

September 23, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Elisabeth A. Shumaker
Clerk of Court

LAWRENCE TOLBERT,

Petitioner–Appellant,

v.

ROBERT ULIBARRI, Warden;
ATTORNEY GENERAL FOR THE
STATE OF NEW MEXICO,

Respondents–Appellees.

No. 08-2040
(D.C. No. 1:06-CV-01022-JCH-LAM)
(D.N.M.)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Before **LUCERO, TYMKOVICH, and HOLMES**, Circuit Judges.

Lawrence Tolbert, a New Mexico state prisoner proceeding pro se, seeks a certificate of appealability (“COA”) to appeal the district court’s denial of his 28 U.S.C. § 2254 habeas petition. Because Tolbert waived his right to appeal by failing to object to the magistrate judge’s report and recommendation, we DENY a COA and DISMISS.

Tolbert was convicted by a jury on three counts of criminal sexual penetration in the first degree, one count of kidnapping in the first degree, one count of aggravated burglary in the second degree, and one count of aggravated

battery in the third degree. He was sentenced to a total of 132 years' imprisonment. After the New Mexico state courts rejected his direct and collateral appeals, Tolbert filed a pro se petition for federal habeas relief on October 20, 2006. Liberally construed, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), his petition claimed ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and a resulting denial of due process. He also requested an evidentiary hearing.

The district court referred the petition to a magistrate judge, who issued Proposed Findings and Recommend Disposition (the "report") that recommended dismissal on the merits. The report included a footnote on the first page which advised, in bold-faced type:

Within ten (10) days after a party is served with a copy of these Proposed Findings and Recommended Disposition, that party may . . . file written objections to such proposed findings and recommended disposition. A party must file any objections . . . within the ten (10) day period allowed if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.

Tolbert did not file objections. Based on Tolbert's failure to file objections to the report, the district court adopted the magistrate's recommendation in full and dismissed the petition without an evidentiary hearing. The district court subsequently denied Tolbert a COA.

Tolbert now seeks a COA from this court to appeal the district court's judgment.¹ In his application for a COA, he raises, in general terms, the same claims presented to the district court and again requests an evidentiary hearing.

We adhere to a "firm waiver rule" that precludes both legal and factual review of issues addressed in a magistrate judge's report and recommendation to which a party has failed to raise timely objections. Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991). This rule applies to pro se applicants only when the magistrate judge has provided clear notice that a failure to timely object will waive that party's rights on appeal. Id. In the report, the magistrate judge unambiguously advised Tolbert that "no appellate review [would] be allowed" unless he filed timely objections. Given that Tolbert failed to file any objections to the report, he has waived his right to appeal the district court's adoption of the magistrate's recommendation.

Because the waiver rule is procedural rather than jurisdictional, we may decline to apply the rule in cases "where the interests of justice so dictate." Moore, 950 F.2d at 659. On February 19, 2008, this court ordered both parties to

¹ Because the district court denied Tolbert a COA, he may not appeal the district court's decision absent a grant of COA by this court. 28 U.S.C. § 2253(c)(1)(A). A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). This requires Tolbert to show "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, 484 (2000) (quotations omitted).

address whether the firm waiver rule barred appellate review in this case.

Tolbert's response to this order does not explain why we should excuse the lack of timely objections to the magistrate's report, and we find no basis in the record to apply the interests of justice exception.

We also review the district court's decision for plain error even in the absence of objections. See Morales-Fernandez v. INS, 418 F.3d 1116, 1122 (10th Cir. 2005). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Id. at 122-23 (quotations omitted). Having carefully reviewed Tolbert's pleadings, the record on appeal, and the magistrate judge's report, we conclude that the district court did not commit plain error when it determined that the state court adjudication did not "result[] in a decision that was contrary to, or involve[] an unreasonable application of, clearly established federal law" or "result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Tolbert also requested an evidentiary hearing, but did not object to the magistrate's decision to make a recommendation without a hearing. As with his substantive claims, we therefore review only for plain error. Because an evidentiary hearing is not required if the district court can resolve the petition on the existing record, see Gonzales v. Tafoya, 515 F.3d 1097, 1121 (10th Cir.

2008), and Tolbert's claims could be so resolved, the court did not commit plain error by opting not to hold a hearing.

For the reasons set forth above, Tolbert's request for a COA is **DENIED** and his appeal is **DISMISSED**.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge