

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 17, 2021

Christopher M. Wolpert
Clerk of Court

JOSHUA DAVID GESS,

Petitioner - Appellant,

v.

CHURNET; WINSTEAD, AUSA;
10TH CIRCUIT DISTRICT COURT;
USMS,

Respondents - Appellees.

No. 21-1141
(D.C. No. 1:20-CV-03431-LTB)
(D. Colo.)

ORDER

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

This matter involves the basic obligation of an appellant to say how the district court erred. *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015).¹ The district court ordered dismissal without prejudice for failure to prosecute, and the petitioner requested reconsideration. When this request was denied, the petitioner said that he wanted to appeal. To appeal, though, he needs a certificate of

¹ Though the petitioner is pro se, he bears the same obligation. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840–41 (10th Cir. 2005) (stating that even unrepresented litigants must present an argument with citation of the record and supporting legal authority).

appealability. 28 U.S.C. § 2253(c)(1)(B). We decline to issue a certificate of appealability and dismiss the matter.

I. Failure to Cure Defects in the Motion for Leave to Proceed in Forma Pauperis

Every appellant must prepay the district court's filing fee or obtain leave to proceed in forma pauperis. *See Greene v. Access Servs., Inc.*, 808 F. App'x 685, 687 (10th Cir. 2020) (unpublished). Here the filing fee was \$5. 28 U.S.C. § 1914(a). Rather than prepay the \$5, the petitioner moved for leave to proceed in forma pauperis.

For this motion, the district court's local rules required the use of a particular form. D.C.COLO.LCivR 5.1(c). The form required prisoners to attach their account statements. *See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, PRISONER'S MOTION AND AFFIDAVIT FOR LEAVE TO PROCEED PURSUANT TO 28 U.S.C. § 1915 IN A HABEAS CORPUS ACTION* (Apr. 15, 2002), available at http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/Motion_Pursuant_to_1915-Waive_Fee-Habeas_Corpus.pdf (last visited Aug. 26, 2021).

The petitioner used another form, which stated that he'd attached a copy of his account statement. But no such statement was attached. The court thus ordered the petitioner to file the request on a court-approved form and submit a prison account statement with his current balance.

Despite this order, the petitioner didn't use the court-approved form or submit the prison account statement.² So the district court again ordered the petitioner to cure these defects within 30 days, warning that failure to timely comply would result in dismissal without prejudice.

The petitioner tried to comply, submitting a new motion for leave to proceed in forma pauperis. But the new motion contained the same defects: It was not on the correct form, and the petitioner did not include a prison account statement.³

The petitioner said that he couldn't obtain the account statement. So the court directed him to submit copies of his request to prison authorities and their refusal to provide the form. In addition, the court reminded the petitioner to submit the motion on the court-approved form, stating that (1) he had 30 days to comply and (2) a failure to timely comply would lead to dismissal without prejudice.

The petitioner did not timely comply, and the district court ordered dismissal without prejudice for failure to prosecute the action. When the

² The form stated that he had no assets. Within five days of filing the motion, he received \$100 in his prison account.

³ The form stated that (1) the filing fee was \$350 and (2) an account statement was attached. Because the petitioner used the wrong form, he incorrectly stated the filing fee. The district court had twice informed the petitioner that the filing fee was only \$5.

action was dismissed, the petitioner had \$99.44 in his prison account⁴—more than enough to pay the \$5 filing fee.

The petitioner wants a certificate of appealability to allow an appeal of this dismissal. We can grant a certificate only upon the presentation of a reasonably debatable appeal point. *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007). But the petitioner doesn't say what the district court did wrong. So we lack any basis to find a reasonably debatable appeal point. *See Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (stating that we do not address the matter when the appellant's opening brief doesn't challenge the district court's reasoning).

II. Denial of Reconsideration

The petitioner moved for reconsideration, stating that prison authorities had been slow in providing the required account statement. The district court declined reconsideration for two reasons:

⁴ After the action was dismissed, the petitioner submitted the account statement. It showed that

- within ten days of filing the habeas petition, he received \$100 and
- one day before the dismissal, he had \$99.44 in his account.

The filing fee was only \$5. *See* 28 U.S.C. § 1914(a). The record does not suggest any reason that the petitioner couldn't pay the filing fee. And the district court had no way of knowing the petitioner's ability to pay the filing fee because he didn't submit the account statement until the action had already been dismissed.

1. The petitioner didn't act diligently in responding to the prior orders.
2. He pleaded guilty, waiving his claim to violation of the Speedy Trial Act.

The petitioner again fails to say how either rationale is wrong. So we have no basis to find a reasonably debatable appeal point with respect to the order denying reconsideration. *See id.*

* * *

With no reasonably debatable appeal point, we

- decline to issue a certificate of appealability and
- dismiss this matter.⁵

Entered for the Court

Robert E. Bacharach
Circuit Judge

⁵ The petitioner also seeks leave to proceed in forma pauperis during the appeal. The filing fee on appeal is much larger (\$505) than the filing fee in district court (\$5). From his previous account statement, we conclude that the petitioner can't afford to prepay the \$505 filing fee. We thus grant his appellate request to proceed in forma pauperis.