Mosley v. Warden Ross Correctional Institution

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES C. MOSLEY,

Petitioner,

CASE NO. 2:07-cv-01036
JUDGE GRAHAM
MAGISTRATE JUDGE ABEL

v.

MICHAEL SHEETS, Warden,

Respondent.

OPINION AND ORDER

On September 30, 2008, final judgment was entered dismissing the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the Court on petitioner's motion for en banc hearing, and his November 24, 2008,[1] request for a certificate of appealability and request to proceed *in forma pauperis* on appeal. Doc. Nos. 25-27. For the reasons that follow, petitioner's motion for en banc hearing, request for a certificate of appealability and request to proceed *in forma pauperis* on appeal, Doc. Nos. 25-27, are **DENIED**.

In this federal habeas corpus petition, petitioner asserts that the evidence was insufficient to sustain his convictions and that the verdict was against the manifest weight of the evidence; that he was denied the effective assistance of trial and appellate counsel; and that the trial court improperly sentenced him to consecutive terms of incarceration. On September 30, 2008, the Court dismissed all of petitioner's claims as procedurally

[1] The Court granted petitioner's request for an extension of time until November 24, 2008, to file his request for a certificate of appealability. Doc. No. 24.

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defaulted.

Where the Court dismisses a claim on procedural grounds, a certificate of appealability

> should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). Thus, there are two components to determining whether a certificate of appealability should issue when a claim is dismissed on procedural grounds: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." The Court may first "resolve the issue whose answer is more apparent from the record and arguments." *Id*.

Upon review of the record, the Court is unpersuaded that reasonable jurists would debate whether this Court was correct in its dismissal of petitioner's claims due to his failure to establish cause and prejudice for his procedural defaults or in the denial of his motion to amend the petition with a new claim which likewise was procedurally defaulted. Therefore, petitioner's request for a certificate of appealability, Doc. No. 26, is **DENIED**.

As to petitioner's request to proceed in *forma pauperis* on appeal, pursuant to 28 U.S.C. §1915(a)(3), an appeal may not be taken *in forma pauperis* if the appeal is not taken in good faith. *See also* Federal Rule of Appellate Procedure 24(a)(3)(A):

> A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal

> case, may proceed on appeal in forma pauperis without further authorization, unless:
>
> (A) the district court--before or after the notice of appeal is filed-- certifies that the appeal is not taken in good faith[.]

Federal Rule of Appellate Procedure 24(a)(3)(A).

> The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). An appeal is not taken in good faith if the issue presented is frivolous. *Id.* Accordingly, it would be inconsistent for a district court to determine that a complaint is too frivolous to be served, yet has sufficient merit to support an appeal in forma pauperis. *See Williams v. Kullman*, 722 F.2d 1048, 1050 n. 1 (2d Cir.1983).

Frazier v. Hesson, 40 F.Supp.2d 957, 967 (W.D. Tenn. 1999). However,

> "the standard governing the issuance of a certificate of appealability is more demanding than the standard for determining whether an appeal is in good faith." U.S. v. *Cahill-Masching,* 2002 WL 15701, * 3 (N.D.Ill. Jan. 4, 2002). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Walker v. O'Brien*, 216 F.3d 626, 631 (7th Cir.2000).

Penny v. Booker, 2006 WL 2008523 (E.D. Michigan, July 17, 2006).

The Court certifies pursuant to 28 U.S.C. §1915(a)(3) that the appeal is not in good faith. Therefore, petitioner's request to proceed *in forma pauperis* on appeal, Doc. No. 28, is also **DENIED.**

Petitioner's motion for en banc hearing, Doc. No. 25, likewise is **DENIED**. The rule providing for a request for en banc hearing, see Rule 35 of the Federal Rules of Appellate

Procedure,[2] is not applicable to this Court's dismissal of petitioner's habeas corpus petition.

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[2] Rule 25 of the Federal Rules of Appellate Procedure provides in relevant part:

En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are

Federal Rule of Appellate Procedure 40does not apply to decisions made by this Court.

Petitioner's motion for en banc hearing, request for a certificate of appealability and request to proceed *in forma pauperis* on appeal, Doc. Nos. 25-27, are **DENIED**.

IT IS SO ORDERED.

S/ James L. Graham
JAMES L. GRAHAM
United States District Judge

Dated: January 26, 2009

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considered a single document even if they are filed separately, unless separate filing is required by local rule.