No. 17-6329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 29, 2018
DEBORAH S. HUNT, Clerk

JARVIS HARRIS,

Petitioner-Appellant,

v.

GRADY PERRY, HCCF Warden,

Respondent-Appellee.

ORDER

Jarvis Harris, a pro se Tennessee prisoner, appeals from the district court's order denying his motion for relief from the judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Harris has applied to this court for a certificate of appealability (COA). He also seeks permission to proceed in forma pauperis.

In 2005, a Tennessee jury convicted Harris of one count of first-degree murder and one count of attempted first-degree murder. The trial court sentenced Harris to life imprisonment. The Tennessee Court of Criminal Appeals affirmed Harris's convictions, *State v. Harris*, No. W2006-02234-CCA-R3-CD, 2007 WL 2409676 (Tenn. Crim. App. Aug. 24, 2007), and the Tennessee Supreme Court denied permission to appeal further.

In 2009, Harris filed a state post-conviction petition, which the trial court denied. The Tennessee Court of Criminal Appeals affirmed this decision, *Harris v. State*, No. W2010-01848-CCA-R3-PC, 2011 WL 3629230 (Tenn. Crim. App. Aug. 18, 2011), and the Tennessee Supreme Court denied further review.

In 2012, Harris filed his § 2254 petition in the district court, alleging several violations of his constitutional rights. The district court initially dismissed two of his claims as not providing a cognizable basis for § 2254 relief and a third claim as clearly without merit. The court

permitted a fourth claim, alleging the ineffective assistance of trial and appellate counsel in handling a Fourth Amendment claim, to proceed. *Harris v. Perry*, No. 2:12-CV-02668-STA-dkv, 2015 WL 5707078 (W.D. Tenn. Sept. 28, 2015). The court subsequently concluded that this issue also was meritless and dismissed the petition. *Harris v. Perry*, No. 2:12-CV-02668-STA-dkv, 2016 WL 552969 (W.D. Tenn. Feb. 10, 2016). Harris next filed two motions for relief from judgment, which the district court denied. *Harris v. Perry*, No. 2:12-CV-02668-STA-dkv, 2016 WL 5396701 (W.D. Tenn. Sept. 27, 2016). Harris appealed the district court's decision, but this court dismissed his appeal as untimely. *Harris v. Perry*, No. 16-6822, 2017 WL 6546949 (6th Cir. July 13, 2017) (order). Harris then filed a third motion for relief from judgment, and the district court also denied this motion. Additionally, the district court denied Harris a COA to appeal its decision. Harris now seeks a COA in order to challenge the denial of his third motion for relief from judgment.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A COA is necessary to appeal the denial of a Rule 60(b) motion in a § 2254 case, *Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010), and, in order to obtain a COA, Harris must demonstrate that jurists of reason "could debate whether . . . the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citations and internal quotation marks omitted).

In his motion for relief from judgment, Harris first argued that he was entitled to relief under Federal Rule of Civil Procedure 60(b)(1). Rule 60(b)(1) provides for relief from a final judgment based on "mistake, inadvertence, surprise, or excusable neglect," and Harris relies on that last basis for seeking relief. After its initial order dismissing three of Harris's claims, *see Harris*, 2015 WL 5707078, at *11-21, the district court appointed counsel to represent Harris and provided him with an opportunity to file a supplemental memorandum or an amended § 2254

petition addressing Harris's remaining ineffective assistance of counsel claim. However, despite a reminder from the district court, counsel never filed a memorandum, and the district court concluded that Harris had waived his right to file an amended § 2254 petition or supplemental memorandum. *Harris*, 2016 WL 552969, at *2. In his subsequent Rule 60(b) motion, counsel pleaded "excusable neglect" due to his assistant failing to bring the court's notices to his attention. The court concluded that counsel's allegations were insufficient to establish "excusable neglect," but the court still permitted counsel to file a supplemental pleading to prevent a manifest injustice to Harris. While counsel did raise additional arguments in his next post-judgment motion, they were insufficient to establish "manifest injustice." *Harris*, 2016 WL 5396701, at *4-7.

Although Harris now contends that his federal habeas counsel's failure to file a supplemental pleading provides a basis for Rule 60(b)(1) relief, counsel's inaction does not rise to the level of "excusable neglect." Clients are accountable for their attorney's acts and omissions, and attorney inadvertence generally does not constitute excusable neglect. *See McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 594-95 (6th Cir. 2002). "[O]ut-and-out lawyer blunders—the type of action or inaction that leads to successful malpractice suits by the injured client—do not qualify as 'mistake' or 'excusable neglect' within the meaning of [Rule 60(b)(1)]." *Id.* at 595 (second alteration in original) (quoting *Helm v. Resolution Tr. Corp.*, 161 F.R.D. 347, 348 (N.D. Ill. 1995)). Harris has not shown that his counsel's inaction amounted to more than ordinary attorney error, and it is insufficient to establish excusable neglect under Rule 60(b)(1). Furthermore, the district court later allowed Harris's federal habeas counsel to file a supplemental pleading, thus protecting Harris from his counsel's error.

Harris also relies on Rule 60(b)(4), which provides that the movant may obtain relief from a judgment which is void. Harris's argument on this point is hard to parse, but the thrust of his contention appears to be that the district court erroneously ruled on the merits of his first and

second motions for relief from judgment rather than first determine whether he was entitled to a COA. Harris's argument is without merit. A COA is necessary before a petitioner may appeal a final order in a habeas corpus proceeding to the court of appeals, *see* 28 U.S.C. § 2253, but this rule is inapposite to the scope of the district court's authority.

Lastly, Harris cites Rule 60(b)(6), a residual clause, which allows for relief from judgment for "any other reason that justifies relief." Rule 60(b)(6) applies only in "exceptional or extraordinary circumstances where principles of equity mandate relief." *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018) (quoting *Sheppard v. Robinson*, 807 F.3d 815, 820 (6th Cir. 2015)); *West v. Carpenter*, 790 F.3d 693, 696-97 (6th Cir. 2015). Such circumstances "rarely occur" in the habeas context. *Miller*, 879 F.3d at (quoting *Sheppard*, 807 F.3d at 820). In the Rule 60(b)(6) context, the district court's discretion is "especially broad due to the underlying equitable principles involved." *Miller*, 879 F.3d at 698 (quoting *West*, 790 F.3d at 697).

In support of his argument, Harris relies on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), as a basis for granting relief from his federal habeas counsel's neglect. Even if *Martinez* and *Trevino* could provide the basis for Rule 60(b)(6) relief, they do not apply to Harris's claims. *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014) ("[N]either *Martinez* nor *Trevino* sufficiently changes the balance of the factors for consideration under Rule 60(b)(6) to warrant relief."). *Martinez* and *Trevino* extend only to underlying claims involving the ineffective assistance of trial counsel. *Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017); *Atkins v. Holloway*, 792 F.3d 654, 662 (6th Cir. 2015); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013). Therefore, *Martinez* and *Trevino* are inapposite to any errors by Harris's federal habeas counsel.

Harris cannot demonstrate that jurists of reason "could debate whether . . . [his Rule 60(b) motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. Accordingly,

the court **DENIES** Harris's COA application and **DENIES** his motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

JARVIS HARRIS, Petitioner, v. GRADY PERRY, Respondent.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION
2017 U.S. Dist. LEXIS 194701
Case No. 2:12-cv-02668-STA-dkv
November 28, 2017, Decided
November 28, 2017, Filed

Editorial Information: Prior History

Harris v. Perry, 2015 U.S. Dist. LEXIS 129774 (W.D. Tenn., Sept. 22, 2015)

Counsel For Grady Perry, HCCF Warden, Respondent: Andrew Craig Coulam, LEAD ATTORNEY, TENNESSEE DEPARTMENT OF FINANCE AND ADM., Nashville, TN.

Judges: S. THOMAS ANDERSON, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: S. THOMAS ANDERSON

Opinion

ORDER CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On February 10, 2016, the Court denied the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner, **Jarvis Harris**, Tennessee Department of Correction prisoner number 400198. (ECF No. 32.) Judgment was entered that same day. (ECF No. 33.) On September 27, 2016, the Court denied Petitioner's motion to set aside the judgment. (ECF No. 38.) Petitioner filed a notice of appeal on December 16, 2016. (ECF No. 39.) The Court of Appeals dismissed the appeal for lack of jurisdiction on the ground that the appeal had not been filed timely. (ECF No. 41.) Petitioner then filed a motion for relief from judgment (ECF No. 42) which was denied on September 27, 2017. (ECF No. 43.) On October 23, 2017, Petitioner filed another notice of appeal. (ECF No. 44.) On November 27, 2017, Petitioner filed a motion for leave to appeal *in forma pauperis*. (ECF No. 47.) The motion is **DENIED**.

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. at 335; *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules"). A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been

resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Cockrell*, 537 U.S. at 336 (internal quotation marks omitted); *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Cockrell*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773.

In this case, because any appeal by Petitioner on the issues raised in his § 2254 Petition and/or in his motion for relief from judgment does not deserve attention, the Court **DENIES** a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.

IT IS SO ORDERED.

/s/ S. Thomas Anderson

S. THOMAS ANDERSON

CHIEF UNITED STATES DISTRICT JUDGE

Date: November 28, 2017