FILED
United States Court of Appeals
Tenth Circuit

June 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LYNDAL D. RITTERBUSH,

Petitioner - Appellant,

v.

LARRY BENZON,

Respondent - Appellee.

No. 19-4074

ORDER

This matter is before the court *sua sponte* to address the matter on which this court directed a limited remand to the district court – *i.e.*, whether the district court would issue a certificate of appealability (COA) for this § 2254 appeal. By way of background, this court directed a limited remand by order entered May 16, 2019, for the district court to decide whether a COA should be issued. Through our own research, we discovered that the district court declined to issue a COA in an order entered May 17, 2019. The clerk of this court is directed to file the district court's order on our docket.

Upon consideration of the district court's May 17 order, we have determined that the abatement of this appeal should be lifted. The appellant's obligation to file a status report in this court is vacated.

This § 2254 appeal shall proceed in the ordinary course. One preliminary deadline remains outstanding: on or before June 17, 2019, the appellant must either (A) pay the

appellate filing fees of $505.00 in full to the district court, or (B) file a motion seeking leave to proceed with *in forma pauperis* status on appeal in the district court. Questions about this requirement should be directed to the clerk of the district court.

This court will set additional requirements and deadlines for this appeal by separate order at a later date.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Lara Smith

by: Lara Smith
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

LYNDAL D. RITTERBUSH, Petitioner, v. LARRY BENZON, Respondent.	**JUDGMENT IN A CIVIL CASE** Case No. 2:17-CV-913-RJS District Judge Robert J. Shelby

IT IS ORDERED AND ADJUDGED

that Petitioner's action is dismissed with prejudice because it was brought after the period of limitation expired.

DATED this 2nd day of May, 2019.

BY THE COURT:

CHIEF JUDGE ROBERT J. SHELBY
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

LYNDAL D. RITTERBUSH, Petitioner, v. LARRY BENZON, Respondent.	**MEMORANDUM DECISION & ORDER GRANTING MOTION TO DISMISS HABEAS-CORPUS PETITION** Case No. 2:17-CV-913-RJS District Judge Robert J. Shelby

Petitioner, Lyndal D. Ritterbush, petitions for habeas corpus relief. *See* 28 U.S.C.S. § 2254 (2019). The Court grants Respondent's motion to dismiss the petition as untimely.

Because Petitioner's conviction became final before Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Petitioner had to file his federal habeas petition within one year of April 24, 1996, adding any time tolled by statute or equitable grounds. *See id.* § 2244(d); *Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000). By statute, the one-year period of limitation is tolled for "[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." 28 *id.* § 2244(d)(2).

Meanwhile, equitable tolling is available "'in rare and exceptional circumstances.'" *Gibson*, 232 F.3d at 808 (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). Those circumstances include situations "when a prisoner is actually innocent" or "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 defective pleading during the statutory period." *Id.*

The chronology of Petitioner's litigation shows the untimeliness of his petition. On April 24, 1996, the clock began running on Petitioner's right to bring a federal habeas petition. Because he filed no direct appeals or state post-conviction applications within the next year, Petitioner's time to file in federal court ran out on April 24, 1997. Petitioner later filed a motion for post-conviction-relief on June 28, 2017. However, this motion, which was denied, was not filed in time to toll the federal period of limitation. After all, "a state court petition . . . that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'" *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (quoting *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000)); *see also Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001). So, statutory tolling does not apply here.

Though Petitioner's habeas deadline in this Court was April 24, 1997, he did not file his petition until over twenty years later, on August 11, 2017. Nonetheless, Petitioner possibly asserts grounds for equitable tolling. He states that he was not aware of his rights and did not have legal resources he needed to pursue his claims.

But Petitioner has generally "failed to elaborate on how [his] circumstances" affected his ability to bring his petition earlier. *Johnson v. Jones*, No. 08-6024, 2008 U.S. App. LEXIS 8639, at *5 (10th Cir. April 21, 2008). For instance, he has not identified how, between April 24, 1996 and August 11, 2017, he was continually and thoroughly thwarted by uncontrollable circumstances from filing. Nor has he detailed who and what would not allow him to file some kind of petition. He also does not hint how extraordinary circumstances eased to allow him to

file this habeas-corpus petition on August 11, 2017. Such vagueness is fatal to his contention that extraordinary circumstances kept him from a timely filing.

Still, Petitioner asserts that his lateness should be overlooked because he lacked legal resources, legal knowledge, and had only limited help and misinformation from prison contract attorneys. However, the argument that a prisoner "had inadequate law library facilities" does not support equitable tolling. *McCarley v. Ward*, Nos. 04-7114, 04-7134, 2005 U.S. App. LEXIS 14335, at *3-4 (10th Cir. July 15, 2005); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("It is not enough to say that the . . . facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."). Further, it is well settled that "'ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.'" *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (citation omitted). Finally, simply put, "'[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.'" *Thomas v. Gibson*, 218 F.3d 1213, 1222 (10th Cir. 2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (citations omitted)); *see also* 28 U.S.C.S. § 2254(i) (2017) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). It follows that Petitioner's contention that the prison contract attorneys' misinformation and lack of help thwarted his habeas filings does not toll the period of limitation. *See Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("An attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling.").

Petitioner has not met his burden of showing that--during the running of the federal period of limitation and decades beyond--he faced extraordinary circumstances that stopped him from timely filing or took specific steps to "'diligently pursue his federal claims.'" *Id.* at 930. Petitioner thus has not established a basis for equitable tolling.

IT IS THEREFORE ORDERED that, because this petition is untimely, Respondent's motion to dismiss is GRANTED. (*See* Docket Entry # 21.) This action is CLOSED.

DATED this 2nd day of May, 2019.

BY THE COURT:

CHIEF JUDGE ROBERT J. SHELBY
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

July 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LYNDAL D. RITTERBUSH,

Petitioner - Appellant,

v.

LARRY BENZON,

Respondent - Appellee.

No. 19-4074
(D.C. No. 2:17-CV-00913-RJS)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **HOLMES**, **MURPHY**, and **CARSON**, Circuit Judges.

This matter is before the court on Lyndal D. Ritterbush's pro se request for a certificate of appealability ("COA"). Ritterbush seeks a COA so he can appeal the district court's dismissal, on timeliness grounds, of his 28 U.S.C. § 2254 habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from "a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" without first obtaining a COA); *id.* § 2244(d)(1) (setting out a one-year statute of limitations on § 2254 petitions, running from the date on which the conviction became final). Because Ritterbush has not "made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), this court **denies** his request for a COA and **dismisses** this appeal.

In 1984, Ritterbush pleaded guilty in Utah state court to attempted aggravated sexual abuse of a child, a first degree felony. On November 23, 1984, the trial court sentenced him to a term of imprisonment of from five years to life. Ritterbush filed the instant § 2254 habeas petition in 2017. Upon the state of Utah's motion, the district court dismissed Ritterbush's petition as untimely. In so doing, the district court noted that because Ritterbush's conviction became final before Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Ritterbush had to file his federal habeas petition within one year of April 24, 1996. *See Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000). Instead, Ritterbush filed his § 2254 petition some twenty-one years later. The district court further noted Ritterbush was not entitled to statutory tolling because he did not file a state-court request for collateral relief within the relevant time period. *See* 28 U.S.C. § 2244(d)(2); *Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001). Finally, the district court determined Ritterbush had not demonstrated the kind of extraordinary circumstances that would come close to equitably tolling the extreme twenty-year delay in the filing of his habeas petition. *See Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) (holding that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances" (quotation omitted)).

The granting of a COA is a jurisdictional prerequisite to Ritterbush'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). To make the requisite showing, 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 motion 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). In evaluating whether Ritterbush has satisfied his burden, this court undertakes "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Miller-El*, 537 U.S. at 338. Although Ritterbush 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." *Id.* (quotations omitted). As a further overlay on this standard, we review for abuse of discretion the district court's decision that Ritterbush is not entitled to have the limitations period set out in § 2244(d)(1) equitably tolled. *See Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003). Fraudulent Concealment – Continual Wrong

Having undertaken a review of Ritterbush's appellate filings, the district court's order of dismissal, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller-El* and *Slack*, we conclude Ritterbush is not entitled to a COA. The district court's resolution of Ritterbush's § 2254 motion is not deserving of further proceedings or subject to a different resolution on appeal. In so concluding, there is no need for this court to repeat the cogent and convincing analysis set out in the district court's order. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017) (holding that the

process of resolving whether a petitioner is entitled to a COA should not devolve into a determination of the merits). Accordingly, this court **DENIES** Ritterbush's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge