

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-6496

PAUL M. DELOATCH,

Petitioner - Appellant,

versus

NORTH CAROLINA ATTORNEY GENERAL; RICK JACKSON,

Respondents - Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. James A. Beaty, Jr., District Judge. (CA-94-267-2)

Submitted: December 14, 1995

Decided: January 2, 1996

Before ERVIN, Chief Judge, and WIDENER and WILKINS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Paul M. Deloatch, Appellant Pro Se. Richard Norwood League, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Appellant appeals the dismissal without prejudice of his 28 U.S.C. § 2254 (1988) petition for failure to exhaust state remedies. Generally, dismissals without prejudice are not appealable, unless no amendment to the complaint could cure the defects in the plaintiff's case. Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1066-67 (4th Cir. 1993). We find that Appellant may be able to save this action through amendment.

The district court, accepting the magistrate judge's recommendation, dismissed Appellant's petition because it contained exhausted and unexhausted claims. See Rose v. Lundy, 455 U.S. 509, 519 (1982). Appellant may either exhaust all the claims in the petition and then refile his petition, or he may amend his petition by deleting any unexhausted claims and resubmitting the amended petition to the district court. Id. Thus, while the district court order here might be read to allow resubmission only after exhaustion, it appears that the order merely did not enumerate specifically all of Appellant's options.

Because the order which Appellant seeks to appeal is not an appealable final order, see Domino Sugar Corp., 10 F.3d at 1066-67, we deny a certificate of probable cause to appeal, deny leave to proceed in forma pauperis, and dismiss the appeal as interlocutory. 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