

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 13, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDD TAWON PAYNE,

Defendant - Appellant.

No. 20-5021
(D.C. Nos. 4:19-CV-00560-CVE-FHM &
4:17-CR-00140-CVE-1)
(N.D. Okla.)

ORDER*

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

Defendant-Appellant Edd Tawon Payne seeks a Certificate of Appealability (COA) from the district court's denial of his 28 U.S.C. § 2255 habeas petition for untimeliness. But because Payne's notice of appeal was also untimely, we lack jurisdiction over his appeal and, accordingly, dismiss it.

BACKGROUND

On December 10, 2019, the district court entered final judgment, dismissing Payne's § 2255 petition as untimely and denying a COA. This gave Payne until

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Monday, February 10, 2020, to file a notice of appeal.¹ See 28 U.S.C. § 2107(b) (2018) (requiring a notice of appeal to be filed within sixty days of final judgment when the United States is a party); Fed R. App. P. 4(a)(1)(B) (same). Our court received Payne’s notice of appeal on February 19, 2020, which we forwarded to the district court for filing on that date. Based on this filing date, Payne’s notice of appeal is untimely. But with his notice of appeal, Payne submitted a signed “Declaration,” stating “under the Penalty of Perjury” that he placed his notice of appeal “in the Prison mail” on February 9, 2020. R. at 160. In doing so, Payne attempts to invoke the prison-mailbox rule to render his notice of appeal timely.

DISCUSSION

We lack jurisdiction when a notice of appeal is untimely. See *Parker v. Bd. of Pub. Utils. of Kan. City*, 77 F.3d 1289, 1290 (10th Cir. 1996) (“The filing of a timely notice of appeal is an absolute prerequisite to our jurisdiction.” (citation omitted)). A prisoner’s notice of appeal is filed in time if the following requirements are met:

If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing and:

(A) it is accompanied by:

¹ The sixty-day filing deadline fell on Saturday, February 8, 2020. But under Federal Rule of Civil Procedure 6(a)(2)(C), the filing period ran through the following Monday.

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid[.]²

Fed. R. App. P. 4(c)(1).

This rule requires that a prisoner use the “system designed for legal mail,” if available. *Id.*; see also *Price v. Philpot*, 420 F.3d 1158, 1166 (10th Cir. 2005) (“If a legal mail system were available, [defendant] would be required to use it to obtain the benefit of the mailbox rule.” (citation omitted)). Failing to indicate whether a legal-mail system was used or unavailable prevents a notice of appeal from receiving the benefit of the prison-mailbox rule.³ See *Sweets v. Martin*, 625 F. App’x 362, 364 (10th Cir. 2015) (unpublished) (“[The defendant] did not say whether a legal mail system had been available or, if it had been, whether he used that system. Without this information, the notice of appeal is not timely under the prison mailbox rule.”). Here, Payne declares that he placed his notice of appeal in the “Prison mail.” R. at 160. But this does not demonstrate that he used the prison’s legal-mail system. See *Price*, 420 F.3d at 1166 (“Alleging only that he used ‘the institutional mails’ is insufficient to connote use of the ‘legal mail system.’” (citation omitted)). In

² Payne cannot show timely filing under Rule 4(c)(1)(A)(ii), because his mailing envelope has a postage stamp dated February 11, 2020, a day after the filing deadline.

³ Without this information, we are unable to determine if the prisoner “use[d] that system” as required “to receive the benefit of” the prison-mailbox rule. Fed. R. App. P. 4(c)(1).

addition, neither his declaration—nor any of his other filings—assert that such a system was unavailable. Thus, his failure to “use . . . the prison’s legal mail system or allege[] that such a system was unavailable” requires that we “treat the filing date as” February 19, 2020, so his notice of appeal is untimely. *Sweets*, 625 F. App’x at 364.

Further, even if a legal-mail system had been unavailable and Payne had asserted as much, his declaration still fails to “stat[e] that first-class postage is being prepaid.” Fed. R. App. P. 4(c)(1)(A)(i). Failure to do so prevents him from receiving the prison-mailbox rule’s benefits.⁴ See, e.g., *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1145 (10th Cir. 2014) (concluding that the defendant’s “fail[ure] to affirm that he pre-paid first-class postage” meant that his filing did not satisfy the prison-mailbox rule’s requirements); *Martinez v. Edmondson*, 388 F. App’x 828, 829 (10th Cir. 2010) (unpublished) (“[The defendant] submitted a . . . notarized statement indicating that he [timely] deposited his notice of appeal in the mail . . . , but the statement fails to attest that first-class postage was prepaid. Consistent with our precedent, we conclude that [the defendant]’s notice of appeal does not comply with the prison mailbox rule. . .”).⁵

⁴ Because its contents do not satisfy the prison-mailbox rule, we do not decide whether Payne’s “Declaration” meets 28 U.S.C. § 1746’s requirements.

⁵ Though we construe pro se pleadings liberally, Payne still must comply with procedural rules. *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.3 (10th Cir. 2002).

CONCLUSION

For the foregoing reasons, we lack jurisdiction to consider Payne's COA request and dismiss his appeal.⁶

Entered for the Court

Gregory A. Phillips
Circuit Judge

⁶ Because we dismiss Payne's appeal in this order for lack of jurisdiction, we deny Payne's motion for a status report or hearing as moot.