

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 12, 2021

Christopher M. Wolpert
Clerk of Court

NATHAN D. SMITH,

Petitioner - Appellant,

v.

SAM CLINE, Warden, El Dorado
Correctional Facility,

Respondent - Appellee.

No. 21-3062
(D.C. No. 5:18-CV-03090-JTM)
(D. Kan.)

ORDER

Before **HARTZ**, **BRISCOE**, and **HOLMES**, Circuit Judges.

Pro se Appellant Nathan D. Smith seeks to appeal the district court's order and judgment denying his 28 U.S.C. § 2254 application. We raise *sua sponte* the question of whether this court has jurisdiction to consider this appeal.

"A timely notice of appeal is both mandatory and jurisdictional." *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006) (citation omitted). In a civil case such as this one, a notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). Although Mr. Smith is proceeding *pro se*, he still must comply with the time requirements in the procedural rules. *See Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994).

In this case, the district court entered judgment denying Mr. Smith's 28 U.S.C. § 2254 application on October 19, 2020. Mr. Smith did not file any post-judgment motions that would serve to toll or extend the time he had to file a notice of appeal from the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi). Accordingly, pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, his notice of appeal was due on or before November 18, 2020. However, Mr. Smith's notice of appeal was not received by the district court until April 7, 2021, nearly five months after the deadline to file the notice of appeal passed.

"[T]his court may not extend the time for filing a notice of appeal." *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 889 (10th Cir. 1984). "Only the district court may do so and only under limited circumstances and for a limited time." *Alva v. Teen Help*, 469 F.3d 946, 950 (10th Cir. 2006) (citing 28 U.S.C. § 2017(c); Fed. R. App. P. 4(a)(5)). Here, Mr. Smith did not request an extension of time from the district court within which to file his notice of appeal, *see* Fed. R. App. P. 4(a)(5)(A), and his opportunity to do so has expired, *see* Fed. R. App. P. 4(a)(5)(A)(i) (requiring a party to move for an extension of time to file a notice of appeal "no later than 30 days after" he was otherwise required to file the notice).

Mr. Smith is likewise ineligible for an order reopening the time to appeal. *See* Fed. R. App. P. 4(a)(6) (providing that district court may reopen the time to file an appeal, "but only if all the [specified] conditions are satisfied").

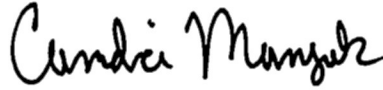
Thus, no exception to the late appeal is available to Mr. Smith. The United States Supreme Court has made clear that federal courts "ha[ve] no authority to create equitable

exceptions to jurisdictional requirements.” *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Therefore, “[t]he time limit has run and we are without jurisdiction under the facts of this case.” *Jenkins v. Burtzloff*, 69 F.2d 460, 464 (10th Cir. 1995).

APPEAL DISMISSED.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

A handwritten signature in black ink, appearing to read "Candice Manyak". The signature is written in a cursive, flowing style.

By: Candice Manyak
Counsel to the Clerk