

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 22, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

RICKEY WAYNE TOLBERT, JR.,

Petitioner - Appellant,

v.

D. HUDSON, Warden, USP Leavenworth,

Respondent - Appellee.

No. 21-3102
(D.C. No. 5:21-CV-3054-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

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

Rickey Wayne Tolbert, Jr., a federal prisoner proceeding pro se, appeals the denial by the United States District Court for the District of Kansas of his application under 28 U.S.C. § 2241 for a writ of habeas corpus. Mr. Tolbert, who was incarcerated at USP Leavenworth in Kansas when he filed his application, is serving a 204-month sentence on bank-robbery and firearms charges. His projected release date is April 9, 2027.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

When Mr. Tolbert was sentenced in federal court he was serving a sentence in a Texas prison because his parole had been revoked in a Texas juvenile case. What he seeks in this § 2241 proceeding is credit toward his federal sentence for the time served in the juvenile case after the federal sentence was imposed. (He has now completed service of the sentence in the juvenile case.) He raises two alternative grounds for that relief. First, he claims that his incarceration in the juvenile case was unlawful (for various reasons arising from Texas law), so that time should be credited toward the federal sentence. Second, he contends that the federal Bureau of Prisons (BOP) has failed to comply with a nunc pro tunc order issued by United States District Judge A. Joe Fish of the Northern District of Texas, which, according to Mr. Tolbert, requires that his federal sentence be served concurrently with the sentence in his juvenile case as well as with two adult sentences imposed after the federal sentence was imposed. The BOP has treated his federal sentence as concurrent only with the two Texas adult sentences.

The district court rejected the challenge to his incarceration in the juvenile case on procedural grounds. It pointed out that relief under 28 U.S.C. § 2254 would not be available because an application under § 2254 would be untimely and Mr. Tolbert was not in custody under the expired state-court sentence. And it said that even if the claim was cognizable under § 2241, it was barred under 28 U.S.C. § 2244(a) and the abuse-of-the-writ doctrine because the claim could have been raised in his prior § 2241 application filed in federal court in Louisiana. The district court further held that the BOP's calculation of Mr. Tolbert's sentence was consistent with Judge Fish's order.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm for substantially the reasons stated in the district court's thorough and well-reasoned order.

The judgment of the district court is **AFFIRMED**.

Entered for the Court

Harris L Hartz
Circuit Judge