

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 7, 2018

Lyle W. Cayce
Clerk

KEITH STUART CUMBEE,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:15-CV-1138

Before DAVIS, OWEN, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Keith Stuart Cumbee, Texas prisoner # 1699482, moves this court for a certificate of appealability (COA) to challenge the denial of a motion he filed pursuant to Federal Rule of Civil Procedure 60 that sought to set aside state court criminal judgments adjudicating him guilty of aggravated assault causing serious bodily injury with a deadly weapon and possession of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

marijuana and to challenge the denial of his motion to stay proceedings pending a decision on his Rule 60 motion. Cumbee filed those motions while his 28 U.S.C. § 2254 application was pending and noticed his appeal from the denial of those motions before final judgment was entered. Judgment has now entered, and Cumbee has noticed his appeal therefrom.

“This Court must examine the basis of its jurisdiction, on its own motion, if necessary.” *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). We have jurisdiction over final decisions and other decisions covered by the collateral order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009); 28 U.S.C. §§ 1291, 1292. The decision denying Cumbee’s Rule 60 motion and his motion for a stay qualifies as neither type of decision. Moreover, Cumbee’s premature notice of appeal was not rendered effective upon the entry of final judgment. See *Green Tree Servicing L.L.C. v. House*, __ F.3d __, __, 2018 WL 2204161 *5 (5th Cir. 2018); *United States v. Cooper*, 135 F.3d 960, 962-63 (5th Cir. 1998). Thus, we lack jurisdiction over this appeal. See *id.*

Accordingly, this appeal is DISMISSED for lack of jurisdiction. Cumbee’s motions for a COA and for permission to proceed in forma pauperis on appeal are DENIED as moot.

[APPENDIX B-Page 1 of 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISIONKEITH CUMBEE §
v. § CIVIL ACTION NO. 6:15cv1138
DIRECTOR, TDCJ-CID §ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

The Petitioner Keith Cumbee filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The parties have consented to allow the United States Magistrate Judge to preside over the case and enter final judgment pursuant to 28 U.S.C. §636(c).

Cumbee has filed a motion which he styles as a "Rule 60 motion," which is a motion for relief from judgment under Fed. R. Civ. P. 60(b). However, his motion asks that the Court grant him relief from his state court judgments of criminal convictions. Rule 60(b) only applies to judgments of the court in which relief is sought. Holder v. Simon, 384 F.App'x 669, 2010 WL 2545643, 2010 U.S. App. LEXIS 12706 (9th Cir. 2010); *see also* Williams v. Apker, 774 F.Supp.2d 124, 128 (D.D.C. 2011).

Furthermore, this Court lacks jurisdiction to set aside state court criminal judgments under the Federal Rules of Civil Procedure. *See, e.g., Crenshaw v. Superintendent of Five Points Correctional Facility*, 595 F.Supp.2d 224, 228 (W.D.N.Y. 2009), *citing Harris v. United States*, 367 F.3d 74, 79 (2nd Cir. 2004). It is accordingly

ORDERED that the Petitioner's "Fed. R. Civ. Proc. Rule 60 Motion" (docket no. 12) is **DENIED**. It is further

[APPENDIX B-Page 2 of 2]

ORDERED that the Petitioner's motion to stay the answer until a ruling is made on his Rule 60(b) motion (docket no. 17) is DENIED.

So ORDERED and SIGNED this 3rd day of August, 2017.


JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEITH STUART CUMBEE §
v. § CIVIL ACTION NO. 6:15cv1138
DIRECTOR, TDCJ-CID §

ORDER

The Petitioner Keith Stuart Cumbee filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The parties have consented to allow the undersigned United States Magistrate Judge to enter final judgment in the proceeding in accordance with 28 U.S.C. §636(c).

Cumbee filed a “motion for relief from judgment” purportedly under Fed. R. Civ. P. 60, but he sought relief from the judgments of conviction in his state criminal cases. This Court denied Cumbee’s motion because Rule 60(b) only applies to judgments of the court in which relief is sought and the federal district courts lack jurisdiction to set aside state criminal judgments through application of the Federal Rules of Civil Procedure.

Cumbee has filed a motion to alter or amend the order denying his purported Rule 60(b) motion, arguing that “giving state convictions and state determinations deference without first considering Cumbee’s Rule 60(b) motion, dkt. 12, to test the presumption of normalcy [sic], is a due process violation.” He states that an immediate appeal of this order would advance the termination of his case because it would render further habeas review unnecessary. Cumbee also asserts that the Court already has jurisdiction through the underlying habeas petition and that the Federal Rules of Civil Procedure apply to habeas corpus proceedings as well as to state cases which are removed to federal court. Cumbee also cites Gonzales v. Crosby, 545 U.S. 524, 530, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) as stating that “Rule 60(b) applies in habeas proceedings just as in any other

[APPENDIX C-PAGE 2 OF 2]

federal proceeding as long as it does not state a claim [sic]," noting that fraud on the court is a true Rule 60(b) motion.

Cumbee's motion makes clear that he is attempting to use Rule 60(b) to make an end run around the normal habeas corpus procedures. The federal courts cannot set aside a criminal conviction from the 7th District Court of Smith County, Texas, under Rule 60(b) of the Federal Rules of Civil Procedure.

The Supreme Court held in Gonzales that a Rule 60(b) motion which seeks to present new claims, new evidence in support of a claim already litigated, or which alleges a change in the substantive law governing a claim should be treated as a successive habeas petition. 545 U.S. at 531-32. However, the Supreme Court was referring to a motion for relief from a judgment disposing of a federal habeas corpus petition, not an attempt to set aside the judgment of a state court through a Rule 60(b) motion. In addition, Cumbee's underlying federal habeas petition is still pending, meaning there is no need to file a successive petition, nor is there a federal court judgment to which Rule 60(b) could apply. Gonzales is not applicable in Cumbee's situation. His motion to alter or amend the order denying his Rule 60(b) motion is without merit, and it is accordingly

ORDERED that the Petitioner's motion to amend the order denying his Rule 60(b) motion (docket no. 28) is **DENIED**.

So ORDERED and SIGNED this 9th day of September, 2017.


JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**