FILED
United States Court of Appeal
Tenth Circuit

January 7, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THOMAS ERIC ESPINOZA,

Petitioner - Appellant,

v.

THE PEOPLE OF THE STATE OF COLORADO; SCOTT DAUFFENBACH, Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 19-1449
(D.C. No. 1:19-CV-01624-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

Thomas Eric Espinoza, a Colorado state prisoner appearing pro se,[1] seeks a certificate of appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2254 application for a writ of habeas corpus as untimely. He also seeks leave to proceed *in forma pauperis*. Exercising jurisdiction under 28 U.S.C. § 1291, we deny both requests and dismiss this matter.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Tenth Circuit Rule 32.1.

[1] Because Mr. Espinoza proceeds pro se, we construe his filings liberally but do not serve as his advocate. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

I. BACKGROUND

Mr. Espinoza was convicted of first-degree murder after deliberation, felony murder, and kidnapping. He was sentenced to life imprisonment. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari. Mr. Espinoza then sought post-conviction relief under Colo. R. Crim. P. 35(c), which the trial court denied. The Court of Appeals again affirmed, and the Colorado Supreme Court denied certiorari. *See* ROA at 53-65, 119-42, 191-201.

Mr. Espinoza next filed the § 2254 application at issue here, raising various grounds for relief. *Id.* at 5-19. In a Report and Recommendation ("R&R"), the magistrate judge recommended that the district court dismiss the action as untimely filed under 28 U.S.C. § 2244(d). *Id.* at 289-97. After considering Mr. Espinoza's objection to this recommendation, the district court agreed with the magistrate judge and dismissed this action as untimely, entered judgment, and denied a COA. *Id.* at 316-18.

II. DISCUSSION

A. *Legal Background*

1. Certificate of Appealability

To appeal from a denial of a habeas application, a prisoner must first obtain a COA. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). When, as here, the district court denied a habeas application on procedural grounds, a COA may issue only if the applicant demonstrates (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Each component of [this] showing is part of a threshold inquiry." *Id.* at 485. Thus, if a petitioner cannot make a showing on the procedural issue, we need not address the constitutional component. *See id.*

2. **Statute of Limitations and Equitable Tolling**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2254 application. 28 U.S.C. § 2244(d)(1). Generally, this limitation period begins on "the date on which the judgement [becomes] final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* "[A] petitioner's conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until . . . after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed." *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) (quotations omitted).

The one-year limitation period is tolled in "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The limitation period may also be subject to equitable tolling in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (quotations omitted). To qualify for equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotations omitted). "An inmate bears a strong burden to show specific

facts to support his claim of extraordinary circumstances and due diligence." *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (brackets and quotations omitted).

B. ***Analysis***

Reasonable jurists could not debate the district court's determination that Mr. Espinoza's § 2254 petition was untimely. We agree the application is time-barred and equitable tolling is not warranted. No COA is warranted.

1. **Timeliness of Habeas Petition**

Mr. Espinoza filed his § 2254 application long after AEDPA's one-year statute of limitations expired. His conviction became final on July 29, 2013, when the 90-day window for seeking review in the United States Supreme Court ended. *See* ROA at 141, 292. AEDPA's one-year limitation period began the following day. *See Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011) ("The statute [of limitations] d[oes] not start to run until . . . the day following the certiorari window."). On February 24, 2014—210 days into the limitation period—Mr. Espinoza filed for post-conviction relief in state court. *See* ROA at 294. This tolled his limitation period until May 21, 2018, when the Colorado Supreme Court declined to review the denial of his petition. *See id.* at 201. At that point, the limitation period began to run again, leaving him 155 days or until October 23, 2018, to file his § 2254 application. *See id.* at 294.

Mr. Espinoza filed his § 2254 application on June 5, 2019—more than seven months after the limitations period expired. *See id.* at 5-19. He does not contest otherwise in his brief to this court. Mr. Espinoza thus has failed to demonstrate that

"jurists of reason would find it debatable whether the district court was correct" in finding his application time-barred. *Slack*, 529 U.S. at 484.

2. **Equitable Tolling**

The magistrate judge's R&R rejected Mr. Espinoza's four arguments for equitable tolling. It concluded Mr. Espinoza could not blame his late filing on (1) his appellate counsel, (2) his ignorance of the law, or (3) his mental impairment. *See* ROA at 294-96. Further, it said (4) Mr. Espinoza had not presented new actual innocence evidence. *Id.* at 296-97. As to mental impairment, the magistrate judge pointed out that Mr. Espinoza's health record evidence predated his conviction by at least 16 years and that he was found competent to stand trial. *Id.* at 295. The R&R said Mr. Espinoza did not show he diligently pursued his claims. *Id.* at 295-96. The district court adopted the magistrate judge's analysis. *Id.* at 316-17.

Mr. Espinoza's brief to this court addresses almost exclusively the merits of his § 2254 claims. *Compare* ROA at 5-18 *with* Aplt. Br. at 1-13. The only reference in his brief to the equitable tolling arguments that the district court rejected is the statement that "A.E.D.P.A's one year statute of limitation for the writ of Habeas Corpus was written for people just like me, mentally impaired, uneducated, [H]ispanic and poor." Aplt Br. at 12. He has failed to show that reasonable jurists would debate the district court's denial of equitable tolling.

III. CONCLUSION

For the foregoing reasons, we deny a COA and dismiss this matter. Because Mr. Espinoza has failed to show the "existence of a reasoned, nonfrivolous argument on the

law and facts in support of the issues raised," *Buchheit v. Green*, 705 F.3d 1157, 1161 (10th Cir. 2012), we deny his motion to proceed *in forma pauperis*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-01624-LTB-GPG

THOMAS ERIC ESPINOZA,

Applicant,

v.

THE PEOPLE OF THE STATE OF COLORADO,
SCOTT DAUFFENBACH, Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on October 2, 2019. (ECF No. 21). Applicant has filed a document titled "Motion for Status for Reply to the Response" (ECF No. 22) and timely written objections to the Recommendation (ECF No. 23). Based on Applicant's filing of timely written objections, the Court has reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct for the reasons stated therein.

Accordingly, for the foregoing reasons, it is

ORDERED that Applicant's written objections (ECF No. 23) are overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 23) is accepted and adopted. It is

FURTHER ORDERED that the amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and the action is dismissed with prejudice as untimely. It is

FURTHER ORDERED that the pending "Motion for Status for Reply to the Response" (ECF No. 22) and the second motion to appoint counsel (ECF No. 18) are denied as moot. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED at Denver, Colorado, this 28th day of October, 2019.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-01624-LTB-GPG

THOMAS ERIC ESPINOZA,

Applicant,

v.

THE PEOPLE OF THE STATE OF COLORADO,
SCOTT DAUFFENBACH, Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* filed *pro se* by Applicant Thomas Eric Espinoza on June 5, 2019. (ECF No. 1). The matter has been referred to this Magistrate Judge for recommendation (ECF No. 20).[1]

The Court must construe the application liberally because Mr. Espinoza is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v.*

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[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is advised of the premises. This Magistrate Judge respectfully recommends that the § 2254 application be dismissed as untimely.

I. BACKGROUND

Mr. Espinoza filed an *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* on June 5, 2019. (ECF No. 1). On June 24, 2019, the Court ordered Respondents Scott Dauffenbach and The Attorney General of the State of Colorado (collectively, the "State of Colorado" or the "State") to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state remedies pursuant to 28 U.S.C. § 2254(b)(1)(A). (ECF No. 6). On July 31, 2019, the State of Colorado filed its Pre-Answer Response arguing that this action is barred by § 2244(d)'s one-year limitation period, which expired on October 23, 2018.[2] (*See* ECF No. 14 at 7-9). Mr. Espinoza filed a Reply to the Response on August 23, 2019, contending that his application should be considered timely because he has suffered from mental health issues. (*See* ECF No. 17). He also filed a second motion to appoint counsel. (ECF No. 18). The Court now addresses whether the application is timely.

[2] Because the Court finds the application untimely, it does not address whether the claims have been exhausted.

II. DISCUSSION

The State of Colorado argues that the application is barred by the one-year limitation period in 28 U.S.C. § 2244(d). That statute provides as follows:

> (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).

Mr. Espinoza does not allege he was prevented by unconstitutional state action from filing this action sooner, he is not asserting any constitutional rights newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, and he knew or could have discovered the factual predicate for each

of his claims before the proceedings relevant to the claims were final. *See* 28 U.S.C. § 2244(d)(1)(B) - (D). As a result, the one-year limitation period begins to run on the date Mr. Espinoza's conviction of judgment became final. *See* 28 U.S.C. § 2244(d)(1)(A).

Finality occurs 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[.]" 28 U.S.C. § 2244(d)(1)(A). Here, the Colorado Supreme Court denied certiorari review of Mr. Espinoza's direct appeal on April 29, 2013. Because Mr. Espinoza did not file a petition for certiorari review in the United States Supreme Court, his direct appeal proceeding concluded when the time for filing a certiorari petition in the United States Supreme Court expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (if a defendant directly appeals to the state's highest court, the conviction is final on the expiration of the 90-day period for seeking certiorari in the United States Supreme Court); *see also* S. Ct. R. 13.1. Therefore, Mr. Espinoza's conviction became final (and the statute began to run) on July 29, 2013—90 days after the Colorado Supreme Court's April 29, 2013 denial of certiorari review—which is when the time expired to seek certiorari review in the United States Supreme Court.[3] *See Holland v. Florida*, 560 U.S. 631, 635 (2010); *Al-Yousif v. Trani*, 779 F.3d 1173, 1178 (10th Cir. 2015).

[3] The 90th day was Sunday, July 28, 2013. The deadline was extended to the next business day Monday, July 29, 2013. *See* S. Ct. Rule 30.1 (time periods ending on a weekend or holiday run through the next court business day).

His Mental impairment prevented him

A. Timeliness and Statutory Tolling

Pursuant to § 2244(d)(2), a properly filed state court postconviction motion tolls the one-year limitation period while the motion is pending. The issue of whether a state court postconviction motion is pending for the purposes of § 2244(d)(2) is a matter of federal law, but "does require some inquiry into relevant state procedural laws." *See Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir. 2000). The term "pending" includes "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999).

Furthermore, "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law." *Gibson*, 232 F.3d at 804. In Colorado, a party has 49 days from a court's written order to file an appeal. Colo. App. R. 4(b). And, if no petition for rehearing is filed in the Court of Appeals, a petition for writ of certiorari must be filed in the Colorado Supreme Court within 42 days after entry of the judgment on the appeal. Colo. App. R. 52(b)(1). But, unlike a direct appeal, "the statute of limitations is tolled only while state courts review the [postconviction] application." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007). "The application for state postconviction review is therefore not 'pending' after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari [in the United States Supreme Court]." *Id.*

Here, the limitations period ran from the date the conviction became final on July 29, 2013 until Mr. Espinoza filed a postconviction Rule 35(c) motion on February 24, 2014—**210 days** elapsed between those two events, which counts towards the statute of limitations. The filing of Mr. Espinoza's Rule 35(c) motion tolled the statute of limitations from February 24, 2014 until the Colorado Supreme Court denied certiorari on May 21, 2018. From that point, Mr. Espinoza had an additional **155 days** (or until October 23, 2018) in which to file a habeas petition. So, the present § 2254 petition filed on June 5, 2019 is time-barred, unless Mr. Espinoza can establish a basis for tolling.

B. Equitable Tolling

Mr. Espinoza makes several claims as to the timeliness of his application. (ECF No. 1 at 6, 12). To the extent Mr. Espinoza argues that his appellate counsel is responsible for the untimeliness, such an argument is irrelevant because AEDPA's one-year statute of limitations did not begin running until after the conviction became final, which was *after* the state appellate challenges. Thus, Mr. Espinoza provides no explanation of how appellate counsel's actions or inactions caused the delayed filing of this habeas application. And insofar as Mr. Espinoza contends that the delay was because he "does not understand the rules and procedures [of] the federal appeals process" and that it is "complicated and complex leaving [him] confused and intimidated" (ECF No. 1 at 12), such a contention fails because "it is well established 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).

Next, Mr. Espinoza asserts that an unspecified "mental defect/impairment has prevented him from making this part of the appeals process." (ECF No. 1 at 12). The State responds that Mr. Espinoza's "vague and conclusory references to his alleged mental impairment [] are insufficient to implicate equitable tolling." (ECF No. 14 at 6-7). In his reply, Mr. Espinoza contends that he does in fact suffer from a "mental impairment" and attaches documents to support his contention. (ECF No. 17 at 7-8; 31-38). The Court now addresses those contentions.

No basis for equitable tolling has been established. Mr. Espinoza has provided the Court with a Denver Fire Department Report from April 19, 1978; a document titled "Emergency Room Visit" dated August of 1988; a document titled "Emergency Room Visit" dated November 11, 1989; a document titled, in part, "Psych Observation Admission Orders" with a date of November 1, 1996; and a "Denver Health DGH Emergency Department Visit" printout which appears to involve an incident on May 6, 1994. (ECF No. 17 at 31-38). Yet all of these health records significantly pre-date when his conviction became final on July 29, 2013—documents that are so remote in time fail to establish a relevant extraordinary circumstance as is required for equitable tolling. *See Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir. 2001). Moreover, the record reflects that the state trial court concluded (much more recently) that Mr. Espinoza was competent to stand trial. (ECF No. 14-3 at 18-22). Above all, Mr. Espinoza has not shown how any of his mental health issues caused his delay in filing this habeas petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005). Nor does Mr. Espinoza

identify the steps he took—after his conviction became final and the AEDPA statute of limitations began running—to diligently pursue his claims. *Id.* Thus, equitable tolling does not save this untimely application.

C. Fundamental Miscarriage of Justice Exception

What remains is Mr. Espinoza's attempt to establish a "fundamental miscarriage of justice" by demonstrating that he is "actually innocent" of the crime charged (murder of his neighbor). (ECF No. 17 at 8-15; *see also* ECF No. 14). He does not. A credible showing of actual innocence provides a gateway to consideration of an otherwise untimely claim of constitutional error as an equitable exception to the one-year limitation period. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (considering claim of actual innocence in context of one-year limitation period in 28 U.S.C. § 2244(d)). However, "tenable actual-innocence gateway pleas are rare." *Id.* To be credible, a claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "[T]he *Schlup* standard is demanding. The gateway should open only when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Perkins*, 569 U.S. at 401 (citation omitted). Here, neither Mr. Espinoza's application nor his reply presents new, reliable evidence of actual innocence. Instead,

he argues the state court denied him due process during his criminal trial, which resulted in a miscarriage of justice. Such allegations, even if true, do not bear on whether he is factually innocent of the murder. *See U.S. v. Maravilla*, 566 Fed. App'x 704, 708 (10th Cir. 2014) (unpublished) (noting that "legal innocence . . . includ[ing] procedural defects invalidating a conviction" are not sufficient to show actual, factual innocence). Accordingly, he fails to identify the existence of any extraordinary circumstances beyond his control that prevented him from filing a timely application—the application is therefore barred by the one-year limitation period in § 2244(d).

III. RECOMMENDATION

For these reasons, this Magistrate Judge respectfully recommends that the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* (ECF No. 1) be **denied** and the action be **dismissed with prejudice** because the application is untimely. This Magistrate Judge further recommends that the second motion to appoint counsel be **denied as moot** (ECF No. 18).

DATED October 2, 2019.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge