United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 15, 2019
Decided July 18, 2019

Before

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 18-3572

DAVID EARL ISON,
Petitioner-Appellant,

v.

RICHARD BROWN,
Respondent-Appellee.

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

No. 2:18-cv-00094-WTL-DLP

William T. Lawrence,
Judge.

ORDER

David Earl Ison has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and a brief requesting 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. Ison's motions to proceed in forma pauperis and for appointment of counsel are DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DAVID EARL ISON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:18-cv-00094-WTL-DLP
	)	
WARDEN,	)	
	)	
Respondent.	)	

Entry Denying Requests for Certificate of Appealability and to Proceed on Appeal *In Forma Pauperis*

I.

The Court previously denied a certificate of appealability in this case. Dkt. 11. Rule 11(a) of the Rules Governing § 2254 Cases requires the district courts to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and "[i]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Pursuant to § 2253(c)(2), the Court finds that no reasonable jurist would find it debatable "whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Therefore, the petitioner's motion for certificate of appealability, dkt. 15, is **denied**.

II.

The petitioner seeks leave to proceed on appeal without prepayment of the appellate fees of $505.00. An appeal may not be taken *in forma pauperis* if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915; *see Coppedge v. United States,* 369 U.S. 438 (1962). "Good faith" within the meaning of § 1915 must be judged by an objective, not a subjective, standard. *See id.*

There is no objectively reasonable argument the petitioner could present to argue that the disposition of this action was erroneous. In pursuing an appeal, therefore, the petitioner "is acting in bad faith . . . [because] to sue in bad faith means merely to sue on the basis of a frivolous claim, which is to say a claim that no reasonable person could suppose to have any merit." *Lee v. Clinton,* 209 F.3d 1025, 1026 (7th Cir. 2000). Accordingly, his appeal is not taken in good faith, and for this reason his request for leave to proceed on appeal *in forma pauperis*, dkt. 16, is **denied.**

IT IS SO ORDERED.

Date: 12/11/2018

William T Lawrence

Hon. William T. Lawrence, Senior Judge
United States District Court
Southern District of Indiana

Distribution:

DAVID EARL ISON
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DAVID EARL ISON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:18-cv-00094-WTL-DLP
	)	
WARDEN,	)	
	)	
Respondent.	)	

Order Dismissing Petition for a Writ of Habeas Corpus and Denying Certificate of Appealability

Petitioner David Earl Ison pleaded guilty to five counts of murder and an additional count of life without parole on March 1, 2012, in Franklin County, Indiana. Mr. Ison now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondent argues that the petition must be denied because it is time-barred. For the reasons explained in this Order, Mr. Ison's petition for a writ of habeas corpus is **denied** and the action dismissed with prejudice because it is time-barred. In addition, the Court finds that a certificate of appealability should not issue.

I. Background

Mr. Ison pleaded guilty on March 1, 2012, and was sentenced on March 14, 2012. Dkt. No. 9-1. He did not seek direct appeal. The Court takes judicial notice of the chronological case summary in Indiana case no. 24C01-1407-PC-000630 which reveals that Mr. Ison filed his petition for post-conviction relief on June 26, 2014. The trial court denied his petition on June 9, 2017. The Indiana Court of Appeals affirmed the trial court on December 28, 2017. The Indiana Supreme Court denied his petition to transfer on February 21, 2018. He then mailed his federal habeas petition on February 26, 2018.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (1996). Mr. Ison filed his 28 U.S.C. § 2254 petition after the April 19, 1996, effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). His petition, therefore, is subject to AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

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 AEDPA, revised several statutes governing federal habeas relief. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). "Under 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). A conviction becomes final at the conclusion of direct review or at the expiration of the time to seek such review. 28 U.S.C. § 2244(d)(1)(A). "The one-year clock is stopped, however, during the time the petitioner's 'properly filed' application for state postconviction relief 'is pending.'" *Day v. McDonough*, 547 U.S. 198, 201 (2006) (quoting 28 U.S.C. § 2244(d)(2)).

III. Discussion

Under Indiana law, a person who pleads guilty cannot challenge his conviction on direct appeal. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004) (citing *Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996)). Furthermore, Mr. Ison could not challenge his sentence on direct appeal because the trial court did not exercise sentencing discretion as Mr. Ison had pleaded guilty to the life without parole count. *Id.* Therefore, Mr. Ison's convictions became final when he was sentenced on March 14, 2012. Even assuming he could have challenged his sentence on direct

appeal, the latest possible date his sentence could have become final was on April 13, 2012, when his time to file a notice of appeal expired. The one-year period of limitation expired on April 13, 2013. Mr. Ison did not file his petition for post-conviction relief until June 26, 2014, more than a year after his statute of limitations for federal habeas had expired. Although the statute of limitations is tolled during the pendency of a petition for post-conviction relief, Mr. Ison's statute of limitations had already expired well before he sought post-conviction relief. Therefore, his petition for habeas relief, mailed on February 26, 2018, is time-barred.

IV. Conclusion

"[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). Mr. Ison has encountered the hurdle produced by the one-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 **denied with prejudice**. Judgment consistent with this Order shall now issue.

V. Certificate of Appealability

Rule 11(a) of the Rules Governing § 2254 Cases requires the district courts to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and "[i]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Pursuant to § 2253(c)(2), the Court finds that no reasonable jurist 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 **denies** a certificate of appealability.

IT IS SO ORDERED.

William T Lawrence

Hon. William T. Lawrence, Senior Judge
United States District Court
Southern District of Indiana

Date: 11/7/18

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