UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1152

OTIS DONALD WITHERSPOON,

Plaintiff - Appellee,

v.

COMMONWEALTH OF VIRGINIA; LABRAVIA J. JENKINS, Commonwealth Attorney,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis III, Senior District Judge. (1:11-cv-00963-TSE-TCB)

Submitted: May 31, 2012 Decided: June 5, 2012

Before KING, DUNCAN, and DIAZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Otis Donald Witherspoon, Appellant Pro Se. Turner Anderson Broughton, Brendan David O'Toole, WILLIAMS MULLEN, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Otis Donald Witherspoon seeks to appeal the district court's order dismissing his civil action attacking his Virginia state convictions on the ground that the prosecutor intentionally delayed prosecuting Witherspoon in order to gain a tactical advantage over him. As Witherspoon concedes in his informal brief, it is clear under Heck v. Humphrey, 512 U.S. 477, 486 (1994), that his lawsuit should be construed as a 28 U.S.C. § 2254 (2006) petition because it attempts only to demonstrate the invalidity of his state convictions.

To the extent that the district court construed Witherspoon's complaint as a § 2254 petition, it dismissed the petition both as untimely and for failure to exhaust state remedies. The district court's order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2006). 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) (2006). When the district court denies relief on the merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court

denies relief on procedural grounds, the petitioner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Witherspoon has not made the requisite showing. Accordingly, we deny Witherspoon's pending motion to appoint counsel, 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