FILED
United States Court of Appeals
Tenth Circuit

November 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CORNELIUS KENYATTA CRAIG,

Petitioner - Appellant,

v.

B. TRUE, Warden,

Respondent - Appellee.

No. 23-1114
(D.C. No. 1:21-CV-01282-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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

Cornelius Kenyatta Craig, a federal prisoner proceeding pro se[1], appeals the district court's dismissal of his petition under 28 U.S.C. § 2241 as successive and abusive. *See* 28 U.S.C. § 2244(a). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Because Mr. Craig proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

BACKGROUND

Mr. Craig is currently incarcerated at ADMAX United States Penitentiary (USP) in Colorado. Previously, he was incarcerated at USP McCreary in Kentucky. While there, serving a sentence of more than 75 years for his part in a series of coordinated, armed carjackings, the Bureau of Prisons (BOP) charged and ultimately convicted him of stabbing two inmates in a prison altercation and killing one of them. The BOP conviction resulted in a loss of good time credit and a monetary fine.

Mr. Craig brought a § 2241 petition in the Eastern District of Kentucky alleging constitutional infirmity in the procedures the prison afforded to him resulting in the disciplinary conviction. But, after conducting an initial review under 28 U.S.C. § 2243, the Eastern District of Kentucky denied the petition as frivolous. Mr. Craig did not appeal this decision.

Instead, after a transfer to ADMAX USP, Mr. Craig brought another § 2241 application in the District of Colorado challenging the same disciplinary proceeding.[2] A magistrate judge then ordered Mr. Craig to show cause why the court should not dismiss his application under § 2244(a) as successive and/or abusive. On receipt of Mr. Craig's response, the magistrate judge recommended dismissal of the § 2241 application. Mr. Craig filed objections to the magistrate judge's recommendation,

[2] The district court initially dismissed the petition for failure to timely pay the filing fee, *see* R. vol. 1 at 31–32, but a panel of this court reversed and remanded for consideration of Mr. Craig's petition on the merits, *see Craig v. True*, No. 21-1264, 2022 WL 3572433, at *3 (10th Cir. Aug. 19, 2022) (unpublished).

but the district court overruled those objections and dismissed the § 2241 application. This appeal followed.

DISCUSSION

We review the dismissal of a habeas petition as second or successive de novo. *See LaFevers v. Gibson*, 238 F.3d 1263, 1266 (10th Cir. 2001). Mr. Craig raises four issues on appeal.

In his first issue, Mr. Craig argues the district court erred by raising the issue of abuse-of-the-writ sua sponte. A panel of this court addressed this issue in *Stanko v. Davis*, 617 F.3d 1262, 1271 (10th Cir. 2010), holding a district court may raise the issue of abuse-of-the-writ sua sponte so long as the applicant has an opportunity to respond. The record shows the magistrate judge issued an order to show cause, to which Mr. Craig responded, before issuing a recommendation of dismissal. Mr. Craig had another opportunity to address the successiveness issue in his objections to the magistrate judge's recommendation. So, the district court did not err in raising the § 2244 issue sua sponte.

We reject Mr. Craig's second and third issues—in which he asserts the decision of the Eastern District of Kentucky did not operate as an adjudication on the merits of his petition—because it plainly did. *See* Fed. R. Civ. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal . . . operates as an adjudication on the merits."). Mr. Craig's disagreement with that decision does not change its procedural import under Rule 41.

We reject Mr. Craig's fourth issue—that we should not impose a second filing fee for this appeal—because this case is materially different than the unpublished case he cites, *Burns v. Buford*, 448 F. App'x 844, 845 (10th Cir. 2011). There, a panel of this court declined to impose a second filing fee "[i]n view of the complex procedural history of the case and our resolution." *Id.* at 848 n.1. No analogous complexity presents itself here.

CONCLUSION

We affirm the judgment of the district court. We deny Mr. Craig's motion to proceed in forma pauperis for failure to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Carolyn B. McHugh
Circuit Judge