

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6663

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KEVIN ISHMEAL POLK,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (CR-02-22; CA-03-264)

Submitted: December 22, 2005

Decided: December 29, 2005

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Kevin Ishmeal Polk, Appellant Pro Se. Thomas Richard Ascik, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Kevin Polk, a federal prisoner, seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2000) motion. An appeal may not be taken from the final order in a habeas corpus 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 the district court's assessment of his constitutional claims is 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 Polk has not made the requisite showing. On appeal, Polk challenges only his sentence based on the holding in United States v. Booker, 543 U.S. 220 (2005). This issue was raised for the first time on appeal and this court has recently held that Booker is not retroactively applicable to cases on collateral review. United States v. Morris, 2005 WL 2950732 (4th Cir. Nov. 7, 2005). Accordingly, we deny Polk's motion to proceed in forma pauperis and 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