United States Court of Appeals for the Fifth Circuit

No. 19-51188

United States Court of Appeals
Fifth Circuit
FILED
March 2, 2021
Lyle W. Cayce
Clerk

BRIAN KEITH GORHAM,

versus

BOBBY LUMPKIN, *Director*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:19-CV-743

ORDER:

Brian Keith Gorham, Texas prisoner # 01998550, was convicted of aggravated sexual assault of a child and sentenced to life imprisonment. Gorham moves for a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2254 petition as time barred and for failure to raise a cognizable claim. He has also moved to proceed in forma pauperis (IFP) on appeal and to supplement his brief in support of his COA motion.

To obtain a COA, Gorham must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a constitutional claim on the merits, the COA standard requires

that the petitioner "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies a habeas petition on procedural grounds without reaching the merits of the underlying constitutional claim, the petitioner must show "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." *Id.*

Gorham has failed to make the requisite showing. *See id.* Accordingly, his COA motion is DENIED. His motion to proceed IFP is likewise DENIED. His motion to supplement his COA brief is GRANTED.

/s/ Leslie H. Southwick

LESLIE H. SOUTHWICK
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRIAN KEITH GORHAM,	§	
TDCJ No. 01998550,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. SA-19-CA-0743-OLG**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

The Court has considered the Judgment to be entered in the above-styled and numbered cause.

Pursuant to this Court's Memorandum Opinion and Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Petitioner Brian Keith Gorham's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) and Amended § 2254 petition (ECF No. 15) are **DISMISSED WITH PREJUDICE**. All pending motions, if any, are **DENIED**, and no Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 25 day of November, 2019.

ORLANDO L. GARCIA
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRIAN KEITH GORHAM, §
TDCJ No. 01998550, §
§
Petitioner, §
§
v. § Civil No. SA-19-CA-0743-OLG
§
LORIE DAVIS, Director, §
Texas Department of Criminal Justice, §
Correctional Institutions Division. §
§
Respondent. §

MEMORANDUM OPINION AND ORDER

Before the Court are *pro se* Petitioner Brian Keith Gorham's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), Petitioner's Memorandum in Support (ECF No. 2), and Petitioner's Amended § 2254 petition (ECF No. 15). Also before the Court are Respondent Davis's Answer (ECF No. 22) and Petitioner's Reply (ECF No. 18) thereto.

Petitioner challenges the constitutionality of his 2015 state court conviction for aggravated sexual assault of a child, arguing (1) he received ineffective assistance of counsel on direct appeal, (2) he received ineffective assistance of counsel during his trial, (3) his trial was rendered fundamentally unfair due to prosecutorial misconduct, and (4) the state habeas court committed error during his state habeas proceedings. In her answer, Respondent contends the first three allegations should be dismissed with prejudice as time-barred and the fourth allegation should be dismissed for failing to raise a cognizable claim.

Having carefully considered the record and pleadings submitted by both parties, the Court agrees with Respondent that Petitioner's first three allegations are barred by the one-year statute of limitations embodied in 28 U.S.C. § 2244(d)(1) and that the fourth allegation fails to

raise a cognizable claim. Thus, the Court concludes Petitioner is not entitled to federal habeas corpus relief or a certificate of appealability.

I. Background

In April 2015, Petitioner was convicted of one count of aggravated sexual assault of a child and was sentenced to life imprisonment. *State v. Gorham*, No. 2012-CR-10383 (175th Dist. Ct., Bexar Cnty., Tex. Apr. 17, 2015) (ECF No. 12-3 at 94). The Texas Fourth Court of Appeals affirmed his conviction on direct appeal and denied his motion for rehearing on February 11, 2016. *Gorham v. State*, No. 04-15-00305-CR (Tex. App.—San Antonio, Feb. 11, 2016, no. pet.). Petitioner did not file a petition for discretionary review (PDR) with the Texas Court of Criminal Appeals (TCCA).

Instead, Petitioner waited until October 27, 2016, to file a state habeas corpus application challenging his conviction and sentence, which was ultimately dismissed by the TCCA on May 3, 2017, for failing to comply with the Texas Rules of Appellate Procedure. *Ex parte Gorham*, No. 84,647-02 (Tex. Crim. App.); (ECF Nos. 12-18, 12-24 at 21). Shortly thereafter, Petitioner filed a second state habeas application on May 15, 2017, which was eventually denied without written order by the TCCA on June 5, 2019. *Ex parte Gorham*, No. 84,647-03 (Tex. Crim. App.); (ECF Nos. 12-25, 13-22 at 20). Petitioner then placed the instant federal habeas petition in the prison mail system on June 21, 2019. (ECF No. 1 at 15).

II. Analysis

A. The Statute of Limitations (Claims 1-3).

Respondent contends the first three allegations raised in Petitioner's federal habeas petition are barred by the one-year limitation period of 28 U.S.C. § 2244(d). Section 2244(d) provides, in relevant part, that:

> (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.

In this case, Petitioner's conviction became final March 12, 2016, when his time for filing a PDR with the TCCA expired. *See* Tex. R. App. P. 68.2 (providing a PDR must be filed within thirty days following entry of the court of appeals' judgment); *Mark v. Thaler*, 646 F.3d 191, 193 (5th Cir. 2011) (holding that when a petitioner elects not to file a PDR, his conviction becomes final under AEDPA at the end of the 30–day period in which he could have filed the petition) (citation omitted). As a result, the limitations period under § 2244(d) for filing a federal habeas petition challenging his underlying conviction and sentence expired a year later on March 12, 2017. Because Petitioner did not file his § 2254 petition until June 21, 2019—over two years after the limitations period expired—his petition is barred by the one-year statute of limitations unless it is subject to either statutory or equitable tolling.

1. Statutory Tolling

Petitioner does not satisfy any of the statutory tolling provisions found under 28 U.S.C. § 2244(d)(1). There has been no showing of an impediment created by the state government that violated the Constitution or federal law which prevented Petitioner from filing a timely petition. 28 U.S.C. § 2244(d)(1)(B). There has also been no showing of a newly recognized constitutional right upon which the petition is based, and there is no indication that the claims could not have been discovered earlier through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(C)-(D).

Similarly, although § 2244(d)(2) provides that "[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 shall not be counted toward any period of limitation under this

subsection," Petitioner's state habeas applications do not toll the limitations period either. As discussed previously, the TCCA dismissed Petitioner's first state habeas application for failing to comply with the Texas Rules of Appellate Procedure. As such, the application was not "properly filed" under § 2244(d)(2) and affords Petitioner no tolling effect. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000) ("[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."); *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999); *see also Caldwell v. Dretke*, 182 F. App'x. 346, 347 (5th Cir. 2006) (unpublished) ("[Petitioner's] second application was rejected for failure to comply with Tex. R. App. P. 73.2, and, therefore, did not toll the limitations period because it was not properly filed.").[1] Likewise, Petitioner's second state habeas application does not toll the one-year limitations period because it was not filed until May 2017, two months after the limitations period expired for challenging his underlying conviction and sentence. *See* 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Thus, no grounds for statutory tolling are shown.

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2. Equitable Tolling

In some cases, the limitations period may be subject to equitable tolling. The Supreme Court has made clear that a federal habeas corpus petitioner may avail himself of the doctrine of 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." *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013) (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). However, equitable tolling is only available in cases presenting "rare and exceptional

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[1] Indeed, the Supreme Court has indicated that a state court's ruling that a state habeas application was not properly filed is "the end of the matter," precluding such application's tolling of the statute of limitations for purposes of the filing of a federal habeas petition. *See Carey v. Saffold*, 536 U.S. 214, 226 (2002); *see also Allen v. Siebert*, 552 U.S. 3, 7 (2007) ("Because Siebert's petition for state postconviction relief was rejected as untimely by the Alabama courts, it was not 'properly filed' under § 2244(d)(2).").

circumstances," *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002), and is "not intended for those who sleep on their rights." *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012). Petitioner has not provided this Court with any valid reason to equitably toll the limitations period in this case.

Again, the TCCA dismissed Petitioner's first state habeas application on May 3, 2017, citing non-compliance with Texas Rule of Appellate Procedure 73.1, which requires that a post-conviction application for writ of habeas corpus conform to that court's filing requirements.[2] Petitioner contends he is entitled to equitable tolling because the state habeas court created the non-compliance by erroneously accepting a supplement to Petitioner's first application, filed by Petitioner over four months after the original application, that was not set out in the appropriate form. But it was Petitioner's *own action* of filing the supplement—rather than any action taken by the state habeas court—that ultimately resulted in his application being non-compliant. *See Larry v. Dretke*, 361 F.3d 890, 897 (5th Cir. 2004) (affirming denial of equitable tolling where petitioner's own action prevented him from asserting his rights). If Petitioner had "properly filed" his state habeas application in accordance with Texas law, the federal statute of limitations would have tolled for the entire period his application was pending before the state habeas courts. *Id.* at 897. As such, Petitioner has not met his burden of demonstrating a rare or extraordinary circumstance beyond his control caused the late filing of his federal habeas petition, and equitable tolling does not apply. *Id.*; *see Jones v. Stephens*, 541 F. App'x 499, 503-05 (5th Cir. 2013) (unpublished) (finding state court's failure to timely inform petitioner his state habeas application was improperly filed under Texas Rule of Appellate Procedure 73.1 did not constitute an extraordinary circumstance warranting equitable tolling).

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[2] Texas Rule of Appellate Procedure 73.2 grants the TCCA authority to dismiss an application that does not comply with Rule 73.1. *See, e.g., Ex parte Blacklock*, 191 S.W.3d 718, 719 (Tex. Crim. App. 2006).

Petitioner also asserts that equitable tolling should apply because he is not a trained lawyer and the prison's law library is outdated. But Petitioner fails to allege any specific facts regarding why the prison's library was inadequate or prevented him from filing a timely habeas application. *See Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011) (emphasizing the prisoner must factually demonstrate that the subpar library or access thereto actually prevented him from untimely filing his petition). Moreover, Petitioner's ignorance of the law, lack of legal training or representation, and unfamiliarity with the legal process do not rise to the level of a rare or exceptional circumstance which would warrant equitable tolling of the limitations period. *U.S. v. Petty*, 530 F.3d 361, 365-66 (5th Cir. 2008); *see also Sutton v. Cain*, 722 F.3d 312, 316-17 (5th Cir. 2013) (a garden variety claim of excusable neglect does not warrant equitable tolling).

Regardless, even assuming the above arguments constitute an extraordinary circumstance which prevented Petitioner from timely filing, Petitioner fails to demonstrate that he has been pursuing his rights diligently. Petitioner's motion for rehearing in the court of appeals was denied in February 2016, yet Petitioner did not execute his first state habeas corpus application until October 27, 2016, over eight months later. Petitioner fails to establish that his claims could not have been discovered and presented earlier. Thus, because Petitioner failed to assert any specific facts showing that he was prevented, despite the exercise of due diligence on his part, from timely filing his federal habeas corpus petition in this Court, his petition is untimely and barred by § 2244(d)(1).

B. Claims Regarding the State Habeas Proceeding (Claim 4).

Petitioner's fourth claim for relief raises several allegations regarding his state habeas proceedings. Such allegations do not entitle Petitioner to relief because alleged errors or irregularities occurring in state habeas proceedings do not raise cognizable claims for federal habeas relief. *See Henderson v. Stephens*, 791 F.3d 567, 578 (5th Cir. 2015) ("infirmities in state

habeas proceedings do not constitute grounds for federal habeas corpus relief"); *Ladd v. Stevens*, 748 F.3d 637, 644 (5th Cir. 2014) (same). This is because an attack on the validity of a state habeas corpus proceeding does not impact the validity of the underlying state criminal conviction. *See Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir. 2001) (reiterating that "an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself.") (citations omitted). For this reason, Petitioner's complaints concerning his state habeas corpus proceeding do not furnish a basis for federal habeas corpus relief.

III. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller–El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has explained that the showing required under § 2253(c)(2) is straightforward when a district court has rejected a petitioner's constitutional claims on the merits: The petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This requires a petitioner to show "that reasonable jurists could debate whether 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 (citation omitted).

The issue becomes somewhat more complicated when the district court denies relief on procedural grounds. *Id.* In that case, the petitioner seeking COA must show both "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." *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing

Slack, 529 U.S. at 484). In that case, a COA should issue if the petitioner *not only* shows that the lower court's procedural ruling is debatable among jurists of reason, but also makes a substantial showing of the denial of a constitutional right.

A district court may deny a COA *sua sponte* without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). For the reasons set forth above, the Court concludes that jurists of reason would not debate the conclusion that Petitioner was not entitled to federal habeas relief. As such, a COA will not issue.

IV. Conclusion

After careful consideration, the Court concludes that Petitioner's allegations challenging the constitutionality of his conviction and sentence (Claims 1-3) are barred by the statute of limitations set forth in 28 U.S.C. § 2244(d). The Court also concludes that Petitioner's remaining allegation (Claim 4) fails to raise a cognizable claim for federal habeas relief. As a result, Petitioner is not entitled to federal habeas corpus relief.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Federal habeas corpus relief is **DENIED** and Petitioner Brian Keith Gorham's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) and Amended § 2254 petition (ECF No. 15) are **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 25 day of November, 2019.

ORLANDO L. GARCIA
Chief United States District Judge