

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 28, 2020

Christopher M. Wolpert
Clerk of Court

MARCUS E. LOLAR,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 20-5096
(D.C. No. 4:18-CV-00397-TCK-JFJ)
(N.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **McHUGH**, Circuit Judges.

Pro se petitioner Marcus Lolar appealed the district court's October 1, 2019 order denying his motion to reconsider the dismissal of his habeas petition. After the appeal was opened, this court challenged the appellant to demonstrate appellate jurisdiction. 10th Cir. R. 27.3(B). The appellant filed a memorandum brief in response. Upon review of the memorandum brief, the district court record, and the applicable authorities, we dismiss this appeal for lack of jurisdiction.

On September 9, 2019, Mr. Lolar appealed the district court August 15, 2019 order and judgment dismissing as time barred his habeas corpus petition under 28 U.S.C. § 2254. Mr. Lolar had filed a motion to reconsider the dismissal pursuant to Federal Rule of Civil Procedure 60(b) on September 6, 2019, which was less than 28 days after judgment was entered, so his appeal from the judgment was suspended while the motion

to reconsider was pending. Fed. R. App. P. 4(a)(4)(A)(vi). The district court entered its order denying Mr. Lolar's Rule 60(b) motion on October 1, 2019. In order to challenge the order denying the Rule 60(b) motion along with the final judgment, Mr. Lolar was required to file a new or amended notice of appeal identifying that order. *Id.*

4(a)(4)(B)(ii). He did not do so. As a result, when this court disposed of his appeal from the final judgment, the court expressly declined to consider the arguments Mr. Lolar offered to challenge the order denying his Rule 60(b) motion because that order was not within the scope of his appeal. *Lolar v. Crow*, No. 19-5084, 822 F. App'x 747, 749 n.1 (July 28, 2020) (unpublished).

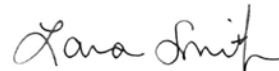
Now Mr. Lolar attempts to appeal the order denying his Rule 60(b) motion separately. This he cannot do. If Mr. Lolar wanted to appeal that order, he was required to do so as part of his appeal from the final judgment. *Cf. Bannister v. Davis*, 590 U.S. –, 140 S. Ct. 1698, 1703 (2020) ("The court thus addresses any attack on the [post-judgment] ruling as part of its review of the underlying decision."). Mr. Lolar did not appeal from the order denying his Rule 60(b) motion at the time his appeal from the judgment was pending. Thus, he has forfeited appellate review of that order. The federal rules do not provide authority for filing a second appeal from what is effectively a single judgment.

Even if he could file a second appeal, that appeal would be untimely. The order denying the Rule 60(b) motion was entered on October 1, 2019. The notice of appeal was due by October 31, 2019. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). The notice of appeal giving rise to this case was filed October 5, 2020, nearly a year after the deadline

expired. Although Mr. Lolar urges this court to find “extraordinary circumstances” and reopen the time to appeal, we have no authority to grant such relief. *Bowles v. Russell*, 551 U.S. 205, 213-15 (2007). His only option was to ask the district court to grant relief from a late appeal. 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6). He did not ask the district court for relief, nor is it clear that he could have obtained any had he asked.

In light of the above, we have determined this court lacks jurisdiction to consider Mr. Lolar’s appeal. Therefore, the appeal is dismissed.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

A handwritten signature in cursive script that reads "Lara Smith".

by: Lara Smith
Counsel to the Clerk