United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2021
Lyle W. Cayce
Clerk

No. 20-20110

ROBIN RENEE MELCHIOR,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-3480

ORDER:

Robin Renee Melchior, Texas prisoner # 1731030, pleaded guilty to driving while intoxicated (DWI), third offense, with a deadly weapon finding and was sentenced to 30 years of imprisonment. She moves for a certificate of appealability (COA) to appeal the dismissal of her 28 U.S.C. § 2254 petition challenging this conviction as untimely. She asserts the district court should have excused the untimeliness of her petition because she has new evidence showing she is actually innocent. She alleges that she has a CarFax report showing the car she was driving during the offense had no damage and

that this report shows the police report falsely stated her car hit two cement barriers and other barriers.

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); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If, as here, the district court denies relief on procedural grounds, a COA should issue only when the prisoner "shows, at least, 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).

Melchior has not made the requisite showing. Actual innocence, if proven, serves as a gateway through which a prisoner may assert § 2254 claims despite the expiration of the limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, Melchior has not made a debatable showing that, in light of new, reliable evidence, no reasonable juror would have found her guilty of the underlying offense beyond a reasonable doubt. *See id.*; *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Because Melchior has not shown that reasonable jurists could debate the dismissal of her § 2254 petition as untimely, *see Slack*, 529 U.S. at 484, her COA motion is DENIED. Her motion for leave to proceed in forma pauperis on appeal is also DENIED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBIN RENEE MELCHIOR, TDCJ #1731030,	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-19-3480
LORIE DAVIS,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

State inmate Robin Renee Melchior (TDCJ #01731030) filed a petition for a writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254, alleging that she received ineffective assistance of counsel from her trial counsel that renders her plea agreement invalid.

I. Background

Petitioner pleaded guilty in Montgomery County to one count of driving while intoxicated in Criminal Case No. 11-040-3600CR.[1] On April 8, 2011, the Court sentenced Petitioner to thirty years' imprisonment due to a deadly weapon finding. *See Melchior v. State*, Case No. 11-040-3600CR. Petitioner directly appealed the judgment, but the Texas Ninth Court of Appeals dismissed the appeal

[1] Petitioner is subject to a judgment in another criminal case, Case No. 10-0505425CR, in which she also pleaded guilty of the same charge on the same date. However, Petitioner does not challenge this conviction and, even if she did, the determination of the Court would not change.

on August 24, 2011, after determining that Petitioner had no right to appeal the judgment based on the terms of her plea agreement. *See Melchior v. State*, No 00-11-0423-CR (Tex. App.–Beaumont [9th Dist.] Aug. 24, 2011. Petitioner did not petition for discretionary review by the Texas Court of Criminal Appeals.

Petitioner filed one state application for a writ of habeas corpus pertaining to her criminal judgment on July 5, 2019.[2] *See* WR-89, 925-02. On August 21, 2019, the Texas Court of Criminal Appeals denied the application without a written order or hearing based on the trial court's findings. *Id.*

Petitioner filed the instant petition on September 13, 2019.[3] *See* Dkt. #1. The petition alleges that her counsel provided ineffective assistance because he failed to conduct an independent investigation into the report filed by Constable Shackleford and failed to file a motion to suppress. *See id.* at 6. After the Court ordered her to show cause as to why the construed petition should not be barred by the statute of limitations, Petitioner responded by stating that she was actually innocent of the underlying criminal charge and that the procedural default on timeliness grounds should be excused. *See* Dkt. #5.

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[2] Petitioner did file a state application for a writ of habeas corpus in her other criminal conviction. *See* WR-89,925-01. Petitioner filed this state application on May 16, 2019, and the application was denied by the Texas Court of Criminal Appeals on July 3, 2019, without a written order or hearing. *Id.*

[3] Because Petitioner does not provide the date that she placed the petition into the prison mail-box system, she may not take advantage of the prison mail-box rule and the petition is deemed filed on the date it was received by the Court. Even if Petitioner were to take advantage of the prison mail-box rule, the petition would be filed on September 5, 2019, and would still be nearly seven years too late.

II. Discussion

This federal habeas corpus proceeding is governed by the Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). According to the AEDPA, all federal habeas corpus petitions filed after April 24, 1996, are subject to a one-year limitations period found in 28 U.S.C. § 2244(d). A federal habeas corpus petition challenging a state court judgment must be filed within one year from the date that the challenged conviction becomes "final by the conclusion of direct review or the expiration of the time for seeking such review."[4] 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final on September 23, 2011, when her time expired to petition for discretionary review from the Texas Court of Criminal Appeals. *See Roberts v. Cockrell*, 319 F.3d 690, 693-95 (5th Cir. 2003) (holding that a Texas conviction becomes final for limitations purposes when the time for seeking further direct review expires). That date triggered the statute of limitations for federal habeas corpus review, which expired one year later on September 24, 2012.[5] *See* 28 U.S.C. § 2244(d)(1)(A). As a result, the pending habeas corpus petition, executed by Petitioner on September 13, 2019, is nearly seven-years too late, and is barred from federal review unless a statutory or equitable exception applies to toll the limitations period.

[4] Petitioner does not otherwise allege that the statute of limitations should run from another possible date, for example, relating to when the facts of his claims became known to her.

A habeas petitioner may be entitled to statutory tolling under 28 U.S.C. § 2244(d)(2), which excludes from the AEDPA limitations period a "properly filed application for [s]tate post-conviction or other collateral review." A state application for collateral review is "*properly* filed" for purposes of § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original). In other words, "a properly filed [state] application [for collateral review] is one submitted according to the state's procedural requirements." *Causey v. Cain*, 450 F.3d 601, 605 (5th Cir. 2006) (quoting *Lookingbill v. Cockrell*, 293 F.3d 256, 260 (5th Cir. 2002)). As stated above, the record shows that Petitioner filed one state habeas application pertaining to the judgment on July 5, 2019. Because the state application was filed past the date the statue of limitations ran, the application does not toll the statute of limitations. Therefore, the federal petition is still filed nearly seven-years too late.

The Fifth Circuit has held that the statute of limitations found in the AEDPA may be equitably tolled, at the district court's discretion, "in rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Equitable tolling is an extraordinary remedy which is sparingly applied. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Supreme Court has clarified that 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.'" *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Petitioner does not demonstrate that she has pursued federal relief with diligence or that equitable tolling is otherwise available. *See Holland*, 560 U.S. at 649; Dkt. #1. Petitioner makes no showing that any circumstance stood in her way of filing the petition on time. Equitable tolling is not available where the petitioner squanders her federal limitations period. *See, e.g., Ott v. Johnson*, 192 F.3d 510, 514 (5th Cir. 1999). Petitioner does say that she is actually innocent of the underlying criminal charges. *See* Dkt. #5. While a claim of actual innocence may excuse procedural deficiencies, such as filing a habeas petition past the statute of limitations, Petitioner does not present a viable claim of actual innocence. Petitioner must show that newly discovered evidence exists and that the evidence would make it more likely than not that no reasonable juror would have found her guilty beyond a reasonable doubt. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Petitioner does not present any newly discovered evidence or show how the evidence discussed would elicit doubt that her guilty plea is valid. Petitioner claims that her attorney failed to present a CarFax report that refuted a statement made by Constable Shackelford describing damage to the car Petitioner drove at the time of the offense. Dkt. #5 at 3-4. Petitioner also alleges that her counsel

failed to investigate into Constable Shackelford's police report and have him testify against Petitioner. *Id.* Petitioner does not show that this information is newly discovered or was unavailable at the time she pleaded guilty. In fact, Petitioner states that this information was merely "not presented to the state trial court during [the] trial proceedings." *Id.* at 3. Moreover, Petitioner does not address how this evidence would invalidate her guilty plea. In sum, Petitioner has not shown a viable actual innocence claim. Petitioner offers no valid explanation for the delay and the record does not reflect equitable tolling is appropriate. In conclusion, the § 2254 petition is denied as time-barred.

III. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right," but also that they "would find it debatable whether the district court was correct in its [] ruling." *Slack*, 529 U.S. at 484. Because jurists of reason would not debate whether the ruling in this case was correct, a certificate of appealability will not issue.

IV. Conclusion

As a result, Petitioner's § 2254 petition (Dkt. #1) is **DENIED** as time-barred. The case is dismissed with prejudice. A certificate of appealability shall not issue.

SIGNED at Houston, Texas, on Jan 30, 2020.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBIN RENEE MELCHIOR, TDCJ #1731030, *Petitioner*, v. LORIE DAVIS, *Respondent.*	§ § § § § § § § § § §	CIVIL ACTION NO. H-19-3480

FINAL JUDGMENT

Robin Renee Melchior's petition for a writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 is denied. The case is dismissed with prejudice.

SIGNED at Houston, Texas, on Jan 30, 2020.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBIN RENEE MELCHIOR, TDCJ #1731030, *Petitioner*, v. LORIE DAVIS, *Respondent*.	§ § § § § § § § § §	CIVIL ACTION NO. H-19-3480

ORDER

Robin Renee Melchior moves to proceed *in forma pauperis* on appeal. The Court dismissed the § 2254 petition as time-barred. The appeal is not in good faith.

Accordingly, the motion (Dkt. #10) is **DENIED**.

SIGNED at Houston, Texas, on Mar 5, 2020.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBIN RENEE MELCHIOR, TDCJ #1731030, *Petitioner*, v. LORIE DAVIS, *Respondent*.	§ § § § § § § § § § §	CIVIL ACTION NO. H-19-3480

ORDER TO SHOW CAUSE

Petitioner Robin Renee Melchior filed a petition for a writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254. In her petition, Petitioner admits that her petition is filed past the applicable one-year statute of limitations, but that the limitation should be excused because she is actually innocent. Public records confirm that the petition appears to be barred from review because it was filed past the statute of limitations.

Accordingly, it is **ORDERED** that Petitioner show cause, within thirty days from the date of this Order, as to why the petition should not be dismissed as time-barred.

SIGNED at Houston, Texas, on Oct 15, 2019.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBIN RENEE MELCHIOR,	§	
Petitioner	§	
	§	
Vs.	§	**CIVIL NO. H-19-3480**
	§	
LORIE DAVIS,	§	
Director	§	

PETITIONER'S RESPONSE TO COURT'S
OCTOBER 15, 2019 ORDER TO SHOW CAUSE

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner Robin Renee Melchior files this her response to the court's October 15, 2019 show cause order. The court has ordered Petitioner to show cause as to why her federal petition should not be dismissed as time-barred.

I.

PETITIONER IS PREJUDICED IN REPSONDING AT THIS TIME

Petitioner will make a good-faith effort to respond to the court's show cause order, but asserts she is prejudiced in responding at this time. The nature of Petitioner's underlying habeas claims for relief, and her reasons for asserting to her federal habeas petition should not be time-barred, should be considered as pleaded by Petitioner, and in consideration of the state records in this case, the original records of the trial proceedings, and post conviction proceedings. Those records are not before the court. The court has entered no show cause order to the Respondent to produce such records. Of importance, for example, is an affidavit filed during the state court habeas proceedings from Petitioner's former defense counsel, Steven Jackson, . Although Petitioner has

some partial information from the state trial and habeas proceedings she does not have the complete records and has been unable to obtain them due to her indigency. When a federal court issues a show cause order to the Respondent, and the Respondent produces records, those records may be viewed on line by any person. The court can then review those records when making rulings on issues impacting the resolution of Petitioner's case.

In Petitioner's challenge to state fact findings, request for in-court evidentiary hearing, and exception allowing late filing under McQuiggin v. Perkins, on file in this case, Petitioner is requesting, among other things, an evidentiary hearing on newly presented evidence. A hearing on the time-bar issue is appropriate, as well.

II.

PETITIONER'S INITIAL RESPONSE TO TIME-BAR ISSUE

Petitioner relies on the exception to the normal time limitations imposed in federal habeas cases on this Supreme Court's decision in *McQuiggin v. Perkins.* 569 U.S. (2013).

In *McQuiggen* the Supreme Court held that a showing of actual innocence may serve as a gateway through which a petitioner may pass when filing an untimely 2254 petition under 28 U.S.C. §2244(d)(1). Under *McQuiggin,* federal courts do not count unjustifiable delays in filing a federal habeas petition as a barrier to habeas relief. The Supreme Court rejected a state's argument that a habeas petitioner who asserts actual innocence must prove diligence to cross the federal court's threshold. Indeed, in *McQuiggin* the petitioner in that case waiting some eleven years before filing affidavits demonstrating actual innocence. A showing of diligence is not required as a prerequisite to consideration of Petitioner's actual innocence exception and her claim of being denied the effective assistance of counsel, resulting in an unknowing, unintelligent, or involuntary plea of guilty. Petitioner has maintained her innocence to the offense for which she

Petitioner's vehicle hit two cement barriers, and struck other barriers. However, soon after the incident Petitioner turned the car back into the dealership. There was absolutely no damage to the car and Petitioner was given a full refund. The CarFax report shows that there was no damage to the car. Mr. Shackelford had no dash cam video in operation, and filed no "crash report." There was no evidence from the county's law enforcement call center that Mr. Shackelford had even stopped a semi truck on the highway, as he had alleged. Mr. Shackelford's cursory statement, that the car Petitioner was driving almost hit him, came within inches of him when passing by, served as the basis for indicting and convicting Petitioner of using a 'deadly weapon'.

Due to lack of investigation Petitioner's defense counsel, Steven Jackson, conducted no investigation into the matter of lack of damage to the car Petitioner was driving or falsehoods contained in Mr. Shackelford's report, as mentioned above. See also Page 6 of Petitioner's federal petition, and pages 6-A and 6-B of that ground attached to this response. Although not before the court, an affidavit filed by Steven Jackson during the state habeas proceeding contains inconsistent and internally controverting statements with regard to Constable Shackelford. At one point in the affidavit Mr. Jackson states that he may have spoken to Mr. Shackelford prior to the original plea proceedings, but did not recall what was said, having made no notes; and in another point in the affidavit waivered on what he actually did or did not do in the matter. The state habeas court denied Petitioner's request for an evidentiary hearing, resulting in Mr. Shackelford never being examined, cross-examined in any proceeding involving Petitioner, and no records being produced by the county to show that Mr. Shackelford had even stopped a semi truck on the highway. The Petitioner was not allowed by the state courts to develop evidence of Mr. Shackfelford's falsehoods contained in his offense report.

Under *McQuiggin*, the court should allow the late filing of Petitioner's federal habeas petition to proceed, as Petitioner brings forth newly presented evidence which make a prima facie case of her actual innocence to having allegedly used a 'deadly weapon' in the context of the DWI offense.

Petitioner reiterates her request for an evidentiary hearing on the matter of her newly presented evidence, and as concern her actual innocence; and to challenge state fact findings as pleaded in Petitioner's memorandum on file in this case. There can be no question but that the failure to develop facts during the state habeas proceeding was no fault of Petitioner. See *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir. 2013).

Petitioner requests the court to issue a show cause order to the Respondent, responding to Petitioner's federal habeas petition, and so that state records are before the court in order to make a fair and just resolution of the issues in Petitioner's case.

Respectfully submitted,

Robin Melchior

ROBIN RENEE MELCHIOR, #1731030
Carol Young Facility
5509 Attwater Ave.
Dickinson, Texas 77539

STATEMENT ON CERTIFICATE OF SERVICE

I, Petitioner, state that no service of the foregoing and within has been made, as no Respondent or other party has made an appearance in this case.

Robin Melchior

ROBIN RENEE MELCHIOR, #1731030