

February 10, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10373
Summary Calendar

TEDDY JOE RABEL,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS
DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:04-CV-953

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

Teddy Joe Rabel was convicted in Texas state court of felony murder and sentenced to ten years of imprisonment. Subsequently, he challenged his conviction in a 28 U.S.C. § 2254 application. Noting certain deficiencies in the application, the magistrate judge order Rabel to correct the deficiencies. Rabel failed to comply with the order, and the district court dismissed the application for want of prosecution. Rabel filed a FED. R. CIV.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

P. 60(b) motion, arguing that he should be relieved from the judgment based on counsel's excusable neglect. Counsel stated that he was unaware of the existence of the order and only became aware of the order upon receiving the dismissal order from the district court. The district court denied the motion. Rabel then filed a notice of appeal.

Rabel seeks a certificate of appealability from this court. However, our jurisdiction is limited to the denial of the FED. R. CIV. P. 60(b) motion because the notice of appeal was untimely as to the dismissal of Rabel's 28 U.S.C. § 2254 application. Dison v. Whitley, 20 F.3d 185, 186 (5th Cir. 1994). With regard to his argument challenging the district court's denial of the FED. R. CIV. P. 60(b) motion, a COA is unnecessary. See Dunn v. Cockrell, 302 F.3d 491, 492 (5th Cir. 2002).

This court reviews the denial of a FED. R. CIV. P. 60(b) motion for abuse of discretion. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). Rabel filed his motion pursuant to FED. R. CIV. P. 60(b)(1), which permits a court to relieve a party from final judgment for excusable neglect. The district court determined that Rabel was not entitled to relief from judgment because Rabel failed to explain why the order to correct the deficiencies in the application was not received but the following orders from the district court were received. The documents mailed to Rabel's counsel were not returned. The district court also noted that Rabel's motion was not supported

by an affidavit. This court also notes that the notice of appeal was untimely filed as to the dismissal of the 28 U.S.C. § 2254 application. The pattern of neglect exhibited by Rabel's counsel does not warrant relief from judgment based on excusable neglect under FED. R. CIV. P. 60(b). Because the district court did not abuse its discretion in denying the motion, the judgment is AFFIRMED. Rabel's request for a COA is DENIED AS UNNECESSARY.