

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 27, 2018
Decided May 18, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

CERTIFIED COPY

A True Copy

Teste:

Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

No. 17-1698

JAMES PELLO,
Petitioner-Appellant,

v.

DUSHAN ZATECKY,
Respondent-Appellee.

Appeal from the United States District
Court for the Southern District
of Indiana, Indianapolis Division.

No. 1:16-cv-1355-RLY-DLM

Richard L. Young,
Judge.

ORDER

James Pello has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Pello's motions to proceed in forma pauperis and for appointment of counsel on appeal are DENIED.

APPX "E"

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:

6/11/2018

Received by:

Laura Townsend

Deputy Clerk, U.S. District Court

form name: c7_Mandate(form ID: 135)

APPX "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES PELLO,

Petitioner,

vs.

DUSHAN ZATECKY,

Respondent.

No. 1:16-cv-1355-RLY-DLM

**Entry Discussing Petition for Writ of Habeas
Corpus and Denying Certificate of Appealability**

An Indiana jury convicted James Pello of two counts of child molesting and one count of dissemination of matter harmful to minors. His convictions rested on evidence showing his sexual and other misconduct with a female third-grader who was the child of family friends. He now challenges those convictions through this action for habeas corpus relief.

Having considered the pleadings, the expanded record and the parties' arguments, and being duly advised, the court finds that Pello's petition for writ of habeas corpus must be **denied**. In addition, the court finds that a certificate of appealability should not issue. This disposition is compelled by the following facts and circumstances:

1. Pello's convictions were affirmed in *Pello v. State*, 894 N.E.2d 1112 (Ind.Ct.App. 2008). The Indiana Supreme Court denied his petition to transfer on January 8, 2009. The last day on which he could have filed a petition for a writ of certiorari with the United States Supreme Court was April 9, 2009.

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2. Pello filed a petition for post-conviction review on December 21, 2012, and an amended petition on March 25, 2013. On November 22, 2013, the post-conviction court entered written findings of fact and conclusions of law denying post-conviction relief. That decision was affirmed in *Pello v. State*, 14 N.E.3d 893 (Ind.Ct.App. 2014). The Indiana Supreme Court denied Pello's petition to transfer on September 18, 2014.

3. Pello's petition for permission to file a successive petition for post-conviction relief was filed on March 16, 2016 and denied on April 11, 2016.

3. This action then followed, having been filed on June 1, 2016 and being fully at issue since August 12, 2016.

4. The respondent has appeared by counsel and argues, in part, that the action was not timely filed. Pello has responded to that argument.

5. "[W]hen examining a habeas corpus petition, the first duty of a district court . . . is to examine the procedural status of the cause of action." *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1132 (7th Cir. 1990).

Our system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction. He may raise constitutional claims on direct appeal, in postconviction proceedings available under state law, and in a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 (1994 ed. and Supp. V). See generally 1 J. Liebman & R. Hertz, **Federal Habeas Corpus Practice and Procedure** § 5.1.a (3d ed. 1998). These vehicles for review, however, are not available indefinitely and without limitation. Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim. See, e.g., *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it" (quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L.Ed. 834 (1944))).

Daniels v. United States, 532 U.S. 374, 381 (2001)(footnote omitted).

Appx D

6. “We live in a world of deadlines.” *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996). In “an attempt to “curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law,” Congress, as part of the Anti-terrorism and Effective Death Penalty Act of 1996, revised several of the statutes governing federal habeas relief. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Along with triggering dates not applicable here, “[u]nder 28 U.S.C. § 2244(d)(1)(A), a state prisoner seeking federal habeas relief has just one year after his conviction becomes final in state court to file his federal petition.” *Gladney v. Pollard*, 799 F.3d 889, 894 (7th Cir. 2015).

7. Pello’s convictions became final for habeas corpus purposes on April 9, 2009. This was the last day on which he could have filed a petition for certiorari review from the decision of the state courts in his direct appeal. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012) (“[T]he judgment becomes final . . . when the time for pursuing direct review . . . expires.”). The applicable statute of limitations thus gave him through April 10, 2010, in which to file a federal petition for a writ of habeas corpus.

8. Pello’s habeas petition was filed in June 2016, more than six years after his statute of limitations expired.

9. It is true that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2); *see also Socha v. Boughton*, 763 F.3d 674, 682 (7th Cir. 2014). In Pello’s case, however, the statute of limitations expired more than 18 months before the post-conviction relief action was even filed. This tolling provision has no effect where, as in Pello’s case, the post-conviction relief action was filed longer after the statute of limitations had expired. *See Gladney*,


799 F.3d at 893 (noting the petitioner's habeas petition was untimely when his first state post-conviction petition was filed after the one-year limitations period had expired); *Teas v. Endicott*, 494 F.3d 580 (7th Cir. 2007) (the fact that the state courts entertained a collateral attack on prisoner's conviction more than one year after the expiration of the one year time limit does not "re-start" the statute of limitations under 28 U.S.C. § 2244(d)); *Fernandez v. Starnes*, 227 F.3d 977, 978-79 (7th Cir. 2000) (explaining that it is illogical to toll a limitations period that has already passed). The filing of the Pello's petition for post-conviction relief therefore has no effect on the computation of the statute of limitations and does not rescue Pello's habeas petition from being woefully untimely.

10. "[H]abeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) (internal citations omitted). In this case, Pello has encountered the hurdle produced by the 1-year statute of limitations. He has not shown the existence of circumstances permitting him to overcome this hurdle, and hence is not entitled to the relief he seeks. His petition for a writ of habeas corpus is therefore dismissed as untimely without a decision being made as to the merits of his claims. See *Bachman v. Bagley*, 487 F.3d 979, 982 (6th Cir. 2007). Judgment consistent with this Entry shall now issue.

11. Pursuant to Rule 11(a) of the *Rules Governing Section 2254 Cases*, the court finds that Pello has failed to show that reasonable jurists would find it "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court therefore **declines** to issue a certificate of appealability.

IT IS SO ORDERED.

Date: 2/27/2017


RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

APX 3/1

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Appx D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES PELLO,

Petitioner,

vs.

DUSHAN ZATECKY,

Respondent.

No. 1:16-cv-1355-RLY-DLM

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58


The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner, James Pello.

Pello's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 2/27/2017

Laura Briggs, Clerk of Court

By: Sina M. Dafe
Deputy Clerk


RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

APP. 5

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