

UNITED STATES COURT OF APPEALS August 20, 2010

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

MATTHEW JOSEPH SUND,

Petitioner - Appellant,

v.

JAMES WINDER,

Respondent - Appellee.

No. 10-4140
(D.C. No. 2:10-CV-00548-DS)

ORDER

Before **TACHA, TYMKOVICH, and HOLMES**, Circuit Judges.

On August 2, 2010, Matthew Joseph Sund filed a document construed as a notice of appeal in connection with a 28 U.S.C. § 2241 proceeding pending in the U.S. District Court for the District of Utah. A preliminary record was sent to this court and we opened the above-captioned appeal. Noting the probable lack of appellate jurisdiction, the court issued a show cause order, to which Mr. Sund responded.

The only order on the district court docket that Mr. Sund could be attempting to appeal is the magistrate judge's directive of June 25, 2010, ordering Mr. Sund to file a copy of a prison trust account statement. This attempted appeal is accordingly

jurisdictionally defective for three reasons.

First, except for proceedings conducted by a magistrate judge upon designation by a district court judge and consent by the parties pursuant to 28 U.S.C. § 636(c), orders entered by a magistrate judge are not final and immediately appealable to a circuit court. “[W]e have consistently recognized that ‘[a] magistrate exercising “additional duties” jurisdiction remains constantly subject to the inherent supervisory power of the district judge and the district judge retains the ultimate responsibility for decision making in every instance.’” Colorado Bldg. & Constr. Trades Council v. Anderson Constr., 879 F.2d 809, 811 (10th Cir. 1989) (internal citation omitted); see also Phillips v. Beierwaltes, 466 F.3d 1217, 1221 (10th Cir. 2006). The parties have not consented to disposition by a magistrate judge so the order identified by appellant is interlocutory and not immediately appealable under 28 U.S.C. § 1291 or any other recognized exception to the final judgment rule. Mr. Sund argues that the order was entered by a district court judge, not a magistrate judge. This assertion is simply incorrect. The order was entered by Hon. Paul M. Warner, United States Magistrate Judge.

Second, except in certain circumstances not present here, this court’s appellate jurisdiction is limited to review of final judgments. United States v. Nixon, 418 U.S. 683 690-92 (1974); Albright v. Unum Life Ins. Co., 59 F.3d 1089, 1092 (10th Cir. 1995). A decision is “not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute judgment.” Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (internal quotations omitted). Thus, “[t]he law normally

requires a defendant to wait until the end of the trial to obtain appellate review of a pretrial order.” Sell v. United States, 539 U.S. 166, 176 (2003). Inasmuch as the district court has not yet dismissed or otherwise brought the case to final judgment, there is no appealable final order entered and accordingly, this court lacks jurisdiction over this attempted appeal. Mr. Sund’s response does not address this issue directly, except perhaps to assert that the order should be considered the same as a final judgment. There is no legal basis for this argument.

Third, even if the order Mr. Sund is attempting to appeal was a final judgment entered by a district court judge, the notice of appeal is untimely. The order Mr. Sund seeks to appeal was entered on June 26, 2010 and the notice of appeal was not filed until August 2, 2010, past the thirty day deadline. See Fed. R. App. P. 4(a)(1)(A). The Supreme Court has held that a timely notice of appeal is a jurisdictional prerequisite to appellate jurisdiction in a case such as this. Bowles v. Russell, 551 U.S. 205, 214 (2007). Mr. Sund attempts to piece together a timeline that would make the notice of appeal timely but his contentions find no support in the law.

The order Mr. Sund attempts to appeal was issued by a magistrate judge, there has been no final judgment nor immediately appealable order entered as yet in the district court proceeding, and the attempted appeal is untimely. Any one of these three findings would serve as grounds for dismissal. There is no basis for this court to exercise

jurisdiction. Accordingly, this attempted appeal is dismissed.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

A handwritten signature in black ink, appearing to read "Douglas E. Cressler", is written over a light gray rectangular background.

by: Douglas E. Cressler
Chief Deputy Clerk