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United States Court of Appeals
Tenth Circuit

August 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRYCE FRANKLIN,

Petitioner - Appellee,

v.

RONALD MARTINEZ, Warden; RAUL TORREZ, Attorney General for the State of New Mexico,

Respondents - Appellants.

No. 22-2137
(D.C. No. 1:20-CV-00576-MIS-JFR)
(D. N.M.)

ORDER[*]

Before **MATHESON**, **BACHARACH**, and **EID**, Circuit Judges.

Respondents-Appellants Ronald Martinez, warden of the Southern New Mexico Correctional Facility, and Raul Torrez, Attorney General for the State of New Mexico (collectively, "Respondents"), appeal the district court's order granting

[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

habeas corpus relief to Petitioner-Appellee Bryce Franklin. Because the Respondents have failed to show we have Article III jurisdiction, we dismiss this appeal.

I. BACKGROUND

A. *Factual History*[1]

Mr. Franklin is a prisoner in the custody of the New Mexico Corrections Department. On June 15, 2018, prison officials instructed Mr. Franklin to complete a urinalysis test for illegal drugs after discovering contraband in his cell. He failed to complete the test. Mr. Franklin received a disciplinary report and lost good time credits he had accumulated, effectively extending his sentence. He also lost privileges at the prison canteen, as well as telephone and electronics privileges.

Mr. Franklin completed the prison administrative review process to challenge his disciplinary report, arguing he "was not 'unwilling' to provide a [urinalysis], but was instead *unable* to do so, in part because [prison officials] did not permit him a full hour to complete the [test] as prison regulations required." App., Vol. III at 157. He also claimed there was "prison surveillance videotape footage" showing he did not receive a full hour to complete the urinalysis. *Id*. at 154, 157. The prison held a

[1] We derive our factual summary from the Report and Recommendation prepared by a magistrate judge, which the district court adopted in full. *See* App., Vol. III at 154; App., Vol. IV at 181, 183. We review the district court's factual findings for clear error. *United States v. Juszczyk*, 844 F.3d 1213, 1214 (10th Cir. 2017). Neither party argues the district court clearly erred in any of its factual findings.

hearing, but Mr. Franklin was not permitted to question the prison's witnesses or present evidence in his own defense.

B. *Procedural History*

1. **State Court Proceedings**

Mr. Franklin sought post-conviction relief in New Mexico state court. The court dismissed his petition, finding Mr. Franklin "was given an hour to produce a urine sample for testing purpose, but [] he did not produce the sample within that time frame," and he "failed to show that he was denied due process" at the administrative hearing. Suppl. App., Vol. III at 46. The New Mexico Supreme Court denied his certiorari petition.

2. **District Court Proceedings**

Mr. Franklin filed a petition for a writ of habeas corpus in the District of New Mexico under 28 U.S.C. § 2254. He alleged the Respondents violated his due process rights by preventing him from "present[ing] documentary evidence and call[ing] witnesses in his defense before an impartial officer at [the] prison disciplinary hearing." App., Vol. III at 156.

The district court construed Mr. Franklin's filing as a petition under 28 U.S.C. § 2241 rather than § 2254.[2] The court ordered the Respondents to "produce the

[2] Section 2241 allows a prisoner to "attack [] the execution of his sentence," whereas § 2254 authorizes a prisoner to "challenge [] the validity of [his] conviction and sentence." *See Montez v. McKinna*, 208 F.3d 862, 864-65 (10th Cir. 2000).

disputed videotape evidence" that Mr. Franklin claimed would show he lacked sufficient time to complete the urinalysis. App., Vol. III at 155. The Respondents informed the court the video footage had not been preserved. The court ordered them to show cause why they should not be sanctioned under Federal Rule of Civil Procedure 37(e)(2) for failing to preserve the footage. The magistrate judge assigned to the case then appointed counsel for Mr. Franklin and held an evidentiary hearing on the Respondents' failure to preserve the footage.

Following the hearing, the magistrate judge issued a Report and Recommendation ("R&R"). It said "federal courts review § 2241 petitions *de novo*," affording no deference to any state-court findings. *Id*. at 159. The R&R then said the Respondents had a duty to preserve the videotape footage and their failure to do so violated Mr. Franklin's due process right to present documentary evidence for his prison disciplinary hearing.

The R&R also said Mr. Franklin had a due process right to call witnesses and question the prison's witnesses at the disciplinary hearing, but he was not permitted to do so. Based on these determinations, the R&R recommended the petition be granted and Mr. Franklin's good-time credits and other privileges be restored.

The Respondents objected to the R&R on numerous grounds. They asserted the magistrate judge "erred in applying *de novo* review" rather than the "deferential standard of review set forth in 28 U.S.C. § 2254(d)." App., Vol. IV at 10.

The district court, after conducting its own *de novo* review of the R&R and the evidence, adopted the R&R. The court acknowledged some inconsistency in Tenth Circuit case law on the applicable standard of review when a state prisoner files a § 2254 petition that a court later construes as a § 2241 petition. Because Mr. Franklin's petition does not "contest his [state] conviction or the sentence itself," it held "his petition is properly construed under § 2241," *id*. at 185, and *de novo* review applies. *Id*. at 186-87. The court also overruled the Respondents' other objections. It ordered the Respondents "to restore to [Mr. Franklin] the sixty (60) days of good time credits, and sixty (60) days['] loss of canteen/telephone and all electronics." *Id*. at 193.

3. **Appeal**

On appeal, the Respondents "do[] not oppose or appeal from th[e] part of the district court's order directing the restoration of Mr. Franklin's forfeited good-time credits and other privileges." Aplt. Br. at 11 n.2. Instead, they appeal only the district court's application of a *de novo* standard of review. *Id*. at 5-6. They argue that under the law in most other circuits, § 2254 "serves as a limitation upon the general grant of habeas authority set forth in § 2241(c)(3)," meaning district courts hearing § 2241 petitions from state prisoners must defer to state-court determinations. *Id*. at 6. They claim our decisions instead employ a "hybrid approach" that we fail to

apply uniformly. *Id*.[3] The Respondents "ask[] this Court to rethink its practice of analyzing state prisoners' sentence-execution challenges under § 2241, and consider adopting the majority view." *Id*. at 6.

Mr. Franklin argues we should dismiss the appeal for lack of jurisdiction because the Respondents "have failed to identify an actual controversy between the parties, rendering this appeal moot." Aplee. Br. at 14. He contends the Respondents' failure to appeal the habeas relief the district court granted him—restoration of his good time credit and prison privileges—"renders moot the question they present to this Court because even if this Court were to agree [with them on standard of review] . . . such a determination has no ability to presently affect the parties' rights." *Id*. at 18.

The Respondents reply they do not "challenge the restoration of Mr. Franklin's forfeited good-time credits and other privileges." Aplt. Reply Br. at 4. But they maintain "a ruling in [their] favor would not amount to an impermissible advisory opinion" because it would have the "real-world effect" of "bringing the Tenth Circuit in line with those circuits that treat § 2254 as a limitation on § 2241." *Id*.

[3] In *Walck v. Edmondson*, 472 F.3d 1227 (10th Cir. 2007), we held "[t]he deferential standard of review contained within § 2254 . . . only [applies] when an individual in state custody collaterally attacks the validity of a state conviction and/or sentence"—not when the petitioner challenges the execution of the sentence under § 2241. *Id*. at 1234. The Respondents suggest this is inconsistent with *Henderson v. Scott*, 260 F.3d 1213 (10th Cir. 2001), in which we wrote that "[a]lthough we analyze [the petitioner's] claim under § 2241, we still accord deference to the [state court's] determination of the federal constitutional issue." *Id*. at 1215; *see* Aplt. Br. at 8-13.

II. **DISCUSSION**

A. ***Legal Background***

Article III of the Constitution vests the "judicial Power of the United States" in the "supreme Court, and [the] inferior Courts." U.S. Const. art. III, § 1. It further states the "judicial Power shall extend" only to certain "Cases" and "Controversies." *Id.* § 2. To qualify as a "case" or "controversy," and thus be

> cognizable in a federal court, a suit must be definite and concrete, touching the legal relations of parties having adverse interests. It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.

North Carolina v. Rice, 404 U.S. 244, 246 (1971) (quotations and alterations omitted). Thus, "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotations omitted); *see also Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (quotations omitted)). On appeal, "[t]he party claiming appellate jurisdiction bears the burden of establishing our subject-matter jurisdiction." *Raley v. Hyundai Motor Co*., 642 F.3d 1271, 1275 (10th Cir. 2011) (quotations omitted).

To determine whether an appeal presents a live case or controversy, or whether it instead seeks an advisory opinion, "we ask whether granting a *present* determination of the issues offered will have some effect in the real world." *Fleming v. Gutierrez*, 785 F.3d 442, 444-45 (10th Cir. 2015) (quotations omitted). And the "effect in the real world" must guide the conduct of the parties in the case, not "the (uncertain) future conduct of third parties." *Jordan v. Sosa*, 654 F.3d 1012, 1026, 1029 (10th Cir. 2011). An appellant must therefore show a decision will "settl[e] [] some dispute which affects the behavior of *the defendant toward the plaintiff*." *Schell v. OXY USA Inc*., 814 F.3d 1107, 1114 (10th Cir. 2016) (quoting *Jordan*, 654 F.3d at 1025).[4]

The Supreme Court has cautioned against exercising appellate jurisdiction over a lower court's reasoning, rather than its judgment. Courts of appeals "review[] judgments, not statements in opinions" of the lower courts. *California v. Rooney*, 483 U.S. 307, 311 (1987) (quotations omitted). They have the "power [] to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). "The question before an appellate Court is, was the *judgment* correct,

[4] We take guidance from courts addressing whether a plaintiff's request for a declaratory judgment would result in an advisory opinion. This court has explained that "what makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109-10 (10th Cir. 2010) (quotations omitted). In other words, judicial resolution "would affect the behavior of the particular parties." *Jordan*, 654 F.3d at 1025.

not the *ground* on which the judgment professes to proceed." *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984) ("[S]ince this Court reviews judgments, not opinions, we must determine whether the [lower court's] legal error resulted in an erroneous judgment . . . .").

We have dismissed appeals for lack of jurisdiction when the appellant has asked us to render an advisory opinion on the district court's reasoning—one that will not "alter the future conduct of the named parties." *Schell*, 814 F.3d at 1114-21 (dismissing an appeal as moot after the appellant sold its interests in leases affected by the declaratory judgment the appellant sought to appeal, and observing the appeal was "an effort to secure an impermissible advisory opinion"); *see also Jordan*, 654 F.3d at 1015-30 (dismissing an appeal from the denial of injunctive and declaratory relief against prison officials when the prisoner was transferred to another prison while the appeal was pending because reaching the merits would "run afoul of the Supreme Court's proscription against advisory opinions"); *United States v. Roblero-Mejia*, 218 F. App'x 773, 774 n.1 (10th Cir. 2007) (unpublished) (declining to reach the merits of an appeal because "even if this court were to rule in favor of [the appellant] on the question actually presented on appeal, it would not affect his

rights," yielding "an advisory opinion") (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).[5]

B. ***Application***

We lack jurisdiction over this appeal. The Respondents must establish our jurisdiction, *Raley*, 642 F.3d at 1275, and they have failed to do so. They ask us to reverse one of the district court's legal determinations—namely, its application of a *de novo* standard of review—but not the resulting judgment in favor of Mr. Franklin. *See* Aplt. Br. at 11 n.2. Under Article III, we may "review[] judgments, not statements in opinions," of the district court. *Rooney*, 483 U.S. at 311 (quotations omitted).

We thus may review the district court's order only if "granting a *present* determination of the issues offered will have some effect in the real world." *Fleming*, 785 F.3d at 444-45 (quotations omitted). The Respondents claim that clarifying the

[5] Other circuits have similarly dismissed appeals where the appellant "does not [] seek any relief related to itself" that success on appeal could provide. *DND Int'l, Inc. v. Fed. Motor Carrier Safety Admin.*, 843 F.3d 1153, 1158 (7th Cir. 2016) (dismissing appeal from a challenge to an administrative order because the appellant "already received all of the relief it sought" when the administrative order was vacated); *see also Djadju v. Vega*, 32 F.4th 1102, 1108 (11th Cir. 2022) (dismissing appeal from denial of habeas relief when the petitioner sought only release from confinement, and was released while the appeal was pending, because "[a]ny decision on the merits . . . would be an impermissible advisory opinion" (quotations omitted)); *Cover v. Schwartz*, 133 F.2d 541, 550-51 (2d Cir. 1942) (dismissing appeal in a patent infringement case where the patent holder conceded there was no infringement but sought confirmation of the patent's validity, and observing there is no "appellate jurisdiction, when no justiciable dispute exists on appeal," even if "such a dispute previously existed" in district court).

standard of review for habeas petitions like Mr. Franklin's will have the "real-world effect" of "bringing the Tenth Circuit in line with" other circuits. Aplt. Reply Br. at 4. But the effect in the real world necessary for a case or controversy must affect the parties in this case, not "the (uncertain) future conduct of third parties." *Jordan*, 654 F.3d at 1026. Because the Respondents do not challenge the portion of the district court's order granting relief to Mr. Franklin, they have failed to show our opinion will "settl[e] [] some dispute *which affects the behavior of the defendant towards the plaintiff*." *Schell*, 814 F.3d at 1114 (quoting *Jordan*, 654 F.3d at 1025).[6] In short, due to the Respondents' choice to appeal only the district court's standard-of-review legal determination, rather than its judgment, "we [cannot] accord [them] prospective relief that would have any effect in the real world." *Jordan*, 654 F.3d at 1029. Their "conduct" toward Mr. Franklin "cannot be affected by" any opinion we could issue. *Schell*, 814 F.3d at 1113. Because any opinion we could offer would be advisory, and because Article III forbids federal courts from issuing advisory opinions, we lack jurisdiction over this appeal.

[6] In their reply brief, the Respondents reiterate that they "did not and do[] not challenge the relief granted to Bryce Franklin." Aplt. Reply Br. at 1. Then they state that "[i]mplicit in th[eir] argument is a request for remand to the district court to allow it to assess the matter under the proper standard of review." *Id*. But the Respondents did not request remand in their opening brief—they asked only for a ruling on the standard of review. *See* Aplt. Br. at 24.

III. **CONCLUSION**

We dismiss this appeal for lack of jurisdiction.

Entered for the Court

Per Curiam