FILED
United States Court of Appeals
Tenth Circuit

September 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK WESLEY BUCHANAN,

Petitioner - Appellant,

v.

STATE OF OKLAHOMA; COUNTY OF OKLAHOMA; OKLAHOMA CITY POLICE DEPARTMENT; OKLAHOMA DEPARTMENT OF CORRECTIONS; OKLAHOMA PARDON AND PAROLE BOARD; OKLAHOMA STATE LEGISLATURE,

Respondents - Appellees.

No. 21-6003
(D.C. No. 5:20-CV-00964-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Applicant Mark Buchanan, a state prisoner proceeding pro se, requests a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the Western District of Oklahoma of his application for relief under 28 U.S.C. § 2254. We deny the request for a COA and dismiss the appeal. We also deny his motion to proceed in forma pauperis (IFP) on appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

On October 13, 2020, Applicant filed in the district court an amended application for a writ of habeas corpus (asserting several claims for relief) and a motion for leave to proceed IFP. The magistrate judge assigned to the case reviewed the IFP motion and determined that Applicant had sufficient funds in his inmate savings account to prepay the filing fee of $5.00. *See* 28 U.S.C. § 1914 ("[O]n application for a writ of habeas corpus the filing fee shall be $5."). The magistrate judge recommended that he be ordered to prepay the filing fee. Applicant objected to the recommendation, but the district court overruled the objection, adopted the magistrate judge's recommendation, and denied the IFP motion on November 16, 2020. The court observed that Applicant had "well over $500" in his inmate account, R., Vol. 1 at 55, and ordered him to pay the filing fee within 21 days, or the court would dismiss the action. Applicant did not pay the fee, so the district court dismissed the action without prejudice and denied a COA. Applicant seeks review in this court, requesting a COA and relief on his habeas claims. Also, he filed a motion in the district court to proceed IFP on appeal, and when the district court denied that motion, he made the same request in a filing with this court.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing 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) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional

claim was either "debatable or wrong." *Id.* If the application was denied on procedural grounds, the applicant faces a double hurdle. Not only must the applicant make a substantial showing of the denial of a constitutional right, but he must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

In support of his IFP motion in district court, Applicant filed a "statement of institutional accounts" showing that he had $580.51 in his prisoner account as of September 7, 2020. R., Vol. 2 at 5 (capitalization omitted). Under Oklahoma law these funds may be used to pay the costs of federal filing fees. *See* Okla. Stat. tit. 57, § 549(A)(5); *Todd v. Att'y Gen. of Okla.*, 377 F. App'x 832, 834 (10th Cir. 2010) (unpublished) ("Under Oklahoma law, . . . funds [in an inmate's account] may be used to pay the costs of federal filing fees." (citing § 549(A)(5))). Thus, Applicant had ample funds available to pay the $5.00 habeas filing fee, and no reasonable jurist could debate the propriety of the district court's denying Applicant's initial IFP motion and dismissing the case without prejudice for failure to pay that fee. *See Cosby v. Meadors*, 351 F.3d 1324, 1327 (10th Cir. 2003) ("If a prisoner has the means to pay, failure to pay the filing fee required by § 1915(b) may result in the dismissal of a prisoner's civil action."); *Lay v. Okla. Dep't of Corr.*, 746 F. App'x 777, 779 (10th Cir. 2018) (unpublished) (affirming district court's denial of IFP status where prisoner's "inmate-savings statement reflected

a $550.67 balance," which "sufficed to prepay the $400 district court filing fee"); *Montana v. Abbott*, 200 F. App'x 828, 830 (10th Cir. 2006) (unpublished) (denying a COA where district court dismissed § 2254 application for applicant's failure to pay $5.00 filing fee).

Applicant's briefs on appeal offer little to support his position on this issue, focusing almost exclusively on the merits of his various claims for habeas relief. Applicant does say that he is "without any funds of any type [i]n his prison draw account," Aplt. Br. at 3, but this claim is belied by the certification of a prison official in his district-court IFP motion that he had over $500 in his inmate account when he filed his § 2254 application. Applicant also alleges that under an earlier court order, "all funds that [he] received were to be taken from him," Aplt. Br. at 14. But, as best we can decipher, what he is complaining about is that when granted IFP status in a civil case a decade ago, he was advised that he is still ultimately responsible for paying the entire filing fee. He has no cause to complain. IFP status does not excuse a plaintiff from paying filing fees; it merely allows him to proceed without *prepaying* them. *See* 28 U.S.C. § 1915(b)(1) ("[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall [still] be required to pay the full amount of a filing fee" in periodic installments.). In any event, Applicant's assertion that "all funds" have been taken from him, Aplt. Br. at 14, is contradicted by the prison-official certification in his district-court IFP motion that he had over $500 in his inmate account.

In addition, Applicant asserts that money has been "wrongfully and deliberately" taken from him, Aplt. Br. at 19, and that prison officials have "misappropriat[ed] . . . his

prison funds account," Aplt. Br. at 8. But even if this is so, there still remains enough money to more than cover a $5 filing fee. The remedy for misappropriation is not to relieve him of the filing-fee requirement.

In short, Applicant offers nothing to rebut the conclusion that reasonable jurists could not dispute the district court's dismissal of his action. *See Montana*, 200 F. App'x at 830 ("With no evidence that Montana paid the filing fee in this case, it is not debatable that the district court correctly denied his [habeas] petition" for failure to pay the fee.).

Finally, Applicant has moved to proceed IFP on appeal. We deny the motion because he has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *McIntosh v. U.S. Parole*, 115 F.3d 809, 812 (10th Cir. 1997).

We **DENY** a COA, **DENY** Applicant's IFP motion, and **DISMISS** the appeal.

Entered for the Court

Harris L Hartz
Circuit Judge