

July 23, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51401
Summary Calendar

ROYRY GLENN TONES,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:06-CV-683

Before DeMOSS, STEWART, and PRADO, Circuit Judges.

PER CURIAM:*

Royry Glenn Tones, Texas prisoner # 1237607, was convicted by a jury of two counts of aggravated robbery and was sentenced to 75 years in prison. He attempted to file a 28 U.S.C. § 2254 petition challenging this conviction, but the district court dismissed his petition without prejudice pursuant to FED. R. CIV. P. 41(b) for failing to comply with a court order to pay the filing fee or request leave to proceed in forma pauperis. Tones

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

now seeks a certificate of appealability (COA) to challenge this dismissal.

Because a new petition filed by Tones would be barred by the limitations period of 28 U.S.C. § 2244(d)(1), the district court's dismissal without prejudice operates as a dismissal with prejudice. See Duncan v. Walker, 533 U.S. 167, 180 (2001); Gray v. Fidelity Acceptance Corp., 634 F.2d 226, 227 (5th Cir. 1981). In his notice of appeal, and again before this court, Tones asserts that he submitted a timely request for withdrawal of his funds from his prison account and that this request was mailed in a timely manner. In light of this, there is no "clear record of delay or contumacious conduct" by Tones. See Gray, 634 F.2d at 227 (internal quotation marks omitted).

Consequently, reasonable jurists would find it debatable that the district court erred in dismissing Tones's petition on procedural grounds. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). COA is therefore GRANTED on the question whether Tones attempted to comply in a timely manner with the district court's order for payment. This case is REMANDED for consideration of this issue in the first instance by the district court and for review of the prison records or an evidentiary hearing, if necessary. Tones's motion for leave to proceed in forma pauperis (IFP) on appeal is likewise GRANTED.