

APPENDIX - A
UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

TENTH CIRCUIT

November 20, 2018

Elisabeth A. Shumaker
Clerk of Court

LEON MARKEL WINSTON,

Petitioner - Appellant,

v.

JOE M. ALLBAUGH,

Respondent - Appellee.

No. 18-7038

(D.C. No. 6:17-CV-00290-Raw-KEW)
(E.D. Okla.)

**ORDER DENYING
CERTIFICATE OF APPEALABILITY***

Before HARTZ, McHUGH, and CARSON, Circuit Judges.

Leon Winston, an Oklahoma state prisoner appearing pro se,¹ seeks a certificate of appealability (“COA”) to challenge the dismissal of his petition for writ of habeas corpus. The district court denied his petition as untimely. We deny the COA and dismiss the appeal.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

¹ Because Mr. Winston appears pro se “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

I. ANALYSIS

Mr. Winston is serving a life sentence without the possibility of parole for First Degree Murder. Mr. Winston filed a timely appeal of his conviction in the Oklahoma Court of Criminal Appeals (“OCCA”), and the OCCA affirmed.

Mr. Winston then filed a petition for a writ of habeas corpus on July 26, 2017, in federal court pursuant to 28 U.S.C. § 2254. Mr. Winston did not argue his petition fell within the statute of limitations; however, he alleged equitable tolling should apply because the prison is on lockdown for about 300 days per year during which time he does not have access to the law library. The district court judge dismissed Mr. Winston’s petition, ruling it time-barred under 28 U.S.C. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). The district court concluded Mr. Winston’s lack of access to the law library did not constitute a rare and exceptional circumstance that warrants equitable tolling and it denied a COA on the issue.

Mr. Winston filed an appeal of the district court’s dismissal of his petition for a writ of habeas corpus. Under AEDPA, we must treat his appeal “as an application for a COA.” *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). To obtain a COA, Mr. Winston must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). And where, as here, the district court disposed of a habeas action as time-barred, a petitioner must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484. Mr. Winston cannot make that showing.

Section 2244(d)'s one-year statute of limitation for filing a federal habeas petition is subject to equitable tolling only in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). "[T]his equitable remedy is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). Therefore, the question here is whether reasonable jurists could debate whether prison lockdowns are rare and exceptional circumstances that warrant equitable tolling.

In the past, we have found exceptional circumstances exist "when a prisoner is actually innocent, when an adversary's conduct—or other uncontrollable circumstances—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a deficient pleading during the statutory period." *Gibson*, 232 F.3d at 808 (citations omitted). We have also held that "a claim of insufficient access to relevant law . . . is not enough to support equitable tolling." *Id.* "The mere fact of a prison lockdown, moreover, does not qualify as extraordinary absent some additional showing that the circumstances prevented him from timely filing his habeas petition." *Phares v. Jones*, 470 F. App'x 718, 719 (10th Cir. 2012).

While prison lockdowns are uncontrollable, they merely impede access to the relevant law, which we have continuously ruled insufficient to warrant equitable tolling. *See, e.g., Bickham v. Allbaugh*, 728 F. App'x 869, 871 (10th Cir. 2018); *Jones v. Taylor*, 484 F. App'x 241, 242–43 (10th Cir. 2012); *Sandoval v. Jones*, 447 F. App'x 1, 4 (10th

Cir. 2011). Access to the law is merely a “means for ensuring ‘a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.’” *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977)). Temporary absence of that means does not automatically warrant equitable tolling. Additionally, nothing in the record demonstrates Mr. Winston has diligently pursued his claim.

The district court’s conclusion that equitable tolling is not justified by prison lockdowns in the absence of a showing of additional circumstances that prevented timely filing is not subject to debate among reasonable jurists.

II. CONCLUSION

For the foregoing reasons, we **DENY** a COA and **DISMISS** the appeal.²

Entered for the Court

Carolyn B. McHugh
Circuit Judge

² Additionally, we deny as moot Mr. Winston’s motion for an evidentiary hearing on the merits of Mr. Winston’s constitutional claims. See *United States v. Arrowgarp*, 558 F. App’x 824, 826 (10th Cir. 2014) (affirming denial of an evidentiary hearing on merits issue as moot when equitable tolling did not apply).

APPENDIX-A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

January 9, 2019

Elisabeth A. Shumaker
Clerk of Court

LEON MARKEL WINSTON,

Petitioner - Appellant,

v.

No. 18-7038

JOE M. ALLBAUGH,

Respondent - Appellee.

ORDER

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX-B

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

LEON MAR'KEL WINSTON, JR.)
Petitioner,)
v.) Case No. CIV 17-290-Raw-Kew
JOE M. ALLBAUGH, DOC Director,)
Respondent.)

OPINION AND ORDER

This action is before the Court on Respondent's motion to dismiss Petitioner's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 as barred by the statute of limitations (Dkt. 10). Petitioner is a pro se state prisoner in the custody of the Oklahoma Department of Corrections who is incarcerated at Cimarron Correctional Facility in Cushing, Oklahoma. He is attacking his conviction in Sequoyah County District Court Case No. CF-2008-458 for First Degree Murder.

Respondent alleges the petition was filed beyond the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(d) (AEDPA).

Section 2244(d) provides that:

(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. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The 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).

The record shows Petitioner waived his right to a jury trial in exchange for the State's dismissal of the Bill of Particulars seeking the death penalty. The state district judge presided at Petitioner's non-jury trial, finding him guilty beyond a reasonable doubt and sentencing him to life imprisonment without the possibility of parole. *Winston v. State*, No. F-2011-2, slip op. at 1 (Okla. Crim. App. May 29, 2013) (Dkt. 11-2).

Petitioner filed a timely appeal of his conviction with the Oklahoma Court of Criminal Appeals (OCCA). On May 29, 2013, the OCCA affirmed Petitioner's Judgment and Sentence. *Id.*, slip op. at 17. His conviction, therefore, became final on August 27, 2013, upon expiration of the 90-day period for a certiorari appeal to the United States Supreme Court. *See Fleming v. Evans*, 481 F.3d 1249, 1257-58 (10th Cir. 2007); *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) (holding that a conviction becomes final for habeas purposes when the 90-day period for filing a petition for a writ of certiorari to the United States Supreme Court has passed). The statutory year began to run the next day on August 28, 2013, and it expired on August 28, 2014. *See Harris v. Dinwiddie*, 642 F.3d 902, 907 n.6 (10th Cir. 2011) (stating that the year begins to run the day after the judgment and sentence becomes final and ends on the anniversary date). This habeas corpus petition was filed on July 26, 2017.

Pursuant to 28 U.S.C. § 2244(d)(2), the statute of limitations is tolled while a

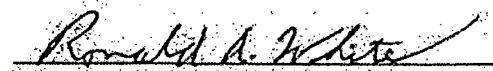
properly-filed application for post-conviction relief or other collateral review of the judgment at issue is pending. Petitioner filed a post-conviction application on September 30, 2013. (Dkt. 11-1 at 12). The OCCA affirmed the denial of relief on March 26, 2015. *Winston v. State*, No. PC-2014-1002 (Okla. Crim. App. Mar. 26, 2015) (Dkt. 11-3). Therefore, Petitioner's deadline for filing this habeas action was extended 543 days from August 28, 2014, until February 22, 2016. *See Maloney v. Poppel*, No. 98-6402, 1999 WL 157428, at *1 n.1 (10th Cir. March 23, 1999) (unpublished) (holding that "tolling calculations should take into account both the day tolling began and the day tolling ended"). Because the petition was not filed until July 26, 2017, more than a year after expiration of the AEDPA statute of limitations, it is time barred.

Petitioner admits his petition is untimely. He claims, however, he could not access the law library to work on his case, because his facility is on lockdown 300 days of the year. Equitable tolling of § 2244(d)(1)'s one-year statute of limitations is available "only in rare and exceptional circumstances." *York v. Galetka*, 314 F.3d 522, 527 (10th Cir. 2003). "Moreover, a petitioner must diligently pursue his federal habeas claims; a claim of insufficient access to relevant law . . . is not enough to support equitable tolling." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (citing *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)). The Court, therefore, finds Petitioner is not entitled to equitable tolling.

The Court further finds Petitioner has not shown "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling." *Stack v. McDaniel*, 529 U.S. 473, 484 (2000). *See also* 28 U.S.C. § 2253(c). Therefore, Petitioner is denied a certificate of appealability. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

ACCORDINGLY, Respondent's motion to dismiss time barred petition (Dkt. 10) is GRANTED, and Petitioner is DENIED a certificate of appealability.

IT IS SO ORDERED this 9th day of August 2018.



Ronald A. White
United States District Judge
Eastern District of Oklahoma

UNITED STATES DISTRICT COURT

EASTERN

DISTRICT OF

OKLAHOMA

JUDGMENT IN A CIVIL CASE

LEON MARKEL WINSTON

V.

JOE M. ALLBAUGH

Case Number: CIV-17-290-Raw-KEW

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Respondent's Motion to Dismiss is GRANTED and Petitioner's Petition for a Writ of Habeas Corpus is DISMISSED; Petitioner is DENIED a certificate of appealability.

8/9/2018

Date

PATRICK KEANEY

Clerk

s/ C Trzcinski

(By) Deputy Clerk

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