

February 14, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40817
Summary Calendar

DONTE RAMONE GREEN,

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 Eastern District of Texas
(4:02-CV-342)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Donte Ramone Green, Texas prisoner # 894464, seeks a certificate of appealability (COA) to appeal the denial of a FED. R. CIV. P. 60(b) motion. Green initially filed a 28 U.S.C. § 2254 petition challenging his conviction for robbery. The district court dismissed the petition as untimely, but Green failed to receive timely notice of the dismissal. Green subsequently moved for an out-of-time appeal based on his failure to receive notice, but the district court denied the motion as

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

untimely. Green eventually filed the instant Rule 60(b) motion for relief from the order denying his motion for an out-of-time appeal.

As Green is not attempting to use the Rule 60(b) motion to alter the judgment in his underlying habeas petition, but instead is seeking relief from the denial of his motion for an out-of-time appeal, a COA is not necessary. See Dunn v. Cockrell, 302 F.3d 491, 492 & n.1 (5th Cir. 2002); 28 U.S.C. § 2253(c)(1). Accordingly, the motion for a COA is denied as unnecessary.

Nevertheless, Green's appeal is unavailing. He contends that the district court failed to explain adequately its reasons for denying Rule 60(b) relief. Giving Green the benefit of liberal construction, we perceive that he also contends that the district court abused its discretion by failing to investigate why the notice of dismissal was returned to the court and by failing to apply equitable tolling to permit Green to appeal the dismissal. Green essentially attempts to re-argue claims he made in his motion for an out-of-time appeal. That motion was previously presented to this court, and we held that the district court was without authority to extend the appeal period. See Green v. Dretke, No. 04-41263 (5th Cir. Nov. 3, 2004); see also FED. R. APP. P. 4(a)(6). Green has failed to show that the district court's denial of Rule 60(b) relief was so unwarranted as to constitute an abuse of discretion. See Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). Accordingly, the district court's denial of Rule 60(b) relief is affirmed. See id.

MOTION FOR COA DENIED AS UNNECESSARY; AFFIRMED.