

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 28, 2023

Christopher M. Wolpert
Clerk of Court

RORY MARKEL FOSTER,

Petitioner - Appellant,

v.

GLORIA GEITHER; JEFF ZMUDA;
IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Respondents - Appellees.

No. 23-3065
(D.C. No. 5:23-CV-03089-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.**

Petitioner-Appellant Rory Markel Foster, proceeding pro se, appeals from the district court’s dismissal of his 28 U.S.C. § 2241 petition. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.¹

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

¹ We remanded this case to the district court to decide whether a certificate of appealability (COA) should issue, and the district court denied a COA. Given a closer look at the nature of Mr. Foster’s petition, however, a COA is unnecessary. See Montez v. McKinna, 208 F.3d 862, 867 n.6 (10th Cir. 2000) (“[A] state prisoner seeking to challenge a detainer filed by a federal agency does not need a COA to

The parties are familiar with the facts. To suffice, Mr. Foster, a Kansas state inmate who is in the custody of the Kansas Department of Corrections (KDOC), filed a § 2241 petition challenging an Immigration and Customs Enforcement (ICE) detainer lodged with the KDOC. R. 3–11. Specifically, he argued his current state custody is in violation of the Interstate Agreement on Detainers Act (codified at Kan. Stat. Ann §§ 22-4401–22-4408), the Immigration and Nationality Act (INA) § 212(a)(6)(C), and 8 U.S.C. §§ 1182 and 1252(i) (sic),² R. 4, 9, because the KDOC is denying him final disposition of his “untried indictment/detainer.” R. 5. As for relief, he asked the court to initiate the final order of removal on his “past due” detainer. Id. 10. The district court ordered Mr. Foster to show cause why his petition should not be dismissed, finding that Mr. Foster was not in custody pursuant to the ICE detainer for purposes of 28 U.S.C. § 2241. Id. 15–21. In addition, the district court explained that to the extent Mr. Foster intended to challenge the conditions of his confinement, such a claim must be raised in a 42 U.S.C. § 1983 suit, not a 28

proceed on appeal.”). This is in line with our decision in Cabrera v. Trammell, 488 F. App’x 294 (10th Cir. 2012) (unpublished), where we considered a state inmate’s appeal of a district court’s dismissal of his § 2241 petition challenging an ICE detainer. See also United States v. Dean, 654 F. App’x 375, 376 n.1 (10th Cir. 2016) (unpublished); Morales v. INS, 26 F. App’x 830, 830 n.1 (10th Cir. 2001) (unpublished). To be clear, Mr. Foster is not complaining that his detention “arises out of process issued by a State court[,]” which would require a COA, Montez, 208 F.3d at 867, but rather challenges a federal agency’s detainer. We will deny the application for a COA as moot.

² We note, as the district court did, that 8 U.S.C. § 1252 does not have a subsection (i).

U.S.C. § 2241 petition. After considering Mr. Foster’s response, the court then dismissed the petition. Id. 69–71.

On appeal, Mr. Foster reiterates his argument that KDOC’s detention violates numerous statutes, constitutional provisions, and treaties. *Aplt. Br.* at 7–9. He urges this court to order his removal from KDOC and placement in ICE custody so a final order of removal can be processed.

To obtain habeas corpus relief under § 2241, a petitioner must demonstrate he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Given he challenges ICE’s detainer under § 2241, he must actually be in federal custody pursuant to the ICE detainer. See Cabrera, 488 F. App’x at 295–96; Garcia-Garcia v. Comfort, 66 F. App’x 155, 157 (10th Cir. 2003) (unpublished). However, we have squarely rejected the notion that a detainer, standing alone, can constitute custody for purposes of § 2241. Galaviz-Medina v. Wooten, 27 F.3d 487, 493 (10th Cir. 1994) (agreeing with the majority of circuits that “the lodging of a detainer, without more, is insufficient to render the alien in custody”). Here, Mr. Foster has merely alleged the lodging of a detainer and there is no evidence he is subject to a final order of removal. Therefore, he is not in custody for purposes of § 2241. The district court properly dismissed the petition.

In addition, the Interstate Agreement on Detainers, which applies only to “detainers based on untried indictments, informations or complaints,” *Kan. Stat. Ann.* § 22-4401, does not apply to ICE civil detainers. See e.g., United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1016 (9th Cir. 1993); Argiz v. U.S. Immigr., 704 F.2d 384,

387 (7th Cir. 1983). Thus, Mr. Foster is not entitled to relief under Kan. Stat. Ann. § 22-4401.

AFFIRMED. We DENY the application for a COA as moot.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge