

April 14, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

BILLY DEWAYNE DAVIS,

Petitioner-Appellant,

v.

JUSTIN JONES,

Respondent-Appellee.

No. 07-6285
(D.C. No. CIV-07-424-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **O'BRIEN**, **EBEL**, and **GORSUCH**, Circuit Judges.

Petitioner-Appellant Billy DeWayne Davis requests a certificate of appealability ("COA"), see 28 U.S.C. § 2253(c), that would enable him to appeal the district court's decision denying him habeas relief, see 28 U.S.C. § 2254, from his Oklahoma conviction for possession of a controlled dangerous substance. Davis has also filed a motion to proceed in forma pauperis (IFP) on appeal.

In his habeas petition, Davis raises several issues with respect to his conviction: (1) whether the evidence was insufficient to support his conviction;

* This order is not binding precedent except under the doctrines of law of the case, *res judicata* and *collateral estoppel*. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

(2) whether the prosecutor improperly commented on Davis' right to remain silent; (3) whether the trial court improperly responded to a jury inquiry; and (4) whether his sentence is excessive.

Davis will be entitled to a COA if he can make "a substantial showing of the denial of a constitutional right." 28. U.S.C. § 2253(c)(2). He can make such a showing by establishing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quotations omitted). For substantially the reasons set forth in the magistrate judge's report and recommendation, adopted by the district court, we conclude that Davis has failed to make an adequate showing in this case. We, therefore, DENY Davis' motion for a COA and DISMISS this appeal. Davis' motion to proceed IFP is granted, and we remind him of his obligation to continue making partial payments until his appellate filing fee is paid in full.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge