

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TYRON JAMES,

Petitioner,

v.

JAMES HEIMGARTNER, et al.,

Respondents.

Case No. 15-3116

MEMORANDUM AND ORDER

Tyron James, a prisoner in a state correctional facility in Kansas, filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody (Doc. 1.) Respondents filed a Motion to Dismiss (Doc. 15) arguing that the petition should be dismissed as untimely under 28 U.S.C. § 2244(d)(1).

Petitioner placed his federal habeas petition in the prison mailing system on May 11, 2015, after his state conviction became final on July 21, 2005. The parties do not dispute the relevant dates set forth in the procedural history portion of respondents' motion to dismiss, thus the court adopts these facts.

I. Legal Standard

Federal petitions for habeas corpus generally must be filed within one year of the date on which the petitioner's conviction became final. 28 U.S.C. § 2244(d)(1)(A). Under § 2244(d)(1)(A), "a petitioner's conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until—following a decision by the state court of last resort—'after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed.'" *Locke v. Saffle*, 237 F.3d 1269, 1273

(10th Cir. 2001) (quoting *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999)). However, the one-year limitation period is tolled during the time “a properly filed application for state post-conviction or other collateral review . . . is pending.” *Id.* § 2244(d)(2).

II. Timeliness

Using July 20, 2006—the date petitioner claims he placed his first Kan. Stat. Ann. § 60-1507 motion (“first motion”) in the prison mailing system—as the date of filing for petitioner’s first motion, petitioner had one day remaining under the statute of limitations. Petitioner did not immediately seek federal relief when his petition for review was denied on August 19, 2013. Instead, petitioner claims that he mailed a second habeas motion under Kan. Stat. Ann. § 60-1507 (“second motion”) to the state court via prison mail on August 20, 2013. Assuming petitioner’s second motion was filed within the one-year period; it was successive and did not toll the statute of limitations. *See Burger v. Scott*, 317 F.3d 1133, 1139 (10th Cir. 2003) (federal courts look to state procedural law to determine whether a state petition is properly filed); *see also* Kan. Stat. Ann. § 60-1507(c) (successive motions are not generally permitted in Kansas). Notably, the Kansas Court of Appeals affirmed the trial court’s dismissal of petitioner’s second motion as successive and untimely. *James v. State*, No. 111091, 2015 WL 1310738, at *5, 7 (Kan. Ct. App. Mar. 13, 2015).

It is worth mentioning that petitioner raised claims of ineffective assistance of postconviction appellate counsel in his second motion. While there is no constitutional right to counsel in a state habeas proceeding under Kan. Stat. Ann. § 60-1507, Kansas has a statutory provision for appointment of counsel if conditional provisions are met. *Robertson v. State*, 201 P.3d 691, 699 (Kan. 2009) (“there is a conditional right to counsel protected by statute[]”). Kansas recognizes that claims of ineffective assistance of postconviction counsel can qualify as an exceptional circumstance to warrant review of a successive habeas motion. *See Carter v. Werholtz*, 430 F. App’x 702, 707 (10th Cir. 2011) (“[U]nder

Kansas law a defendant may be able to bring a second or successive § 60-1507 motion under the exceptional-circumstances doctrine by showing that the reason for not raising the issue sooner was ineffective assistance of counsel.”); *see also Robertson*, 201 P.3d at 699–700 (once the Kansas statutory right to counsel attaches, a movant is entitled to effective assistance of counsel.”). However, the Kansas Court of Appeals addressed the merits of petitioner’s claims and found that he failed to show postconviction counsel was ineffective. *James*, 2015 WL 1310738 at *7–8.

III. Equitable Tolling

Without additional tolling, petitioner’s federal habeas petition is time-barred. *See Burger*, 317 F.3d at 1141 (recognizing “that § 2244(d) is not jurisdictional, but rather is subject to equitable tolling.”). In habeas cases, equitable tolling is limited to “rare and exceptional circumstances.” *Id.* (quoting *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000)). “The Tenth Circuit has stated that equitable tolling ‘would be appropriate, for example, where a prisoner is actually innocent, when an adversary’s conduct—or other uncontrollable circumstance—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period.’” *Cline v. Schnurr*, No. 5:14-CV-3159-JTM, 2015 WL 6138484, at *3 (D. Kan. Oct. 19, 2015) (quoting *Gibson*, 232 F.3d at 808)).

Petitioner claims that he diligently pursued his rights and was entitled to bring the second motion because he raised constitutional issues challenging his conviction. Petitioner also alleges that his retained postconviction counsel was ineffective by (1) failing to file a timely state habeas petition; (2) lying to him about her progress on his case; and (3) failing to provide petitioner copies of his transcripts. As a result, petitioner personally filed his first motion to avoid it being time-barred—although, retained counsel later filed an amended state habeas petition. *See James*, 2015 WL 1310738 at *1.

Even if counsel was ineffective with respect to petitioner's first motion, petitioner failed to immediately seek federal review after it was denied. At this point, petitioner's retained counsel no longer represented him; and petitioner was aware of her alleged misconduct prior to the expiration of his deadline. *Cf. Fleming v. Evans*, 481 F.3d 1249, 1256–57 (10th Cir. 2007) (citing cases where the statute of limitations were equitably tolled because habeas counsel misled the petitioners into believing they were working on and would file timely habeas petitions). Petitioner does not claim that the ineffectiveness of his retained counsel hindered his ability to timely file a federal habeas petition on August 20, 2013, as opposed to a second state habeas petition. And as addressed above, petitioner was not "entitled" to bring the second motion, which was deemed improper by the state courts. Also, federal habeas relief is not available for independent claims of ineffective assistance of postconviction counsel. *See Carter*, 430 F. App'x at 708 ("There is no constitutional right to postconviction counsel; so even if his attorney in his proceedings under § 60-1507 should have raised these ineffectiveness claims, that failure is not a ground for relief under § 2254.").

The court finds that petitioner cannot meet the "rare and exceptional" circumstances standard to warrant equitable tolling in his case. Therefore, the petition is time-barred under § 2244(d), and is dismissed.

Rule 11 of the Rules Governing Section 2254 Proceedings states that the court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. When the court bases its ruling on procedural grounds, a petitioner must demonstrate "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," and "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Gifford v. Everett*, 28 F. App'x 748, 750 (10th Cir. 2001) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Here, the court declines to issue a certificate of appealability. Nothing suggests that the court's rulings in this case are debatable or incorrect, and no record authority suggests that the Tenth Circuit would resolve this case differently. Petitioner may not appeal the court's denial of a certificate, but he may seek a certificate of appealability from the Tenth Circuit. *See* Rules Governing Section 2254 Cases, Rule 11(a).

IT IS THEREFORE ORDERED that respondents' Motion to Dismiss (Doc. 15) is granted.

IT IS FURTHER ORDERED that is petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody (Doc. 1) is dismissed.

This case is closed.

Dated this 28th day of March, 2017, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES COURT OF APPEALS January 11, 2018

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

TYRON JAMES,

Petitioner - Appellant,

v.

JAMES HEIMGARTNER;
ATTORNEY GENERAL OF
KANSAS,

Respondents - Appellees.

No. 17-3080
(D.C. No. 5:15-CV-03116-CM)
(D. Kansas)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Before **KELLY, MURPHY**, and **MATHESON**, Circuit Judges.

This matter is before the court on Tyron James's pro se request for a certificate of appealability ("COA").¹ James seeks a COA so he can appeal the dismissal of his 28 U.S.C. § 2254 habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A). Because he has not "made a substantial showing of the denial of a constitutional

¹Also pending before this court is a motion for leave to proceed on appeal in forma pauperis. Because the district court entered an order on September 13, 2017, granting James's Motion for Leave to Appeal in Forma Pauperis, we **deny** the identical motion James filed in this court as moot.

right,” *id.* § 2253(c)(2), this court **denies** James’s request for a COA and **dismisses** this appeal.

Following a jury trial in Kansas state court, James was convicted of two counts of “first-degree premeditated murder. *State v. James*, 109 P.3d 1171, 1172 (Kan. 2005). The Kansas Supreme Court affirmed James’s convictions and the resulting “concurrent hard 50 life sentences.” *Id.* at 1173-74. In an unpublished memorandum disposition, the Kansas Court of Appeals denied James’s request for collateral relief, concluding “James failed to satisfy his burden to show that counsel’s performance was constitutionally deficient or that counsel’s performance prejudiced the defense and deprived him of a fair trial.” *James v. State*, No. 105,984, 2013 WL 517625 at *4-5 (Kan. Ct. App. Feb. 8, 2013). The Kansas Court of Appeals thereafter affirmed the dismissal of a second state-court motion for collateral relief filed by James on the grounds it was successive and untimely. *James v. State*, No. 111,091, 2015 WL 1310738, at *3-7 (Kan. Ct. App. March 13, 2015). The state court specifically noted that the successive and untimely nature of James’s second state-court motion for collateral relief was not excused by James’s allegations of ineffective assistance of counsel in the proceedings on his first state-court motion for collateral relief because the record conclusively demonstrated those allegations were without merit. *Id.* at 7-9.

James then filed the instant § 2254 habeas corpus petition on May 11, 2015. The district court concluded James’s petition was untimely under the provisions

of 28 U.S.C. § 2244(d). The district court noted it was uncontested that James's state-court convictions became final on July 21, 2005. James filed his first state-court motion for collateral relief on July 20, 2006. *See* 28 U.S.C. § 2244(d)(2) (providing that the one-year limitations period is tolled during the time "a properly filed application for state post-conviction or other collateral review . . . is pending"). When the Kansas Court of Appeals denied relief on August 19, 2013, James had but one day left before the limitations period set out in § 2244(d) expired. Instead of filing a § 2254 petition, James filed a second state-court motion for collateral relief. Thus, the only way James's § 2254 petition could be timely was if his second state-court motion for collateral relief tolled the limitations period set out in § 2244(d). The district court decided the answer to that question was "no," concluding James's § 2254 motion was untimely because the state court had determined the second motion was not properly filed (i.e., untimely and successive). *See Burger v. Scott*, 317 F.3d 1133, 1139 (10th Cir. 2003) (federal courts look to state procedural law to determine whether a state petition is properly filed). Thus, that motion could not serve to toll the limitations period, meaning the limitations period expired on August 20, 2013, and James's May 11, 2015 federal habeas petition was filed more than a year too late. The district court further determined James was not entitled to equitable tolling because he had not acted diligently and because he could not credibly

claim any delay in the filing of his federal petition was caused by ineffective assistance of counsel in his first state-court collateral proceeding.

The granting of a COA is a jurisdictional prerequisite to James's appeal from the dismissal of his § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is, he must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (quotations omitted). When a district court dismisses a § 2254 petition on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Although James need not demonstrate his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Miller-El*, 537 U.S. at 338. As a further overlay on this standard, we review for abuse of discretion the district court's decision that James is not entitled to have the limitations period in § 2244(d) equitably tolled. *See Burger*, 317 F.3d at 1141.

Having undertaken a review of James's appellate filings, the district court's order, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller-El*, we conclude James is not entitled to a COA. The district court's conclusion that James's petition is untimely is clearly correct. Furthermore, it cannot reasonably be asserted the district court abused its discretion in denying James's request for equitable tolling. Indeed, in his filings before this court on appeal, James does not even address the district court's rulings on timeliness and equitable tolling. Instead, he merely argues the merits of his § 2254 habeas petition. Accordingly, this court **DENIES** James's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

February 9, 2018

Elisabeth A. Shumaker
Clerk of Court

TYRON JAMES,

Petitioner - Appellant,

v.

No. 17-3080

JAMES HEIMGARTNER, et al.,

Respondents - Appellees.

ORDER

Before **MATHESON, KELLY, and MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk