No. 19-4126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 07, 2020
DEBORAH S. HUNT, Clerk

LEON HAWKINS,

Petitioner-Appellant,

v.

DONNIE MORGAN, Warden,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, Circuit Judge.

Leon Hawkins, an Ohio prisoner proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as time-barred. This court construes Hawkins's timely notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Hawkins has filed a motion to proceed in forma pauperis on appeal.

In 1997, a jury convicted Hawkins of two counts of aggravated murder with death penalty specifications, one count of attempted aggravated murder, one count of aggravated burglary, and one count of aggravated robbery. The trial court sentenced Hawkins to a term of imprisonment of thirty years to life. The Ohio Court of Appeals affirmed the trial court's judgment, *State v. Hawkins*, No. 97APA06-740, 1998 WL 134321, at *7 (Ohio Ct. App. Mar. 24, 1998), and the Ohio Supreme Court denied Hawkins's delayed application for leave to appeal, *State v. Hawkins*, 700 N.E.2d 333 (Ohio 1998) (table). On April 5, 1999, the United States Supreme Court denied Hawkins's petition for a writ of certiorari. *Hawkins v. Ohio*, 526 U.S. 1053 (1999).

In September 2009, Hawkins filed a motion for a new trial, which the trial court construed as a petition for post-conviction relief and denied as untimely. *State v. Hawkins*, No.

Appendix E

96CR-2229 (Franklin Cty., Ohio Ct. Com. Pl. Apr. 16, 2010). In August 2011, he filed another petition for post-conviction relief, which the trial court denied. *State v. Hawkins*, No. 96CR-2229 (Franklin Cty., Ohio Ct. Com. Pl. Jan. 26, 2012), *aff'd*, *State v. Hawins*, 10th Dist. No. 12AP-164 (Ohio Ct. App. Sept. 27, 2012). Hawkins then moved for resentencing in December 2017. The trial court denied the motion, and the Ohio Court of Appeals affirmed. *See State v. Hawkins*, No. 18AP-126, 2018 WL 6807128, at *2 (Ohio Ct. App. Dec. 27, 2018). Hawkins filed another motion for resentencing in May 2018. The trial court denied this motion, and the Ohio Court of Appeals affirmed. *See State v. Hawkins*, No. 18AP-600, 2019 WL 643296, at *2 (Ohio Ct. App. Feb. 14, 2019), *leave to appeal denied*, 122 N.E.3d 217 (Ohio 2019) (table).

In September 2019, Hawkins filed a § 2254 petition in the district court, raising a single ground for relief—that the trial court erred by sentencing him on each aggravated-murder count. Pursuant to Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, a magistrate judge conducted an initial review of the petition and concluded that it was barred by the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2244(d). Hawkins objected, arguing that he could not have raised his claim until the Ohio Supreme Court's 2016 decision in *State v. Williams*, 71 N.E.3d 234, 239 (Ohio 2016), which held that, when a sentencing court determines that a defendant has been convicted of allied offenses of similar import, it is prohibited from imposing multiple sentences for those offenses. Hawkins asserted that he was "rais[ing] this claim under the Double Jeopardy [C]lause." The district court overruled Hawkins's objections, dismissed his petition as barred by the statute of limitations, and declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies a habeas petition on a procedural ground without reaching the underlying constitutional claims, a COA should issue when the petitioner demonstrates "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 the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

AEDPA imposes a one-year statute of limitations for filing federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). Generally, the one-year statute of limitations for habeas petitions filed by state prisoners begins to run 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). The statute provides for tolling of the limitations period during the time in which "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). And, under certain circumstances, the AEDPA limitations period may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). A credible showing of actual innocence may also allow a habeas petitioner to overcome AEDPA's limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 387 (2013).

Hawkins's conviction became final on April 5, 1999, when the Supreme Court denied his certiorari petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). Absent tolling, he had one year from that date, or until April 5, 2000, to file a § 2254 petition in the district court. Hawkins's petition was untimely because he filed it in September 2019, nearly twenty years after the expiration of the limitations period. And none of Hawkins's post-conviction petitions had a tolling effect because they were filed long after the limitations period had expired. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Further, Hawkins did not allege, nor did the record reveal, any extraordinary circumstances that would warrant equitable tolling.

Instead, Hawkins maintained that he could not have raised his double jeopardy claim until the Ohio Supreme Court's decision in *Williams*. But *Williams* concerned the issue of sentencing for allied offenses of similar import under Ohio law, not federal constitutional law.

And although § 2244(d)(1)(C) allows for the delay of the start of the statute of limitations for a newly recognized constitutional right, that right must have been newly recognized by the *United States* Supreme Court. There is no reason why Hawkins could not have raised a federal double jeopardy claim prior to the *Williams* decision. Moreover, to the extent Hawkins wished to raise a challenge to his sentence under state law, such claims are not cognizable on habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Reasonable jurists would not debate the district court's denial of Hawkins's § 2254 petition as barred by the statute of limitations. *See Slack*, 529 U.S. at 484. His application for a COA is therefore **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEON HAWKINS,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent.

CASE NO. 2:19-CV-3870
JUDGE SARAH D. MORRISON
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

On October 30, 2019, this Court overruled Petitioner's objections and adopted and affirmed the Magistrate Judge's Report and Recommendation dismissing the Petition. (ECF No. 8.) On November 18, 2019, Petitioner filed a Motion for Reconsideration (ECF No. 9) on the grounds that the Court misconstrued Petitioner's argument to be based on the Double Jeopardy Clause. Rather, he contends his argument is based on Ohio's allied offenses statute.

As the Court made clear in footnote 1 of the Court's previous order, to have a cognizable claim under 28 U.S.C. § 2254, it must be the case that Petitioner is arguing that the Ohio state courts made an error of *federal* law, not state law. *Jackson v. Smith*, 745 F.3d 206, 214 (6th Cir. 2014). A state court's incorrect application of Ohio's allied offenses statute would not be an error of federal law. *See id.* The Court has no jurisdiction to consider such an alleged error.

Petitioner's Motion for Reconsideration is **DENIED.**

Petitioner has also sought leave to appeal the Court's October 30, 2019, Order *in forma pauperis*. (ECF No. 10.) In that Order, the Court declined to issue a certificate of appealability, certified that any appeal would not be in good faith, and stated that any application to proceed *in*

Appendix D

forma pauperis on appeal should be denied. Accordingly, Petitioner's Motion for Leave to Appeal *in forma pauperis* is **DENIED**.

The same remains true with respect to this Order on Petitioner's Motion for Reconsideration. The Court is not persuaded that reasonable jurists could debate that dismissal of this action is warranted (and that reconsideration is not warranted) on the grounds that Petitioner relies on a state law claim, which is not cognizable under 28 U.S.C. § 2254. Therefore, the Court **DECLINES** to issue a certificate of appealability.

The Court **CERTIFIES** that any appeal would not be in good faith such that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEON HAWKINS,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent.

CASE NO. 2:19-CV-3870
JUDGE SARAH D. MORRISON
Magistrate Judge Chelsey M. Vascura

ORDER and
REPORT AND RECOMMENDATION

This is an action pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. Petitioner seeks release from confinement imposed pursuant to a state-court judgment in a criminal action. This case has been referred to the Undersigned pursuant to 28 U.S.C. § 636(b) and Columbus General Order 14-1 regarding assignments and references to the United States Magistrate Judges.

Petitioner has filed a motion to proceed *in forma pauperis*. (ECF No. 1.) Upon consideration, the undersigned finds the motion to be meritorious, and it is **GRANTED**. Petitioner shall be **PERMITTED** to prosecute this action without prepayment of fees or costs and judicial officers who render services in this action will do so as if costs had been prepaid.

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court ("Rule 4"), this Court must conduct a preliminary review to determine whether "it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . . ." If it does so appear, the petition must be dismissed. *Id.* Rule 4 allows for the dismissal of petitions that raise legally frivolous claims, as well as petitions that contain factual allegations that are palpably incredible or false. *Carson v. Burke*,

Appendix D

> court denied appellant's motion noting that "[d]efendant did not receive a void or partially void judgment, and is not entitled to a resentencing hearing."

State v. Hawkins, 10th Dist. No. 18AP-600, 2019 WL 643296, at *1 (Ohio Ct. App. Feb. 14, 2019). On May 15, 2019, the Ohio Supreme Court declined to accept jurisdiction of Petitioner's appeal. *State v. Hawkins*, 155 Ohio St.3d 1458 (Ohio 2019).

On September 6, 2019, Petitioner filed this *pro se* habeas corpus petition. He asserts, as his sole ground for relief, that the trial court improperly sentenced him on two counts of aggravated murder. Plainly, however, this action is time-barred.

II. STATUTE OF LIMITATIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), effective April 24, 1996, imposes a one-year statute of limitations on the filing of habeas corpus petitions. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (d)(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 postconviction 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.

698 F. App'x 244, 246-47 (6th Cir. 2017) (citing *Allen v. Siebert*, 552 U.S. 3, 7 (2007)). Additionally, Petitioner does not allege, and the record does not reflect, any extraordinary circumstances that would justify equitable tolling of the statute of limitations, particularly for the time period at issue here. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (In order to obtain equitable tolling of the statute of limitations, a litigant must establish that he has been diligently pursued relief and that some extraordinary circumstance stood in his way of timely filing.) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Finally, the record does not reflect that any of the provisions of 2244(d)(1)(B) – (D) apply. Petitioner argues that relief is warranted under *State v. Williams*, 148 Ohio St.3d 403 (Ohio 2016), which held that "when a sentencing court concludes that an offender has been found guilty of two or more offenses that are allied offenses of similar import . . . it should permit the state to select the allied offense to proceed on for purposes of imposing sentence and it should impose sentence for only that offense.". To the extent that this claim may be liberally construed to raise a claim under the Double Jeopardy Clause, *see Jackson v. Smith*, 745 F.3d 206, 210 (6th Cir. 2014); *Ball v. Knab*, No. 2:09-cv-480, 2010 WL 4570226, at *7-8 (S.D. Ohio Oct. 12, 2010), nothing prevented Petitioner from earlier raising this issue which would have been readily apparent to him at the time of sentencing.

IV. DISPOSITION

For the foregoing reasons, the undersigned **RECOMMENDS** that this action be **DISMISSED** as time-barred.

Procedure on Objections

If any party objects to this Report and Recommendation, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific