiving an illegal gratuity, conspiring to receive an illegal gratuity, and making a false statement. The charges stemmed from his acceptance of gifts from lobbyists associated with Jack Abramoff. *See generally United States v. Verrusio* (*Verrusio I*), 762 F.3d 1 (D.C. Cir. 2014). For his crimes, Verrusio was sentenced to one day in prison and two years' supervised release. *United States v. Verrusio* (*Verrusio II*), No. 1:09-cr-64 (BAH), 2017 WL 1437055, at *1 (D.D.C. Apr. 21, 2017). After completing his sentence, Verrusio filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and a petition for a writ of error *coram nobis* under 28 U.S.C. § 1651. The District Court rejected both applications, as well as Verrusio's motion for reconsideration of the *coram nobis* decision. *See United States v. Verrusio* (*Verrusio III*), No. 1:09-cr-64 (BAH), 2017 WL 2634638, at *3-9 (D.D.C. June 19, 2017); *Verrusio II*, 2017 WL 1437055, at *7-11. Verrusio seeks review of the District Court's decisions. We affirm.

The District Court first found that Verrusio failed to demonstrate "custody" under § 2255. We agree. Pursuant to the statute, a "prisoner in custody under sentence of" a federal court may challenge convictions and sentences that are, among other things, "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. The term "custody" has the same meaning as that in 28 U.S.C. § 2241, the statute generally authorizing writs of *habeas corpus*. The Supreme Court considers the status of a *habeas* petitioner's custody only "at the time his [§ 2241] petition is filed," *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (per curiam), and we do the same when resolving a § 2255 motion. Having already served his sentence, Verrusio was required to demonstrate a sufficiently "immediate" and "severe restraint[] on individual liberty." *Hensley v. Mun. Ct.*, 411 U.S. 345, 351 (1973). In this appeal, Verrusio points to collateral consequences imposed because of his convictions: restrictions on his voting, gun, and travel privileges. Appellant's Br. 37-38. For petitioners released from a prison or detention facility, the Supreme Court has found custody only when they demonstrated a significant impingement on their freedom of movement. *See Justices of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 300-02 (1984); *Hensley*, 411 U.S. at 351-52; *Jones v. Cunningham*, 371 U.S. 236, 238-39 (1963); *see also Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998) (noting that a "substantial disincentive to movement might be so severe as to create 'custody'"). Whether or not any collateral consequences may satisfy the custody requirement, Verrusio's cursory discussion of the voting, gun, and travel restrictions at issue does not suffice to establish that he remains a "prisoner in custody under sentence of" a federal court. 28 U.S.C. § 2255; *see also* Appellant's Br. 37-38.

We turn to the *coram nobis* appeal. Because the District Court granted a certificate of appealability below, we need not decide whether we would have jurisdiction to decide the *coram nobis* appeal in the absence of the certificate. The District Court dismissed the *coram nobis* petition for lack of Article III standing. *See Verrusio III*, 2017 WL 2634638, at *3-9; *Verrusio II*, 2017 WL 1437055, at *9-11. We decline to disturb the ruling.

Verrusio's petition heavily relies on *McDonnell v. United States*, 136 S. Ct. 2355 (2016). In his initial brief before the District Court, Verrusio sought vacatur of his convictions because the indictment and trial evidence were "based on an interpretation" of federal law that the Supreme Court rendered invalid in *McDonnell*. Motion to Vacate, Set Aside and Correct Sentence Pursuant to 28 U.S.C. § 2255, or in the Alternative, Petition for a Writ of Error *Coram Nobis* at 28-29, *United States v. Verrusio*, No. 1:09-cr-64 (BAH) (D.D.C. filed June 29, 2016), ECF No. 162. In his reply brief, he also sought *coram nobis* relief because testimony of a key defense witness whose subpoena had been quashed became "material after *McDonnell*." Reply in Support of Motion to Vacate, Set Aside and Correct Sentence Pursuant to 28 U.S.C. § 2255, or in the Alternative, Petition for a Writ of Error *Coram Nobis* at 12-13, *United States v. Verrusio*, No. 1:09-cr-64 (BAH) (D.D.C. filed Aug. 26, 2016), ECF No. 166. The District Court initially denied the petition because it lacked "jurisdiction." *Verrusio II*, 2017 WL 1437055, at *6; *see also id.* at *11 ("[T]he defendant lacks standing to pursue his petition for *coram nobis* and this Court lacks subject-matter jurisdiction."). Assuming that Verrusio's collateral consequences constituted Article III injury, the District Court found that it could not redress them by granting the petition. *Id.* at *9-10. As the District Court viewed the briefing, Verrusio's *McDonnell* arguments could at most result in

vacatur of the two counts related to illegal gratuities, and the collateral consequences would persist because of the untouched false-statement conviction. *Id.* at *10.

Verrusio sought reconsideration of the *coram nobis* decision. According to him, the District Court failed to consider that, if it were to vacate the convictions as to the illegal-gratuity charges, the "prejudicial spillover from evidence introduced in support" of those two would require vacatur of the third count. Motion for Reconsideration of Petition for a Writ of Error *Coram Nobis* at 10-12, *United States v. Verrusio*, No. 1:09-cr-64 (BAH) (D.D.C. filed May 19, 2017), ECF No. 180. In denying the reconsideration motion, the District Court reaffirmed that it was deciding the petition on jurisdictional grounds. *See Verrusio III*, 2017 WL 2634638, at *4-5. The District Court rejected Verrusio's prejudicial spillover argument. Relevant here, the District Court concluded that jury instructions minimized any prejudice and that the trial evidence would have been relevant to the false-statement count even if the government had not pursued the illegal-gratuity charges. *Id.* at *6-9. In other words, because his prejudicial spillover argument would not win on the merits, Verrusio still failed to demonstrate redressability.

In urging on appeal that the District Court has "subject matter jurisdiction," Verrusio submits that his prejudicial spillover argument would win on the merits, thus "requir[ing] the vacatur" of the third count. Appellant's Br. 38. Because his appeal focuses on only prejudicial spillover, he forfeits all other jurisdictional arguments. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 n.5 (D.C. Cir. 2017); *Huron v. Cobert*, 809 F.3d 1274, 1280 & n.4 (D.C. Cir. 2016) (collecting cases). We reject Verrusio's contention. One precedent stands in his way. *See Moon v. United States*, 272 F.2d 530, 532 (D.C. Cir. 1959) (rejecting prejudicial spillover argument on *coram nobis* review because it is "clearly insufficient" as a ground for relief). *Moon* notwithstanding, Verrusio's prejudicial spillover claim would fail substantially for the reasons stated by the District Court. *See Verrusio III*, 2017 WL 2734638, at *7-9. The allegedly prejudicial trial evidence would have been either relevant to the false-statement count or insufficiently inflammatory. Statements made by Verrusio to law enforcement made the government's case particularly strong. And like the one given here, an instruction telling the jury separately to consider the evidence for each count helps to minimize the spillover effect. *See, e.g.*, *United States v. Tarantino*, 846 F.2d 1384, 1398 (D.C. Cir. 1988) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk