FILED
United States Court of Appeals
Tenth Circuit

September 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICKEY WHITE,

Petitioner - Appellant,

v.

OKLAHOMA DEPARTMENT OF CORRECTIONS; CARL BEAR, Deputy Director,

Respondents - Appellees.

No. 23-6085
(D.C. No. 5:23-CV-00156-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Rickey White, presently in Oklahoma state custody, appears pro se seeking a certificate of appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2241 petition for a writ of habeas corpus.[1] Mr. White also moves to

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Mr. White is proceeding without the assistance of counsel. We therefore "construe his pleadings liberally." *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003). However, we "cannot take on the responsibility of serving as [his] attorney in constructing arguments." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

proceed in forma pauperis ("IFP"). Because Mr. White has failed to satisfy the standards for issuance of a COA, we deny his application for a COA. We also deny his motion to proceed IFP and dismiss this matter.

I. BACKGROUND

Mr. White filed his petition for a writ of habeas corpus under 28 U.S.C. § 2241 requesting to be placed in protective custody. Mr. White alleges an unnamed inmate has threatened him and wants to harm him. He further asserts that failure to place him in protective custody would constitute a serious deprivation of his basic needs and violate the Eighth Amendment prohibition on cruel and unusual punishment.

The assigned magistrate judge recommended the district court dismiss the petition without prejudice because Mr. White's "challenge to the conditions of his confinement is not cognizable under § 2241 and must be brought as a civil rights action under 42 U.S.C. § 1983." ROA at 70. Mr. White objected to the recommendation, reiterating his request to be placed in protective custody, requesting in the alternative that he be transferred to another facility, and asserting that he should not be required to bring his claims under § 1983. The district court conducted a de novo review of the objected-to portions of the Report and Recommendation and concluded that a petition for habeas corpus was not the correct vehicle for Mr. White's action. The court adopted the Report and Recommendation in its entirety. The district court dismissed Mr. White's petition without prejudice for refiling under § 1983 and denied a COA. The district court also denied Mr. White's motion for leave to appeal IFP, finding he had not presented "a reasoned, non-

frivolous argument for appeal and that the appeal [wa]s not taken in good faith." *Id.* at 93.

Mr. White filed a timely notice of appeal, followed by an application for a COA, an appellate brief, and a motion to proceed IFP. Mr. White again requests to be placed in protective custody to ensure his safety from an unnamed inmate who has allegedly threatened Mr. White. He alternatively requests to be transferred to another state.[2] Mr. White again argues that failure to grant this request will constitute a violation of the Eighth Amendment prohibition on cruel and unusual punishment and will place him in prison conditions that deprive him of "a basic human need." Appellant's Brief and COA Request at 3. He further argues that this court should authorize an appeal because reasonable jurists could find that the Oklahoma Department of Corrections is violating his Eighth Amendment rights, that he has been prejudiced by the denial of his Eighth Amendment and Fourteenth Amendment rights, and that "the district court['s] assessment of the constitutional claim was wrong." *Id.* at 4.

[2] Mr. White makes this request for the first time in his appellate brief. He "did not raise th[is] matter[] in district court and has not provided a 'reason to deviate from the general rule that we do not address arguments presented for the first time on appeal.'" *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012) (quoting *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002)); *see also United States v. Tubens*, 691 F. App'x 507, 510 (10th Cir. 2017) (unpublished) ("We normally do not consider claims raised for the first time in a COA application.").

II. DISCUSSION

Before we may exercise jurisdiction over Mr. White's case, he must obtain a COA. *See* 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) ("[T]his court reads § 2253(c)(1)(A) as applying whenever a state prisoner habeas petition relates to matters flowing from a state court detention order. This includes . . . challenges related to the incidents and circumstances of any detention pursuant to state court process under § 2241.").

Under 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." To satisfy this standard, the applicant must "show[] 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Further, if the district court denied the application on procedural grounds without reaching the underlying merits of the constitutional claim, "the applicant faces a double hurdle." *Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008). In such a case, he must show both: (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "that jurists of reason would

find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Mr. White has not satisfied this standard, and thus issuance of a COA is improper. In the Tenth Circuit, "[i]t is well-settled law that prisoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, must do so through civil rights lawsuits . . . not through federal habeas proceedings." *Standifer v. Ledezma*, 653 F.3d 1276, 1280 (10th Cir. 2011). By contrast, § 2241 is the appropriate vehicle when a prisoner "challenges the fact or duration of his confinement and seeks immediate release or a shortened period of confinement." *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012).

The district court correctly concluded that Mr. White's claims should have been brought in a civil rights suit under § 1983, rather than a § 2241 habeas petition. Mr. White does not assert that he should be released or that his period of confinement should be shortened. His request for protective custody or transfer to another prison constitutes a challenge to the conditions of his confinement, rather than to the fact or duration of his confinement.[3] *See Palma-Salazar*, 677 F.3d at 1035 ("This court has stated that a request by a federal prisoner for a change in the place of confinement is properly construed as a challenge to the conditions of confinement and, thus, must be

[3] As has been noted, Mr. White now articulates an alternative request that he be transferred to another state. He did not make this request in his habeas petition or in his successive filings to the district court. Thus, we do not consider this request in evaluating whether reasonable jurists could debate the district court's handling of his petition.

brought pursuant to [*Bivens*]." (internal quotation marks omitted)); *Boutwell v. Keating*, 399 F.3d 1203, 1209 (10th Cir. 2005) ("[A] challenge to a transfer from one security level to another or from one prison to another is cognizable under § 1983."); *see also Wills v. Barnhardt*, No. 21-1383, 2022 WL 4481492, at *2 (10th Cir. Sept. 27, 2022) ("A challenge to the [Federal Bureau of Prisons'] transfer decision is properly construed as a challenge to the conditions of . . . confinement and must be brought pursuant to *Bivens*." (internal quotation marks omitted)); *Buhl v. Berkebile*, 597 F. App'x 958, 959 (10th Cir. 2014) (unpublished) (holding that a petition alleging that the petitioner was placed in a special housing unit and asking to be released into the general prison population or transferred from the prison constitutes a challenge to the conditions of confinement); *Huerta v. Hawk-Sawyer*, 16 F. App'x 916, 917–18 (10th Cir. 2001) (unpublished) (holding that a civil rights action is the correct vehicle for an action challenging the petitioner's transfer to a maximum security prison and administrative segregation). Mr. White's request is therefore not cognizable under § 2241 and should be brought as a civil rights action under 42 U.S.C. § 1983.

Mr. White has not demonstrated that reasonable jurists could debate this conclusion. In his application for a COA and his appellate brief, Mr. White reiterates his request to be placed in protective custody and argues that failure to do so violates the Eighth Amendment. He further asserts that reasonable jurists could find that his Eighth Amendment and Fourteenth Amendment constitutional rights are being violated and that he is being denied basic human needs. None of these arguments

addresses the grounds upon which the district court dismissed this case, however. Thus, none of these arguments demonstrates that reasonable jurists could debate whether the district court should have resolved Mr. White's petition in a different manner or that the issues presented are adequate to deserve encouragement to proceed further.

Because Mr. White has failed to meet the standard required for issuance of a COA, we lack jurisdiction to review Mr. White's petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) ("[U]ntil a COA has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.").

Additionally, Mr. White is not entitled to proceed IFP. To succeed in his motion, Mr. White must "show a financial inability to pay the required filing fees and 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). As has been addressed, Mr. White has failed to address the grounds upon which the district court dismissed this case. Specifically, he has not demonstrated that reasonable jurists could debate whether his claims should be brought under § 1983 rather than § 2241. Nor does any such argument exist where our precedent clearly holds that Mr. White needed to bring his claim under § 1983 rather than § 2241. Mr. White has not shown the existence of a reasoned, nonfrivolous argument

in support of the issues raised in this matter and he is therefore not entitled to proceed IFP.[4]

III. CONCLUSION

For the foregoing reasons, we conclude that Mr. White has not made the showing required for a COA. Accordingly, we DENY Mr. White's request for a COA and his motion for leave to proceed IFP and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[4] We remind Mr. White that this denial of a COA does not relieve him of the responsibility to pay the filing fee in full. To help ensure payment of the fee, we direct the Clerk to send a copy of this order to the finance officer at Mr. White's institution of incarceration, and we further direct that appropriate withdrawals be made from Mr. White's prisoner trust fund account to pay the appellate filing fee.