

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUN 26 1990

ROBERT L. HOECKER
Clerk

SCOTT MICHAEL THORNTON,)	
)	
Petitioner-Appellant,)	
)	
v.)	No. 89-6371
)	(D.C. No. CIV-89-1255-W)
WARREN T. DIESSLIN; ATTORNEY)	(W. Dist. of Oklahoma)
GENERAL, State of Oklahoma,)	
)	
Respondents-Appellees.)	

ORDER AND JUDGMENT*

Before MCKAY, TACHA and ANDERSON, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Scott M. Thornton appeals pro se from the dismissal of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We affirm.

Thornton pled guilty on February 23, 1987 to two charges of first degree burglary and three charges of robbery with firearms.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

He is currently serving two 20 year terms and three 25 year terms for those convictions, all of which terms run concurrently. He did not appeal those convictions.

On January 5, 1989, Thornton filed an application for post-conviction relief in the Oklahoma County district court, alleging (1) that his guilty plea was not voluntarily given; (2) that no factual basis existed for his guilty plea; (3) that he was not correctly advised of the possible range of punishment; and (4) that the State of Oklahoma had failed to abide by the plea agreement it entered with him. The district court denied his application, by order dated March 23, 1989, on the ground that Thornton "has not provided a sufficient reason to explain his failure to withdraw his guilty plea and seek an appeal," and should therefore be denied relief on that basis. The court additionally found that an affidavit Thornton executed in connection with his plea of guilty provided a sufficient factual basis for his plea; that Thornton was advised of the range of punishment; and that the state had complied with the plea agreement. The district court's post-conviction findings included the specific notice stating: "YOU MAY APPEAL THIS ORDER BY FILING A PETITION IN ERROR IN THE COURT OF CRIMINAL APPEALS WITHIN THIRTY DAYS FROM THIS DATE."

Thornton thereafter filed a Motion to Reconsider Order Denying Application for Post-Conviction Relief dated April 3, which was denied at a hearing on April 14. Thornton filed a Notice of Intent to Appeal, dated April 25, followed by a "Petition in Error" to the Oklahoma Court of Criminal Appeals, which the Clerk of

the Appellate Courts acknowledged was received on May 12. This latter petition was rejected as untimely filed.

Finally, Thornton wrote a letter to the judge who had denied his motion to reconsider the denial of his post-conviction relief petition, asking for assistance in filing his post-conviction appeal "by verifying to the Appellate Court that the 'final' ORDER was, in fact, handed down on 4-14-89 [the date of the hearing on his motion to reconsider]" or seeking permission to file an appeal out of time. The judge ultimately responded that she had no power to do what Thornton asked her to do.

Thornton filed this habeas petition in July, 1989, arguing that (1) he was coerced into pleading guilty; (2) there was no factual basis supporting his guilty plea; (3) he was never advised of the range of punishment; (4) his counsel was ineffective; and (5) the state failed to abide by the portion of the plea agreement relating to the location of Thornton's confinement. The district court dismissed the petition on the basis that "[Thornton's] submissions and the record clearly show [Thornton] made an informed choice not to appeal the denial of post-conviction relief. Hence, [Thornton] is precluded from obtaining federal habeas review of his claims due to his knowing and deliberate bypass of established state procedures." District Court Opinion and Order dated October 24, 1989 (citations omitted).

This circuit applies the "deliberate by-pass" standard of Fay v. Noia, 372 U.S. 391, 438 (1963) to the failure to directly appeal a state conviction, as well as to the failure to appeal the denial of a state habeas petition. See Osborn v. Shillinger, 861

F.2d 612, 624, 624 n.11 (10th Cir. 1988); Worthen v. Meachum, 842 F.2d 1179, 1181 (10th Cir. 1988). Thornton failed both to directly appeal his conviction and to timely appeal the denial of his post-conviction relief petition. Accordingly, we must determine whether the district court correctly held that his failure was a "deliberate by-pass," defined as "'an intentional relinquishment or abandonment of a known right or privilege.'" Fay, 372 U.S. at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). We hold that it did.

Thornton was informed of his right to appeal in both instances where he failed to do so. He was required to specifically indicate his understanding of his right to withdraw his guilty plea and to appeal his conviction in the Summary of Facts he filled out and signed at the time he entered his plea. Additionally, as indicated, the order denying his post-conviction relief petition specifically informed him of his right to appeal and the means by which to do it. While he vigorously argues that his failure to directly appeal his conviction was the result of his fear that the state would then refuse to honor the plea agreement reached with respect to the location of his confinement, thereby endangering his life, or that his family would be somehow "jeopardized" by an appeal, he offers no more than his vague and conclusory assertion that such was the case. Such an assertion does not vitiate the validity of his statements made at the time of his guilty plea, indicating his understanding of his right to appeal. See Watkins v. Crouse, 344 F.2d 927, 929 (10th Cir. 1965) ("The test for such 'deliberate bypass' of course includes an

awareness of the availability of state remedy We do not read Fay v. Noia . . . to mean . . . that the petitioner has to have some improper motive in bypassing state procedure."); see also Hammer v. Meachum, 691 F.2d 958, 960 (10th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

Thornton explains his failure to timely appeal the denial of his post-conviction petition as resulting from his lack of access to materials relating to Oklahoma law. While perhaps unfortunate, such lack of access does not excuse Thornton's failure to timely appeal, the right to do which was specifically pointed out in the state court order.

For the foregoing reasons, the judgment of the district court dismissing Thornton's petition for a writ of habeas corpus is AFFIRMED.

The Mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge