

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-7401

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PHILIP B. GREER,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (CR-01-11; CA-04-46-1)

Submitted: January 22, 2007

Decided: February 22, 2007

Before TRAXLER, KING, and GREGORY, Circuit Judges.

Dismissed in part; vacated in part and remanded by unpublished per curiam opinion.

Philip B. Greer, Appellant Pro Se. Amy Elizabeth Ray, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Philip B. Greer seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2000) motion. This court granted a certificate of appealability on the issue of whether Greer received ineffective assistance of counsel because counsel did not file a notice of appeal. See, e.g., United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993). The Government filed a brief conceding that the district court erred by denying this claim despite the fact Greer alleged under penalty of perjury that he requested his counsel to file a notice of appeal. We dismiss in part and vacate in part and remand.

Because the record did not conclusively show that Greer's counsel was not ineffective for not filing a notice of appeal, we vacate in part the district court's order and remand to the district court for an evidentiary hearing on this issue.

Greer also sought to appeal the district court's order denying relief on his other claims. This court granted a certificate of appealability only on the issue regarding whether counsel was ineffective for not filing a notice of appeal. That part of the order denying relief on the remaining claims is not appealable 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 any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude Greer has not made the requisite showing as to his remaining claims.

Accordingly, we grant Greer's motion to proceed in forma pauperis and we vacate that part of the district court's order denying Greer's claim he received ineffective assistance of counsel for failing to file a notice of appeal and remand for an evidentiary hearing on this issue. As to the remaining claims, we deny a certificate of appealability and dismiss in part 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 IN PART;
VACATED IN PART AND REMANDED