

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAR 21 1990

ROBERT L. HOECKER
Clerk

DEAN WOOD,)
)
Petitioner-Appellant,)
)
v.)
)
DUANE SHILLINGER, and the ATTORNEY)
GENERAL OF THE STATE OF WYOMING,)
)
Respondents-Appellees.)

No. 89-8044
(D.C. No. C88-0068-B)
(D. Wyoming)

ORDER AND JUDGMENT*

Before LOGAN, MOORE, and ANDERSON, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Dean Wood, a state court prisoner in Wyoming, filed a federal habeas corpus action pursuant to 28 U.S.C. § 2254, claiming inadequacy of his counsel because the attorney failed to file a direct appeal from his state court conviction. He asserts this

* 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.

resulted in the loss of his right to appeal and denied him access to the courts.

The district court denied relief for failure to exhaust state remedies. Our review of the record reflects, however, that Wood did indeed file petitions for habeas corpus relief in the Wyoming state district court and in the Wyoming Supreme Court, alleging, inter alia, ineffective assistance of counsel for counsel's failure to file a timely notice of appeal and refusing to take a direct appeal. The Wyoming Supreme Court denied Wood's request on February 18, 1988, finding insufficient grounds to grant relief. While it is not absolutely clear whether this holding was made on the merits of his petition, we hold that his presentation of the claims to the state supreme court constitutes exhaustion of state remedies sufficient to permit federal habeas corpus jurisdiction insofar as the arguments were presented to the Wyoming courts.

In Wood's brief petitioner's principal assertion is that he signed the waiver of appeal rights under duress from his attorney. He states he later requested that the attorney file an appeal, and, by the time he informed a judge because his attorney would not act and the judge appointed a public defender to represent him, it was too late; the Wyoming Supreme Court threw out his claim because it was out of time. We think these facts sufficiently state a claim of inadequate representation of counsel, if indeed Wood could prove that he changed his mind and told his lawyer to appeal and that the change of mind came within the time limits for filing an appeal. See Hannon v. Maschner, 845 F.2d 1553 (10th Cir. 1988).

Wood did not, however, assert before either the Wyoming Supreme Court or the district court that he had retracted his waiver of appeal. These arguments cannot be made for the first time on appeal. Crisp v. Mayabb, 668 F.2d 1127, 1136 (10th Cir. 1981).

Because petitioner can show no plausible argument for relief we deny the motion to proceed in forma pauperis and for a certificate of probable cause, and AFFIRM the determination of the district court dismissing the petition.

The mandate shall issue forthwith.

Entered for the Court

James K. Logan
Circuit Judge