United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 10, 2019
Decided January 16, 2019

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

No. 18-1784

JESUS COTTO,
Petitioner-Appellant,

v.

JACQUELINE LASHBROOK,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 3719

Thomas M. Durkin,
Judge.

ORDER

Jesus Cotto has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. We have 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.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JESUS COTTO, B70889	)	
	)	
Petitioner,	)	
	)	No. 17-cv-3719
v.	)	
	)	
JACQUELINE LASHBROOK, Warden,	)	Judge Thomas M. Durkin
	)	
Respondent.	)	

ORDER

On May 17, 2017, Petitioner Jesus Cotto filed a petition for relief under 28 U.S.C. § 2254, the federal habeas statute. There is no dispute that the petition was filed outside the one-year limitations period. The State has moved to dismiss the petition as untimely. For the reasons that follow, the State's motion to dismiss, R. 8, is granted and Cotto's petition, R. 1, is denied.

Background

Cotto was convicted of armed robbery and sentenced to life in prison as an armed habitual criminal. R. 8-1 at Ex. A. The state appellate court affirmed his conviction on June 3, 2009, *id.*, and Cotto did not seek rehearing or file a petition for leave to appeal ("PLA") in the Illinois Supreme Court. In September 2011, Cotto filed a post-conviction petition in state court, which was denied. The Illinois appellate and supreme courts both affirmed. R. 8-1 at Ex. C, Ex. D. On May 17, 2017, Cotto filed the present habeas petition attacking the state court judgment.

Analysis

Under 28 U.S.C. § 2244(d)(1), a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Relevantly here, the limitation period begins on the date after the conclusion of direct review. *See* 28 U.S.C. § 2244(d)(1)(A). The time during which a State post-conviction is pending, however, is not counted toward the limitation period. 28 U.S.C. § 2244(d)(2). The State argues that because Cotto did not file this petition until May 2017, his petition is untimely under the one-year statute of limitations, and neither the collateral tolling exception of 28 U.S.C. § 2244(d)(2) nor an equitable tolling exception may apply.

The State is correct that a state post-conviction petition filed more than one year after a conviction becomes final does not collaterally toll the federal limitations period. *See DeJesus v. Acevedo*, 567 F.3d 941, 944 (7th Cir. 2009) (state collateral proceeding that does not begin until after expiration of limitations period does not reset limitations period under § 2244(d)(2)). Cotto's conviction became final for purposes of federal habeas relief in July of 2010, one year after the appellate court's decision became final.[1] Cotto filed his state post-conviction petition in September 2011, over a year after the limitations period expired. Cotto does not dispute the expiration of the limitations period. Instead, he argues his petition should be equitably tolled because of circumstances that were out of his control.

[1] Cotto had 35 days following the state appellate decision to file a petition for leave to appeal in the Supreme Court. Ill. Sup. Ct. R. 315 ("[A] party seeking leave to appeal must file the petition for leave in the Supreme Court within 35 days after the entry of such judgment.").

Untimely petitions can be saved by equitable tolling. *Gray v. Zatecky*, 865 F.3d 909, 912 (7th Cir. 2017). But equitable tolling of a statute of limitations is "an extraordinary remedy that is rarely granted." *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016). A habeas petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights with reasonable diligence, and (2) that some extraordinary, nearly insurmountable circumstance outside his control stood in his way and prevented timely filing. *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The habeas petitioner bears the burden of demonstrating both elements of the *Holland* test. *Id.* If he cannot demonstrate either of the elements, then equitable tolling will not be applied. *Id.* The district court must evaluate the circumstances holistically, considering "the entire hand that the petitioner was dealt" rather than taking each fact in isolation. *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014). Equitable tolling is a "highly fact-dependent area in which courts are expected to employ flexible standards on a case-by-case basis." *Id.* at 684 (internal quotation marks and citation omitted).

Cotto alleges he has been diligent in filing his post-conviction motions, but was unsuccessful either because of his counsel's failure or because of prison conditions. Specially, he alleges that he was unable to file a PLA on time because his state counsel failed to send him a copy of the decision until three months after it was decided, making filing within the 35 day appellate filing window, Ill. Sup. Ct. R. 315, impossible. R. 11 at 3. He also alleges new counsel failed to timely file his state post-conviction petition, but that the trial court ruled on it without addressing

the tardiness. R. 11 at 4. Finally, he alleges he tried to file his federal habeas petition months before he actually did, but was denied access to the courts because the correctional center failed to provide him with an audit sheet and copies of the petition. *See* R. 11 at 6. Cotto submitted an affidavit, a dated envelope, and a copy of a grievance supporting his diligence argument.

Cotto's efforts to file post-conviction relief do not rise to the level of reasonable diligence required. The Supreme Court in *Holland* found that a habeas petitioner had exercised reasonable diligence by writing his attorney "numerous letters seeking crucial information and providing direction"; "repeatedly contact[ing] the state courts, their clerks, and the Florida State Bar Association"; and preparing "his own habeas petition *pro se* and promptly fil[ing] it with the District Court" on the day he discovered that the limitations period had expired. *Holland v. Fla.*, 560 U.S. 631, 653 (2010). In *Socha*, the Seventh Circuit held that a habeas petitioner had exercised reasonable diligence by repeatedly writing his attorney requesting access to his file, pleading with the public defender's office for help, and alerting the court "before the deadline arrived" that he sought to preserve his rights. 763 F.3d at 687–88. Cotto, on the other hand, merely argues his attorneys were untimely in sending him the appellate court decision affirming his conviction and in filing his post-conviction petition. But Cotto received notice that the appellate court confirmed his conviction in September 2009. Even though this was too late to file a PLA, Cotto does not argue he attempted to file a late PLA or even immediately hired a new attorney to file his post-conviction petitions, either in state or in federal

court. Cotto eventually hired new counsel to file his state post-conviction petition. R. 11 at 4. But that counsel filed the state post-conviction petition over a year after the federal habeas limitations period had expired. Cotto does not argue that he hired counsel within the limitations period nor does he argue he sent constant unheeded directions or requests for information to counsel like the petitioners in *Holland* and *Socha*. Indeed, Cotto does not argue he tried to file a federal habeas petition *at all* until 2017—his grievance filed in April 2017, R. 11 at 14, indicates he had been trying to get paper work for only three weeks. There is no indication of why he waited almost eight years after his state court conviction was affirmed or even six months after his state court petition was denied to begin the federal process.[2] Cotto fails to demonstrate that he exercised reasonable diligence to file his federal habeas petition.

Cotto likewise fails to meet the extraordinary circumstances element. The Seventh Circuit has granted relief from the statute of limitations based on equitable tolling in cases of "mental incompetence," *Davis v. Humphreys*, 747 F.3d 497, 499 (7th Cir. 2014), "intentional confiscation of a prisoner's . . . legal papers by prison officials," *Weddington v. Zatecky*, 721 F.3d 456, 464–65 (7th Cir. 2013), and a perfect storm of dilatory conduct by a petitioner's former counsel and prison

[2] Cotto also makes a passing argument that he could not file his habeas petition before exhausting state remedies. R. 11 at 3, 4–5. While that is true, Cotto failed to file his state post-conviction proceeding until over a year after the limitations period had passed. And, if he was concerned about the limitations period, he could have filed a habeas petition and asked a federal court to stay it until he had the opportunity to exhaust his state court remedies. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (delineating the limited circumstances in which stays are available).

administrators, *see Socha,* 763 F.3d at 685–87. Attorney oversights, however, do not rise to the extraordinary level required, *see Lawrence v. Fla.*, 549 U.S. 327, 336–37 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel."), nor do circumstances reflecting common aspects of prison life. *Gray*, 865 F.3d at 913 (limited access to prison legal resources, long lockdowns ranging from two weeks up to ten months, and long delays in obtaining files do not rise to the level of extraordinary circumstances warranting equitable tolling). At best, the record here reflects a history of attorney negligence and unfortunate prison circumstances, which do not rise to the extraordinary level required.

Equitable tolling can also be warranted if the petitioner makes a "credible showing of actual innocence." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). Cotto does not argue he is actually innocent, only that evidence may be discovered to support an actual innocent petition at some point in the future. R. 11 at 7. Speculations about potential evidence are insufficient. *Id.* at 1936 (noting the standard is demanding); *Blackmon v. Williams*, 823 F.3d 1088, 1101 (7th Cir. 2016) (actual innocence standard requires showing that "more likely than not . . . no reasonable juror would find him guilty beyond a reasonable doubt."). Cotto's habeas petition was untimely, and his alleged circumstances fail to rise to the level required to toll the limitations period.

Lastly, the Court declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). Rule 11(a) of the Rules Governing § 2254 Cases provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *See Gonzalez v. Thaler*, 565 U.S. 134, 143 n.5 (2012). To obtain a certificate of appealability, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This demonstration "includes showing that 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." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000); *see also Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011). Here, the Court's denial of Cotto's petition rests on application of well-settled precedent. Accordingly, certification of Cotto's claims for appellate review is denied.

Conclusion

For the foregoing reasons, the Court grants respondent's motion to dismiss, R. 8, and denies petitioner's habeas petition, R. 1.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: March 19, 2018

Additional material from this filing is available in the Clerk's Office.