

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7491
Summary Calendar

EDGAR RAY DICKEY,

Petitioner-Appellant,

versus

EDWARD HARGETT,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA J92 0309 L C)

(November 18, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Edgar Ray Dickey was convicted of manslaughter and is serving a 20-year prison sentence at the Mississippi State Penitentiary. This appeal is from the dismissal of Dickey's federal habeas petition for failing to exhaust state remedies. In his habeas petition, Dickey alleged that he asked his retained trial counsel to file an appeal but that the attorney failed to do so because

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

there were outstanding costs that had not been paid. Dickey's motion for appointment of counsel was dismissed without prejudice by the Mississippi Supreme Court. In September 1991, Dickey filed a petition for out-of-time appeal in the Circuit Court of Copiah County, Mississippi. Six months later, Dickey filed a petition for writ of mandamus seeking to compel the circuit court to act on his petition for out-of-time appeal. In May 1992, the Mississippi Supreme Court denied the mandamus petition.

In June 1992, Dickey filed a federal habeas petition, arguing that he had exhausted his available state remedies because those remedies were rendered ineffective by the state's inaction. The district court sua sponte dismissed the case for failure to exhaust state remedies, noting that only ten months had passed since the filing of the motion for out-of-time appeal. The district court did not believe that "there had been such an inordinate delay as to render the state procedures ineffective." The district court issued a certificate of probable cause for an appeal. The state did not make an appearance in the district court and has not filed a brief in this appeal.

A state prisoner who seeks relief via habeas corpus must exhaust his state remedies unless "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b); see Rose v. Lundy, 455 U.S. 509, 515 n.7, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982);

Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978) (en banc). In Breazeale v. Bradley, 582 F.2d 5, 6 (5th Cir. 1978), the court excused a habeas petitioner's failure to exhaust state remedies because a state court had failed to take any action on the petitioner's state habeas petition for over one year and had failed to explain the delay.¹ Because of the passage of time since the entry of the district court's judgment, more than one year has passed since Dickey filed his petition for out-of-time appeal and the state has offered no explanation for the delay.

Dickey has fairly presented the issue to the state court by moving for an out-of-time appeal. See Barnett v. Mississippi, 497 So. 2d 443, 444 (Miss. 1986); see also Satterwhite v. Lynaugh, 886 F.2d 90, 92 (5th Cir. 1989) ("In order to exhaust, a petitioner must `fairly present' all of his claims to the state court"). The Barnett court held that a pro se criminal defendant's motion for out-of-time appeal should be granted if he can prove that he asked his attorney to appeal within the time for filing notice of appeal and that his attorney, through no fault of the defendant's, failed to appeal. 497 So. 2d at 444.

Under Breazeale, the state court's failure to act on the motion has rendered Dickey's state remedies ineffective. Therefore, the district court's judgment dismissing the federal

¹By the time this court's opinion was published, nearly 18 months had passed since the filing of Breazeale's state habeas petition. The court's reasoning, however, was predicated on the passage of "over one year." Breazeale, 582 F.2d at 6.

habeas petition is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.