

Rehearing granted and appeal
dismissed by unpublished opinion
filed 12/4/00

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

THOMAS R. MORKE,
Plaintiff-Appellant,

v.

No. 00-6206

DAVID A. GARRAGHTY, Warden,
Greensville Correctional Center,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, Chief District Judge.
(CA-99-45-7)

Submitted: June 30, 2000

Decided: July 20, 2000

Before WILKINS and MOTZ, Circuit Judges,
and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

COUNSEL

Thomas R. Morke, Appellant Pro Se. Thomas Drummond Bagwell,
Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

Thoms R. Morke appeals the district court's order dismissing as untimely his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 2000), and a subsequent order denying relief on his motion filed pursuant to Fed. R. Civ. P. 59(e). A motion to alter or amend judgment under Rule 59(e) shall be filed no later than ten days after entry of the judgment. See Fed. R. Civ. P. 59(e). Because Morke's motion was not filed within ten days of the entry of judgment, it must be considered as a Rule 60(b) motion, rather than a Rule 59(e) motion. See In re Burnley, 988 F.2d 1, 3 (4th Cir. 1992). A Rule 60(b) motion does not bring up for review the merits of the underlying substantive judgment, nor does it toll the period for filing an appeal of the underlying judgment. See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7, 264-65, 268-69 (1978).

Because Morke did not file his Rule 59(e) motion within ten days of the district court's order dismissing his § 2254 petition, entered on September 30, 1999, the time period for filing his appeal of that order was not tolled. See Fed. R. App. P. 4(a)(4). Therefore, Morke's appeal is only timely as to the district court's denial of his subsequent motion for reconsideration. This Court reviews a denial of a Rule 60(b) motion for abuse of discretion. See NOW v. Operation Rescue, 47 F.3d 667, 669 (4th Cir. 1995).

We have reviewed the record and conclude that the district court's denial of Morke's motion for reconsideration did not constitute an abuse of discretion. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED