

UNITED STATES COURT OF APPEALS FILED
United States Court of Appeals
Tenth Circuit
FOR THE TENTH CIRCUIT

APR 25 1990

ROBERT DALE MCKINNEY,
Petitioner-Appellant,
v.
DAN REYNOLDS, Warden; ATTORNEY
GENERAL, State of Oklahoma,
Respondents-Appellees.

ROBERT L. HOECKER
Clerk

No. 89-6238
(D.C. No. 89-1034-P)
(W.D. Okla.)

ROBERT DALE MCKINNEY,
Plaintiff-Appellant,
v.
E. ALVIN SCHAY, Appellate Public
Defender; OKLAHOMA PUBLIC
DEFENDER SYSTEM,
Defendants-Appellees.

No. 89-6334
(D.C. No. 89-1028-W)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and BALDOCK, Circuit Judges.

Robert Dale McKinney brought pro se actions seeking damages under 42 U.S.C. § 1983 (1982) and habeas corpus relief under 28 U.S.C. § 2254 (1982). The basis of both claims is the Oklahoma

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Appellate Public Defender's negligent failure to pursue McKinney's appeal of his state criminal conviction in a timely fashion. In McKinney's section 1983 suit, the district court concluded that McKinney had failed to allege facts showing the existence of a claim under color of state law and dismissed his suit for failure to state a claim. In McKinney's habeas action, the district court dismissed the suit without prejudice for failure to exhaust state remedies and denied issuance of a certificate of probable cause.

The undisputed facts underlying McKinney's claims reveal that the public defender miscalculated the date for filing McKinney's notice of intent to appeal his criminal conviction in state court, and the appeal was originally rejected as untimely. However, when the error was discovered, McKinney was granted leave to file an appeal out of time and his appeal was apparently reinstated into the docket in the same sequence it would have had if it had been timely filed. It appears from the papers McKinney has presented to this court that his direct criminal appeal is still pending.

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"A prerequisite to any relief under section 1983 is that the defendant has acted under color of state law." Barnard v. Young, 720 F.2d 1188, 1188-89 (10th Cir. 1983). In Polk County v. Dodson, 454 U.S. 312 (1981), the Supreme Court held that a public defender does not act under color of state law for purposes of section 1983 when performing a lawyer's traditional functions as counsel in a criminal case. Here the basis of McKinney's claim is his counsel's negligent failure to file a timely notice of appeal,

a function unarguably encompassed by Polk County. To the extent McKinney argues that his public defender conspired with state officials, his conclusory allegations are clearly insufficient to state a claim. See Hammond v. Bales, 843 F.2d 1320, 1323 (10th Cir. 1988).

McKinney has moved this court for leave to proceed in forma pauperis on appeal of the dismissal of his section 1983 claim. As set out above, we conclude that McKinney has failed to make a rational (reasoned) argument on the law and the facts in support of the issue raised on appeal and the motion is therefore denied. See Coppedge v. United States, 369 U.S. 438 (1962); Ragan v. Cox, 305 F.2d 58 (10th Cir. 1962).

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Exhaustion of state remedies is a prerequisite to consideration of a claim for relief under section 2254. See Rose v. Lundy, 455 U.S. 509 (1982); 42 U.S.C. § 2254(b) (1982). An applicant for habeas relief has not exhausted his state remedies until he has presented his claim to the highest state court having jurisdiction to hear it. See Duckworth v. Serrano, 454 U.S. 1, 4 (1981); Osborn v. Shillinger, 861 F.2d 612, 616 (10th Cir. 1988). McKinney admits that his direct criminal appeal is now pending before the Oklahoma Court of Criminal Appeals, and he has therefore failed to satisfy the exhaustion requirement of section 2254.

McKinney has applied to this court for a certificate of probable cause. We deny the application, concluding that McKinney

has failed to make a substantial showing of the denial of an important federal right by demonstrating that the issue raised is debatable among jurists, that a court could resolve the issue differently, or that the question deserves further proceedings. See Barefoot v. Estelle, 463 U.S. 880 (1983).

McKinney's motion for introduction of new evidence is denied. We cannot consider evidence on appeal that has not been presented to the district court.

The mandates in Nos. 89-6238 and 89-6334 shall issue forthwith.

Entered For The Court

Stephanie K. Seymour
Circuit Judge