

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-6179

DEREK D. SMITH,

Petitioner - Appellant,

versus

COMMONWEALTH OF VIRGINIA,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Samuel G. Wilson, Chief District Judge. (CA-01-849-07)

Submitted: June 18, 2004

Decided: July 16, 2004

Before LUTTIG, MOTZ, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Derek D. Smith, Appellant Pro Se. Virginia Bidwell Theisen, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Derek D. Smith seeks to appeal the district court's order dismissing as untimely his petition filed under 28 U.S.C. § 2254 (2000). We dismiss the appeal in part for lack of jurisdiction because his notice of appeal filed January 6, 2004, was not timely filed.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. Civ. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed. R. App. P. 4(a)(6). This appeal period is "mandatory and jurisdictional." Browder v. Director, Dep't of Corr. 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

The district court's order was entered on the docket sheet on November 20, 2002. The notice of appeal was filed on January 6, 2004.* As Smith failed to file a timely notice of appeal or obtain an extension or reopening of the appeal period, we dismiss in part for lack of jurisdiction with respect to this notice of appeal.

Our review of the record, however, disclosed an earlier

*For the purpose of this appeal, we assume that the date appearing on Smith's appeal materials is the earliest date it could have been properly delivered to prison officials for mailing to the court. See Fed. R. App. P. 4(c); Houston v. Lack, 487 U.S. 266 (1988).

document entitled "Notice of Appeal" that the district court mistakenly construed as a motion to reconsider. That notice of appeal was filed on December 2, 2002, and is thus timely as to the November 20, 2002, order. We thus address that appeal.

An appeal may not be taken from the final order in a § 2254 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001).

We have independently reviewed the record and conclude that Smith has not made the requisite showing. 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