United States Court of Appeals for the Fifth Circuit

No. 20-50469

JAY WARREN ARNOLD,

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 Western District of Texas
USDC No. 6:19-CV-332

Before WILLETT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED Appellant's Motion for a Certificate of Appealability and GRANTED Appellant's Motion for leave to amend Motion for a Certificate of Appealability. The panel has considered Appellant's motion for reconsideration of Motion for a Certificate of Appealability only.

IT IS ORDERED that the motion is DENIED.

United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
FILED
March 16, 2021
Lyle W. Cayce
Clerk

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ORDER:

Jay Warren Arnold, Texas prisoner # 2061090, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition in which he challenged his convictions and 60-year sentence for family violence aggravated assault and aggravated kidnapping. The district court dismissed the federal petition as time barred.

To obtain a COA, Arnold must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where, as here, a claim is denied by the district court on procedural grounds, 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." *Slack*, 529 U.S. at 484. Arnold has not made the requisite showing. *See id.*

Accordingly, Arnold's motion for a COA is DENIED. His motion for leave to amend the COA motion is GRANTED.

STUART KYLE DUNCAN
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAY WARREN ARNOLD #2061090	§	
	§	
V.	§	**W-19-CA-332-ADA**
	§	
LORIE DAVIS	§	

ORDER

Before the Court is Petitioner's Petition For a Writ of Habeas Corpus by a Person in State Custody (#1), Respondent's Response (#12), Petitioner's Reply (#16), and Petitioner's Supplement (#17)[1]. Petitioner also files a request for leave to file a motion for release on bail (#19). The Court dismisses that motion because, by Petitioner's own admission, he has failed to exhaust his state court remedies for seeking release. Petitioner is proceeding pro se and in forma pauperis. For the reasons set forth below, Petitioner's application for writ of habeas corpus is dismissed with prejudice as time-barred.

Procedural History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 54th District Court of McLennan County, Texas for aggravated assault-family violence and aggravated kidnapping. *Ex parte Arnold*, App. No. 88,555-02 (SHCR (#14-35) at 271-274). Petitioner was found guilty by

[1] Petitioner moves for leave to file a supplement to his reply, which the Court grants. The Court has considered both his reply and his supplement.

a jury and sentenced to 60 years of imprisonment on each charge, to run concurrently. Petitioner appealed to the Sixth Court of Appeals which affirmed the convictions. *Arnold v. State*, No. 06-16-00062-CR, 2016 WL 6995484 (Tex. App.—Texarkana Nov. 29, 2016, pet. ref.). Four months later, the Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review. *Arnold v. State*, PD No. 0002-17 (Tex. Crim. App. Mar. 29, 2017).

On April 24, 2018, Petitioner filed a state application for habeas relief. SHCR (#14-2) at 41. The Texas Court of Criminal Appeals dismissed this application on July 18, 2018, as untimely. *See* SHCR (#13-46). Petitioner filed a second state habeas application on November 13, 2018, which was denied by the Texas Court of Criminal Appeals without written order on March 27, 2019. *Id.* (#14-11). Petitioner signed his federal habeas petition on May 22, 2019.

DISCUSSION

Respondent argues that Petitioner's application is barred by the one-year statute of limitations. Federal law establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. *See* 28 U.S.C. § 2244(d). That section provides, in relevant part:

> (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 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 conviction became final, at the latest, on August 1, 2017, when the time for filing a petition for writ of certiorari expired. Sup. Ct. R. 13.1. Therefore, Petitioner had until August 1, 2018, to timely file his federal application. Petitioner did not execute his federal application for habeas corpus relief until May 22, 2019, over nine months after the limitations period had expired.

The limitations period may be tolled for "the time during which a *properly filed* application" for state habeas relief is pending. 28 U.S.C. § 2244(d)(2) (emphasis added). A state habeas application is properly filed "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). *See also Broussard v. Thaler*, 414 F. App'x 686, 688, 2011 WL 701227, at *3 (5th Cir. 2011) (concluding that the prisoner's habeas application was not properly filed because the TCCA dismissed the application for failing to comply with Rule 73.1 and, as such, it did not toll AEDPA's statute of limitations); *Wickware v. Thaler*, 404 F. App'x 856, 858, 2010 WL 5062314, at *2 n.2 (5th Cir. 2010) (unpublished) (noting that unpublished panel decisions from the Fifth Circuit illustrate persuasively that, as a general rule, the state prisoner must comply with the required

habeas format set forth in the Texas Rules of Appellate Procedure in order to meet the "properly filed" requirement for statutory tolling under AEDPA).

Petitioner's conviction became final on August 1, 2017. In September of 2017, Petitioner filed a handwritten pro se motion in the trial court seeking the appointment of counsel and subpoenas of assorted evidence. The motion was apparently disregarded since it was being filed after Petitioner's conviction was final. Then, on January 8, 2018, Petitioner chose to file a pro se motion to disqualify or recuse his trial court judge from presiding over his forthcoming state habeas application. On February 2, 2018, these motions were denied and dismissed as untimely due to the fact that Petitioner had not yet filed his state habeas application. Rather than file his state habeas application at that point, however, Petitioner instead appealed the denial and dismissal of his untimely recusal motion. However, on February 9, 2018, the state appellate court dismissed his appeal because it was not authorized. Again, Petitioner did not opt to file a state habeas application at that point, but instead sought en banc reconsideration of his motion to recuse. This request was denied on March 21, 2018. At that point, Petitioner decided to continue the appeal process for his untimely motion to recuse and filed a petition for discretionary review on the issue which was eventually denied by the Texas Court of Criminal Appeals on September 26, 2018.

While his petition for discretionary review on the recusal issue was pending, Petitioner's filed his first state habeas application on April 24, 2018. It was dismissed by the Texas Court of Criminal Appeals, however, as untimely filed because Petitioner still had the related appeal of a motion for recusal pending. In other words, Petitioner's first

state habeas application was not "properly filed" and therefore did not toll the limitations period during the time it was pending. The dismissal of the improperly filed application occurred on July 18, 2018, which would still have given Petitioner two weeks to file a protective petition in this Court. Nonetheless, he failed to do so. Instead, Petitioner waited until the expiration of the AEDPA limitations period on August 1, 2018, before filing his second state habeas application on November 13, 2018.

Even if, as Petitioner claims, it was impossible for him to properly file a state habeas petition in sufficient time to meet his federal limitations period because the other motions he had filed with the trial court prevented the Texas Court of Criminal Appeals from accepting a petition and ruling on it, this does not entitle him to statutory tolling for that period. In essence, Petitioner chose to pursue an unorthodox strategy of filing motions in an attempt to preemptively have a different judge assigned to review his state habeas petition. In filing these motions, however, Petitioner was making a choice not to pursue his state habeas petition until this issue could be resolved. Having made this choice, he prevented the Texas Court of Criminal Appeals from considering his initial habeas application as timely and the result was that the AEDPA deadline was not tolled. The motions Petitioner chose to file do not entitle him to statutory tolling because they were not "other collateral review" of his conviction. Rather, his motions dealt with side issues relating to his potential habeas filing, not any actual challenge of his conviction on the merits.

Petitioner also appears to contend he is eligible for equitable tolling. "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has

been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Although the Fifth Circuit has permitted equitable tolling in certain cases, it requires a finding of "exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (finding "exceptional circumstances" in a case in which the trial court considering the petitioner's application under Section 2254 granted the petitioner several extensions of time past the AEDPA statute of limitations). The Fifth Circuit has consistently found no exceptional circumstances in other cases where petitioners faced non-routine logistical hurdles in submitting timely habeas applications. *See e.g. Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (proceeding pro se is not a "rare and exceptional" circumstance because it is typical of those bringing a § 2254 claim). As the Fifth Circuit has pointed out, "Congress knew AEDPA would affect incarcerated individuals with limited access to outside information, yet it failed to provide any tolling based on possible delays in notice." *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). The Fifth Circuit explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that "excusable neglect" does not support equitable tolling. *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. America President Lines,* 96 F.3d 124, 128 (5th Cir. 1996)).

Petitioner asserts that his first filed state habeas application was an attempt to toll the limitations period because he recognized that his pending motion for recusal would be a hindrance to a timely filing. Petitioner argues that this shows his diligence in

pursuing his rights. The question is whether Petitioner can be said to have been diligently pursuing relief when he was the person responsible for filing the motions in the state trial court that, in part, prevented him from being timely. The Court determines that he was not diligent. He instead sought to pursue a different course of action, that course failed, and now he cannot be heard to complain that the choice to pursue that course took too long and prevented him from timely filing in this Court. In fact, Petitioner's claims for equitable relief make it clear that he understood the correct way to obtain statutory tolling, but simply failed to pursue that avenue, instead opting for what proved to be a frivolous motion to disqualify a judge in advance of that judge considering his habeas application.

In addition, Petitioner fails to identify any "extraordinary circumstance" which prevented him from pursuing his relief in a timely fashion. Indeed, if he had simply filed his state habeas application simultaneously with his request for recusal of the judge, he may well have been timely in this Court. Instead, he sought to preemptively disqualify the judge. When told by the court that he was seeking that relief too early, he appealed the decision. If he had instead chosen to file a habeas application at that time, he may still have been timely in this Court. However, having chosen to fight this other battle instead of pursuing his state habeas application in a diligent fashion, Petitioner's pursuit of relief cannot be said to be the result of any extraordinary circumstance, except insofar as it was a circumstance of his own creation.

Petitioner also may be contending that the untimeliness of his application should be excused because he is actually innocent. In *McQuiggin v. Perkins*, 133 S. Ct. 1924

(2013), the Supreme Court held a prisoner filing a first-time federal habeas petition could overcome the one-year statute of limitations in § 2244(d)(1) upon a showing of "actual innocence" under the standard in *Schlup v. Delo*, 513 U.S. 298, 329 (1995). A habeas petitioner, who seeks to surmount a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 326–27 (1995); *see also House v. Bell*, 547 U.S. 518 (2006) (discussing at length the evidence presented by the petitioner in support of an actual-innocence exception to the doctrine of procedural default under *Schlup*). "Actual innocence" in this context refers to factual innocence and not mere legal sufficiency. *Bousely v. United States*, 523 U.S. 614, 623–624 (1998).

"The Supreme Court has not explicitly defined what constitutes 'new reliable evidence' under the *Schlup* actual-innocence standard." *Hancock v. Davis*, 906 F.3d 387, 389 (5th Cir. 2018). However, the Fifth Circuit has made clear that "evidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'" *Hancock*, 906 F.3d at 390 (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)). Petitioner fails to provide any new evidence whatsoever that would support a claim of actual innocence.

The record does not reflect that any unconstitutional state action impeded Petitioner from filing for federal habeas corpus relief prior to the end of the limitations

period. Furthermore, Petitioner has not shown that he could not have discovered the factual predicate of his claims earlier. Finally, the claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review.

CONCLUSION

Petitioner's application for habeas corpus relief is dismissed with prejudice as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court 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." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's

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