UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7556

DARYLL SHUMAKE,

Petitioner - Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:18-cv-01170-LMB-MSN)

Submitted: February 10, 2020 Decided: February 20, 2020

Before GREGORY, Chief Judge, and NIEMEYER and DIAZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Daryll Keith Shumake, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Daryll Keith Shumake seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 (2018) petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1) (2018)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Shumake has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny his pending motions, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: February 20, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7556
(1:18-cv-01170-LMB-MSN)

DARYLL SHUMAKE

Petitioner - Appellant

v.

COMMONWEALTH OF VIRGINIA

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Daryll Shumake,
Petitioner,

v.

Commonwealth of Virginia,
Respondent.

1:18cv1170 (LMB/MSN)

ORDER

The Commonwealth of Virginia has moved to dismiss as untimely an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Daryll Shumake. See [Dkt. Nos. 1, 25, 30 & 31]. In response, Shumake has filed a Brief in Opposition, a Motion in Demurrer, and a Motion to Transfer Records. See [Dkt. Nos. 33, 34 & 35]. For the reasons set forth below, the Court will grant the Commonwealth's motion to dismiss.

On May 19, 2003, the Circuit Court of the City of Chesapeake sentenced Shumake to a "total sentence to serve" of nineteen years for carjacking and possession of a firearm by a convicted felon. See [Dkt. No. 31-1]. Shumake had thirty days to file a notice of appeal, see Va. S. Ct. R. 5A:6(a), but he did not, and his time to do so expired on June 18, 2003.

A one-year limitation period applies to habeas petitions filed in federal court. See 28 U.S.C. § 2244(d)(1). In this case, as in most, the limitation period began running on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id. at (A). Because Shumake did not file a direct appeal and his time to do so expired on June 18, 2003, that is the date the limitation period began to run. See Gonzalez v. Thayer, 565 U.S. 134, 150 (2012).

The one-year federal limitation period is statutorily tolled for the "time a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Shumake, however, did not file an application for post-conviction relief in state court until October 14, 2004, almost four months after the one-year federal limitation period expired on June 18, 2004. See [Dkt. No. 31-2]. This belated application and a second belated application were pending from October 14, 2004 to December 14, 2005, and from December 6, 2012 to January 23, 2013. See [Dkt. Nos. 31-2, 31-3, 31-4 & 31-5]. Even assuming solely for the purpose of deciding the timeliness of Shumake's petition that he benefitted from statutory tolling during these periods, there still remains over twelve years of untolled time between June 18, 2004 (when Shumake's convictions and sentence became "final") and August 23, 2018 (when Shumake signed and "filed" his federal habeas petition), which makes Shumake's federal habeas petition plainly untimely.

Construing Shumake's pleadings liberally because he is proceeding pro se, it appears that he nonetheless seeks to avoid dismissal for untimeliness on two grounds. First, Shumake argues that he is entitled not only to statutory tolling of the one-year limitation period, but also to equitable tolling based on exceptional circumstances. See generally Holland v. Florida, 560 U.S. 631 (2010). And, second, Shumake argues that he is "actually innocent" of the crimes for which he was convicted and thus entitled to benefit from a recently-recognized equitable exception to the one-year limitation period. See generally McQuiggin v. Perkins, 569 U.S. 383 (2013). These arguments are meritless.[1]

[1] Shumake has been a frequent litigant in federal court. See www.pacer.gov. Because he "has had three actions or appeals dismissed on the ground that they were frivolous, malicious, or failed to state any claim upon which relief may be granted," he is now subject to restrictions on his ability to proceed in forma pauperis in new civil actions or appeals. See Order filed on April 30, 2019, in Shumake v. Commonwealth of Virginia, No. 19-6160 (4th Cir. 2019) (available on

"Equitable tolling of petitions for collateral review is available only when the petitioner demonstrates '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" Whiteside v. United States, 775 F.3d 180, 184 (4th Cir. 2014) (en banc) (quoting Holland, 560 U.S. at 649 (internal quotation marks omitted)). Shumake fails both prongs of this test. First, there is not the slightest indication that Shumake has been pursuing his rights diligently. As stated above, Shumake inarguably permitted more than twelve years to pass untolled before he initiated this federal habeas proceeding, even as he litigated numerous other actions and appeals (including an earlier habeas petition) in federal court. Second, Shumake's contention that his "illiter[ac]y and emotional distress/mental health disorder; along with petitioner being poverty stricken nor [k]nowing the law for that matter" [Dkt. No. 33 at 1], constitute extraordinary circumstances is meritless. Shumake's many filings across a multitude of cases demonstrate that he is not illiterate, and, "[a]s a general matter, the federal courts will apply equitable tolling because of a petitioner's mental condition only in cases of profound mental incapacity." United States v. Sosa, 364 F.3d 507, 513 (4th Cir. 2004). Here, Shumake has offered nothing to demonstrate that he is profoundly incapacitated. See also Ata v. Scutt, 662 F.3d 736, 742 (6th Cir. 2011) ("a blanket assertion of mental incompetence is insufficient to toll the statute of limitations"). Moreover, because a substantial majority of petitioners are indigent and untrained in the law,

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www.pacer.gov); see also 28 U.S.C. § 1915(g). Those restrictions do not apply here, but Shumake's litigation history is nonetheless noteworthy because he claims that extraordinary circumstances prevented him from filing this habeas proceeding any earlier than he did, even as he was litigating other actions and appeals in federal court, including a federal habeas petition in 2005. See Shumake v. Johnson, 1:05cv433 (E.D. Va. 2005) (dismissed without prejudice for failure to exhaust state remedies). In short, this litigation history undermines and refutes Shumake's claim that extraordinary circumstances prevented him from initiating this habeas proceeding any sooner than he did.

these conditions do not constitute extraordinary circumstances, either. See, e.g., United States v. Oriakhi, 394 F. App'x 976, 977 (4th Cir. 2010) ("unfamiliarity with the legal process or ignorance of the law cannot support equitable tolling").

Shumake's further argument is that he is entitled to an equitable exception to the limitation period because he is "actually innocent." Shumake states that "his cousin, Kenny Johnson, who was initially caught being in possession of the property . . . wrote the petitioner . . . a sworn notarized affidavit admitting to committing the crime of September 30, 2002." [Dkt. No. 33 at 2]. This affidavit does not appear to be anywhere in the record (e.g., as an attachment to Shumake's amended petition or any of his most recent filings), and Shumake's unsupported assertion that such a document exists is insufficient to invoke the equitable exception to the one-year limitation period predicated on a showing of "actual innocence." See McQuiggin, 569 U.S. at 386 ("We caution, however, that tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet this threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'") (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). Indeed, "part of the assessment whether actual innocence has been convincingly shown" turns on the timing of an "actual innocence" claim; a long and unexplained delay "should seriously undermine the credibility of the actual-innocence claim." Id. at 400. Shumake's long delay in alleging that such an affidavit exists, as well as his unexplained failure to produce a copy of it, vitiates his "actual innocence" claim and undermines his argument that he should be exempted from the one-year federal limitation period.[2]

[2] In 2012, Shumake filed a petition for a writ of actual innocence based on nonbiological evidence in state court. See [Dkt. No. 31-4]. Shumake contended that he could not have committed any crimes on September 30, 2002, because he was already incarcerated. See id.

The Court has considered whether to issue Shumake a certificate of appealability. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B). When a district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When a district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. See Slack, 529 U.S. at 484-85. Because Shumake has not made the requisite showing, the Court will not issue a certificate of appealability.

Accordingly, it is hereby

ORDERED that Commonwealth of Virginia's motion to dismiss [Dkt No. 30] be and is GRANTED; and it is further

ORDERED that Shumake's Motion in Demurrer [Dkt. No. 34] and Motion to Transfer Records [Dkt. No. 35] be and are DENIED; and it is further

ORDERED that Shumake's amended petition [Dkt. No. 25] be and is DISMISSED WITH PREJUDICE; and it is further

ORDERED that a Certificate of Appealability be and is DENIED.

To appeal this decision, Shumake must file a written notice of appeal with the Clerk's office within thirty (30) days of the date of this Order. See Fed. R. App. P. 4(a). A written notice of appeal is a short statement indicating a desire to appeal and including the date of the

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Shumake failed to substantiate this claim. See [Dkt. No. 31-5]. Shumake did not claim at the time that his cousin had executed an affidavit admitting guilt. See [Dkt. No. 31-4].

Order Shumake wishes to appeal. Failure to file a timely notice of appeal waives the right to appeal this decision. To appeal this decision, Shumake must also obtain a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b). This Court has expressly declined to issue such a certificate for the reasons stated above.

The Clerk is directed to (1) enter Judgment in favor of the Commonwealth of Virginia, (2) send a copy of this Order and the Judgment to Shumake and counsel for the Commonwealth of Virginia, and (3) close this civil action.

Entered this 2nd day of October, 2019.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

Exhibit Xthree

FILED: March 31, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7556
(1:18-cv-01170-LMB-MSN)

DARYLL SHUMAKE

Petitioner - Appellant

v.

COMMONWEALTH OF VIRGINIA

Respondent - Appellee

MANDATE

The judgment of this court, entered February 20, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Exhibit X two

FILED: March 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7556
(1:18-cv-01170-LMB-MSN)

DARYLL SHUMAKE

Petitioner - Appellant

v.

COMMONWEALTH OF VIRGINIA

Respondent - Appellee

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

Exhibit A

FILED: March 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7556
(1:18-cv-01170-LMB-MSN)

DARYLL SHUMAKE

Petitioner - Appellant

v.

COMMONWEALTH OF VIRGINIA

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 30, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6160
(7:18-cv-00292-MFU-RSB)

DARYLL KEITH SHUMAKE

Plaintiff - Appellant

v.

THE COMMONWEALTH OF VIRGINIA

Defendant - Appellee

ORDER

The court dismisses this proceeding for failure to prosecute pursuant to Local Rule 45.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk