

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 17, 2016

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

DARRYL HODGE,

Petitioner - Appellant,

v.

STATE OF UTAH,

Respondent - Appellee.

No. 16-4043
(D.C. No. 1:14-CV-00118-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **KELLY, GORSUCH**, and **MATHESON**, Circuit Judges.

Darryl Hodge, proceeding pro se, seeks to appeal the district court’s dismissal of his application for habeas relief under 28 U.S.C. § 2254. We deny a certificate of appealability (COA) and dismiss the appeal.

Hodge was convicted in Utah state court in 2007 of aggravated sexual assault and aggravated assault. He filed a § 2254 habeas application in 2014. Respondent moved to dismiss the application as untimely. After Hodge responded, the district court ordered Respondent to file a proposed order on its dismissal motion. The court

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

further ordered Hodge to respond to the proposed order within 14 days of its filing. R. at 169. Respondent filed a proposed order on February 17, 2016, but Hodge didn't file a response. On March 21, 2016, the district court dismissed Hodge's habeas application under Fed. R. Civ. P. 41(b) for failure to obey the court's order and failure to prosecute the case. R. at 183.

Although we liberally construe a pro se party's application for a COA, *Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002), we don't make arguments for him, *Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167, 1173 (10th Cir. 2013). In his COA application, Hodge addresses the merits of his habeas claims, but he doesn't advance any contention of error in the district court's dismissal of his case under Rule 41(b). Consequently, Hodge hasn't demonstrated "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," as required for this court to issue a COA. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Hodge's application for a COA is denied and the appeal is dismissed. We deny his motion to proceed on appeal without prepayment of fees and costs. Hodge must immediately pay the full amount of appellate filing fees and costs.

Entered for the Court

Neil M. Gorsuch
Circuit Judge