

WESTLAW**Barnett v. Davis**

United States Court of Appeals, Fifth Circuit | October 10, 2017 | 698 Fed.Appx. 239 (Mem) (Approx. 2 pages)

698 Fed.Appx. 239 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.

Ricky Allen BARNETT, Petitioner-Appellant

v.

Lorie DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent-Appellee

No. 16-41193

Filed October 10, 2017

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 4:12-CV-167

Attorneys and Law Firms

Ricky Allen Barnett, Pro Se

Alex Matthew Smith, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX, for Respondent-Appellee

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM: *

Ricky Allen Barnett, Texas prisoner # 01541732, moves for a certificate of appealability (COA) and leave to proceed in forma pauperis (IFP) on appeal of the district court's denial of his motion to reopen the appeal period pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Rule 4(a)(6) is permissive and compliance with Rule 4(a)(6) does not require the district court to grant the motion, we review the district court's denial of the motion for an abuse of discretion. See *In re Jones*, 970 F.2d 36, 39 (5th Cir. 1992). Barnett did not file his motion to reopen the appeal period within 180 days of the entry of the judgment or within 14 days after he received notice of the judgment and thus did not satisfy the requirements of Rule 4(a)(6)(2). Accordingly, the district court's denial of the

APPENDIX A

motion was not an abuse of discretion. *Rodriguez v. Johnson*, 104 F.3d 694, 696 (5th Cir. 1997).

The motion for a COA is DENIED AS UNNECESSARY. See *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007); *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002). Even if a COA were required, Barnett has not shown that one should issue. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

He also has not shown that there is a nonfrivolous issue for appeal concerning the denial of his motion to reopen. See *Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). Barnett's motion for IFP is DENIED. As there is no nonfrivolous issue for appeal, the appeal is DISMISSED AS FRIVOLOUS. See *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2.

All Citations

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Footnotes

- * 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.

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

RICKY ALLEN BARNETT, #01541732

VS.

DIRECTOR, TDCJ-CID

§
§
§
§
§

CIVIL ACTION NO. 4:12cv167

POSTJUDGMENT ORDER

Movant filed a motion to reopen his case and allow him to file an out-of-time appeal (Dkt. #25). Ordinarily, a notice of appeal must be filed within 30 days after the judgment or order appealed from is entered. Fed. R. App. Proc. 4(a)(1)(A). A motion for extension of time in which to file the appeal must be filed within 30 days of the initial deadline. Fed. R. App. Proc. 4 (a)(5) (A).

In this case, Final Judgment issued on March 30, 2015. Consequently, Movant's motion for an extension of time to file his appeal must have been filed by May 29, 2015. The record shows that on September 3, 2015, Movant filed a notice of appeal. However, on December 17, 2015, the Fifth Circuit Court of Appeals dismissed the appeal because it was untimely filed.

On February 1, 2016, Movant filed the instant motion. He claims he did not receive notice of Final Judgment until April 24, 2015, but fails to show why he waited more than four months before filing anything. He then waited another six weeks after the Fifth Circuit dismissed his appeal before filing this motion. Movant has not shown excusable neglect or good cause for filing his motion 308 days after Final Judgment. It is accordingly

ORDERED that the motion (Dkt. #25) is **DENIED**.

SIGNED this 10th day of August, 2016.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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