FILED
United States Court of Appeals
Tenth Circuit

May 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TSVETAN KANEV,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA; OFFICER OLEJNIZACK, officer in charge, Aurora Processing Center; OFFICER SMITH, ICE Denver Field Office, Centennial; OFFICER TORRES, ICE Denver field office, Centennial; TAE JOHNSON, Acting Director of the United States Immigration and Customs Enforcement; ALEJANDRO MAYORKAS, United States Secretary of Homeland Security; MERRICK B. GARLAND, Attorney General of the United States; UNIDENTIFIED ICE OFFICER, Aurora Processing Center,

Respondents - Appellees.

No. 22-1166
(D.C. No. 1:21-CV-03002-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

---

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Tsvetan Kanev appeals a district court order dismissing his habeas application filed under 28 U.S.C. § 2241 without prejudice for failure to cure deficiencies in his pleading and failure to prosecute. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

BACKGROUND

While detained by U.S. Immigration and Customs Enforcement (ICE), Mr. Kanev filed an untitled pleading in the district court on November 8, 2021. A magistrate judge ordered him to cure deficiencies in his pleading within thirty days, specifically by clarifying whether he was seeking habeas relief or challenging the conditions of his confinement. The order directed Mr. Kanev to use the court-approved form and warned that his action would be dismissed without prejudice if he failed to cure the deficiencies within the allotted time. Mr. Kanev filed a § 2241 habeas application on November 22, but he did not use the court-approved form. The magistrate judge issued a second order on December 13, giving Mr. Kanev an additional thirty days to cure the remaining deficiency in his pleading. The order directed the clerk to provide Mr. Kanev with two copies of the court-approved form and again warned that his failure to comply by the new January 12, 2022, deadline would result in dismissal of his action without prejudice.

[1] A certificate of appealability is not required for this court to hear Mr. Kanev's appeal of the dismissal of his § 2241 habeas application. *See Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

Mr. Kanev was deported to his home country of Bulgaria on December 17, 2021. His amended habeas application was filed on January 19, 2022, but not docketed until January 20. Unaware of his January 19 filing, the district court dismissed Mr. Kanev's habeas application without prejudice on January 20 based on his failure to cure deficiencies and his failure to prosecute. Notice of the judgment mailed to Mr. Kanev at the ICE detention facility was returned to the district court as undeliverable. Mr. Kanev did not file a notice of appeal within sixty days after entry of the judgment.

On May 5, 2022, Mr. Kanev filed a notice of appeal and asked the court to reopen the time for filing his notice of appeal. Mr. Kanev stated he was never served with the dismissal order and final judgment and had only recently learned of the dismissal of his action after activating a PACER account. The district court granted Mr. Kanev's motion, deeming his May 5, 2022, notice of appeal to be timely filed. In its order, the court also acknowledged Mr. Kanev had filed an amended habeas application on January 19, the day before it dismissed his action for failure to cure deficiencies and failure to prosecute. But the court noted that filing was untimely.

APPELLATE JURISDICTION

This court has an independent duty to assure we have appellate jurisdiction. *See Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1259 (10th Cir. 2018). "[A] timely notice of appeal in a civil case is jurisdictional." *Alva v. Teen Help*, 469 F.3d 946, 950 (10th Cir. 2006). Because the United States was a party in this action, Mr. Kanev's deadline to file his notice of appeal was March 21, 2022—sixty days

after the district court entered judgment on January 20, 2022. *See* Fed. R. App. P. 4(a)(1)(B)(i); *see also Mayfield v. U.S. Parole Comm'n*, 647 F.2d 1053, 1054 n.1 (10th Cir. 1981) ("The time limits established by Fed. R. App. P. 4(a)(1) apply in habeas corpus proceedings."). Mr. Kanev did not file his notice of appeal until May 20, 2022. But he moved under Federal Rule of Appellate Procedure 4(a)(6) to reopen the time for filing his notice of appeal. *See* R. at 93; *see also Jenkins v. Burtzloff*, 69 F.3d 460, 463 (10th Cir. 1995) (holding a request within a notice of appeal to reopen the time for filing a notice of appeal under Rule 4(a)(6) must be "manifest")

> Rule 4(a)(6) allows the district court to reopen the time to file an appeal if:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6). Rule 4(a)(6) derives from 28 U.S.C. § 2107(c) and is therefore "jurisdictional and not subject to waiver." *United States v. Garduño*, 506 F.3d 1287, 1290 (10th Cir. 2007).

We review a district court's determination under Rule 4(a)(6) for an abuse of discretion. *See Ogden v. San Juan Cnty.*, 32 F.3d 452, 454-55 (10th Cir. 1994). The district court found that Mr. Kanev satisfied all of the conditions in Rule 4(a)(6). It concluded (1) he never received notice of the final judgment under Federal Rule of

Civil Procedure 77(d),[2] (2) he moved to reopen the time to file his appeal on May 20, 2022, within 180 days after entry of the judgment on January 20, and (3) no party would be prejudiced. We see no abuse of discretion in the district court's analysis. Therefore, because Mr. Kanev's notice of appeal was timely under Rule 4(a)(6), we have jurisdiction to consider his appeal.

DISMISSAL OF ACTION WITHOUT PREJUDICE

A district court may dismiss an action for failure to prosecute or comply with a court order. *See* Fed. R. Civ. P. 41(b). We review such a dismissal for an abuse of discretion. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007). Where, as here, the court dismisses the action without prejudice, it need not adhere to "any particular procedures." *Id*. at 1162.

The district court dismissed Mr. Kanev's action for failure to prosecute and because he did not comply with the court's order to submit his § 2241 habeas application on the court-approved form by January 12, 2022. In his appeal brief,

[2] Rule 77(d)(1) requires the clerk, immediately after entry of a judgment, to serve notice on the parties pursuant to Federal Rule of Civil Procedure 5(b). Rule 5(b)(2)(C) allows for service by mail to the party's "last known address." The district court noted that the clerk mailed notice to the ICE detention facility after Mr. Kanev was deported to Bulgaria, but that mailing was returned as undeliverable. *Cf. Ogden*, 32 F.3d at 455 (finding no abuse of discretion in denial of Rule 4(a)(6) motion where dismissal order was mailed and not returned as undeliverable). In addition, no further attempt at service was made after Mr. Kanev provided the district court with his new address in his January 19, 2022, filing. Under Rule 77(d)(1), a party may also serve notice of the entry of judgment. But no party did so in Mr. Kanev's case because the district court dismissed his action before any defendant had appeared.

Mr. Kanev largely focuses on the merits of his § 2241 habeas application rather than the basis for the district court's dismissal. But he does also appear to challenge the court's conclusion that he failed to comply with its order. Mr. Kanev asserts he did so by *sending* his habeas application on the approved form to the court on January 12, 2022. *See* Aplt. Br. at 2; *see also id.* at 7 (asserting "all deficiencies were timely cured"). But "[a] paper not filed electronically is filed by delivering it . . . to the clerk." Fed. R. Civ. P. 5(d)(2). Mr. Kanev's pleading was not delivered to the clerk until January 19, 2022. Moreover, the prison mailbox rule, *see Price v. Philpot*, 420 F.3d 1158, 1163-66 (10th Cir. 2005), did not apply to Mr. Kanev, who was no longer detained at the time he sent his amended pleading to the district court. Consequently, Mr. Kanev fails to demonstrate that the district court abused its discretion in dismissing his action without prejudice.

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge