APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

August 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARLEY DAVID SHARP,

Petitioner - Appellant,

v.

BARRY GOODRICH, Warden, C.C.C.F.; DEAN WILLIAMS, Executive Director of the Department of Corrections; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 21-1229
(D.C. No. 1:21-CV-00207-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

Harley David Sharp, a Colorado state prisoner proceeding pro se, 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. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

court"). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.[1]

I. BACKGROUND

A Colorado state court jury convicted Mr. Sharp of sexual assault on a child, sexual assault on a child as a pattern of abuse, and sexual assault on a child by one in a position of trust. The Colorado Court of Appeals affirmed the judgment of conviction, and the Colorado Supreme Court denied his petition for writ of certiorari. He attempted and failed to gain post-conviction relief in the state courts.

The federal district court dismissed his § 2254 application as untimely under 28 U.S.C. § 2244(d)(1)(A), which provides that "[a] 1-year period of limitation . . . shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[2] The magistrate judge found that Mr. Sharp's conviction became final on June 20, 2016, and that he commenced this action on January 15, 2021, which exceeded § 2244(d)(1)(A)'s one-year limitation period.

The magistrate judge next addressed whether Mr. Sharp's post-conviction proceedings tolled the limitation period to make his § 2254 application timely. Section 2244(d)(2) provides:

---

[1] Because Mr. Sharp appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

[2] The magistrate judge found that Mr. Sharp had not argued the limitation period should be based on the other provisions of § 2244(d)(1)—that is (B), (C), or (D).

> 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.

The magistrate judge found that the limitations period ran for 119 days from June 21, 2016 to October 18, 2016, and then stopped when Mr. Sharp moved in state court for post-conviction relief. He found that tolling ended on March 30, 2020, when the Colorado Supreme Court denied Mr. Sharp's petition for certiorari, restarting the limitation period on March 31, 2020, until it expired 246 days later on December 1, 2020, well before Mr. Sharp commenced this action.

The magistrate judge then addressed Mr. Sharp's contention that he should be entitled to equitable tolling of the limitation period because COVID-19 protocols and limited law library access hindered his ability to pursue federal habeas relief. The magistrate judge rejected this argument, finding that Mr. Sharp had not pursued his claims diligently and had not shown how COVID restrictions prevented him from doing so.

The magistrate judge recommended that Mr. Sharp's § 2254 application be denied as untimely. The district court agreed and entered an order and a judgment accordingly. The court later entered an order denying a COA.

II. DISCUSSION

A. *COA Standard*

We must grant a COA before we can consider Mr. Sharp's appeal from the district court's dismissal of his § 2254 application. *See Miller-El v. Cockrell*, 537 U.S. 322,

335-36 (2003). Where, as here, the district court dismissed the application on procedural grounds, we will grant a COA only if the applicant can demonstrate 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. ***Mr. Sharp's Arguments***

Mr. Sharp seeks a COA based on three arguments.

1. **Statutory Tolling**

Mr. Sharp argues that, under § 2244(d)(2), the district court should have added 48 days to the statutory tolling period so the one-year limitation period thus should have expired on January 18, 2021, rather than the date determined by the district court, December 1, 2020.

Mr. Sharp argues that the district court should have added (1) 7 days because he gave his state post-conviction relief petition to prison officials to mail on October 11, 2016 (it was filed on October 18, 2016); (2) 1 day because he submitted his § 2254 application to prison officials for mailing on January 15, 2021;[3] (3) 27 days because his state post-conviction proceedings ended on April 27, 2020, when judgment became final

[3] The magistrate judge said the action was commenced January 16, 2021. The district court docket shows the § 2254 application was filed on January 21, 2021. The record shows that Mr. Sharp submitted his application to prison officials on January 15, 2021, for mailing to the court. ROA at 737. We give him the benefit of the prisoner mailbox rule and accept January 15, 2021 as the filing date. *See Houston v. Lack*, 487 U.S. 266, 270 (1988).

in the state trial court, rather than March 30, 2020, when the Colorado Supreme Court denied certiorari; and (4) 13 days because he filed a mittimus clarification request on May 4, 2020, and an amended mittimus issued on May 18, 2020. Aplt. Br. at 26-28.

In his objections to the magistrate judge's recommendation, Mr. Sharp presented only the first two statutory tolling arguments. ROA at 708-09. We nonetheless address only the third argument to resolve the statutory tolling issue. The tolling period ended when the Colorado Supreme Court denied Mr. Sharp's certiorari petition because the state post-conviction proceedings, under § 2244(d)(2), were no longer "pending." This court has recognized this end point in numerous decisions. *See e.g., Lopez v. Edelen*, 853 F. App'x 290, 290-91 (10th Cir. 2021); *Brim v. Zavaras*, 371 F. App'x 885, 886 (10th Cir. 2010); *Nguyen v. Golder*, 133 F. App'x 521, 524 n.4 (10th Cir. 2005); *Armijo v. Marr*, 201 F.3d 447 at *1 (10th Cir. 1999).[4]

Without the extra 27 days Mr. Sharp seeks for tolling, his § 2254 application remains untimely. Reasonable jurists would not debate the district court's resolution of this issue.

2. **Equitable Tolling**

The standard of appellate review for a district court's denial of equitable tolling is abuse of discretion. *See Al-Yousef v. Trani*, 779 F.3d 1173, 1177 (10th Cir. 2015). The district court did not find Mr. Sharp's COVID-19 and library-access arguments

[4] We cite these unpublished decisions for their persuasive value. *See* Fed. R. App. 32.1(a); 10th Cir. R. 32.1(A).

persuasive. Mr. Sharp states in his brief, "I did the best I could with what I had." Aplt. Br. at 30. We have reviewed the record and cannot say the district court abused its discretion in denying equitable tolling or that reasonable jurists would debate its ruling.[5]

3. **Claims Not Time Barred**

Mr. Sharp contends that his first two § 2254 claims were timely based on 28 U.S.C. § 2244(d)(1)(D), which provides for the limitation period to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." In each claim, he argues the prosecution failed to provide evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As the magistrate judge noted, Mr. Sharp did not adequately make this timeliness argument in district court. ROA at 670, *see* ROA 572-88, 698-757. He therefore has waived it here. *See Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) (observing in the habeas context that arguments not advanced in district court are generally waived); *see also United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (denying COA in light of court's "general rule against considering issues for the first time on appeal").

[5] Mr. Sharp's argument that the magistrate judge sent him a § 2241 form rather than one for § 2254, Aplt. Br. at 30, does not alter our view of the district court's equitable tolling determination.

III. CONCLUSION

Reasonable jurists would not debate the district court's dismissal of Mr. Sharp's § 2254 application as untimely. We therefore deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00207-LTB-GPG

HARLEY DAVID SHARP,

Applicant,

v.

BARRY GOODRICH, Warden, C.C.C.F., and
DEAN WILLIAMS, Executive Director of the Department of Corrections,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on May 5, 2021 (ECF No. 20). The Recommendation states that any objection to the Recommendation must be filed within fourteen days after its service. *See* 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on May 5, 2021. Thus, the parties had until May 19, 2021 to file any objection to the Recommendation. No timely objection to the Recommendation was filed. However, in light of Applicant's *pro se* status, to the extent his Motion to Expand the Record (ECF No. 21) is construed as a written objection to the Recommendation, 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.

Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 20) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 5) is denied and the action is dismissed as untimely. 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. It is

FURTHER ORDERED that Respondents' Motion for Leave to File Motion to Dismiss (ECF No. 14) and Motion to Dismiss as Untimely (ECF No. 15), and Applicant's Motion for Leave to File Motion to Object (ECF No. 16) are granted. It is

FURTHER ORDERED that Applicant's Motion to Expand the Record (ECF No. 21) is denied.

DATED: May 27, 2021

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

Civil Action No. 21-cv-00207-LTB-GPG

HARLEY DAVID SHARP,

Applicant,

v.

BARRY GOODRICH, Warden, C.C.C.F., and
DEAN WILLIAMS, Executive Director of the Department of Corrections,

Respondents.

JUDGMENT

Pursuant to and in accordance with the Order of Dismissal entered by Lewis T. Babcock, Senior District Judge, on May 27, 2021, it is hereby

ORDERED that Judgment is entered in favor of Respondents and against Applicant.

DATED at Denver, Colorado, this 27 day of May, 2021.

FOR THE COURT,

JEFFREY P. COLWELL, Clerk

By: s/A. Thomas
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00207-LTB-GPG

HARLEY DAVID SHARP,

Applicant,

v.

BARRY GOODRICH, Warden, C.C.C.F., and
DEAN WILLIAMS, Executive Director of the Department of Corrections,

Respondents.

ORDER

On May 27, 2021, this habeas corpus action was dismissed as untimely based on the May 5, 2021 Recommendation of United States Magistrate Judge. (*See* ECF Nos. 20, 23). The matter is now before the Court on Applicant's Motion to Object (ECF No. 22) filed May 26, 2021.

To the extent Applicant seeks to file objections to the Recommendation, the objections are untimely. The Recommendation states that any objection must be filed within fourteen days after its service. *See* 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on May 5, 2021, making **May 19, 2021** the deadline for filing written objections. After this deadline passed without any response from the parties, the Court reviewed and adopted the Recommendation and dismissed the action on May 27, 2021. The objections submitted by Applicant were filed with the Court on May 26, 2021. Thus, the Court finds that Applicant's objections to the Recommendation are untimely.

Further, to the extent Applicant's filing can be construed as a motion for reconsideration, the request must be denied. A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). The Court will consider the motion as being made pursuant to Rule 59(e) because it was filed within twenty-eight days after judgment was entered. *See Van Skiver*, 952 F.2d at 1243 (stating that motion to reconsider filed within time limit for filing a Rule 59(e) motion under prior version of that rule should be construed as a Rule 59(e) motion).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A Rule 59(e) motion should not revisit issues already addressed or advance arguments that could have been raised previously. *Id.* Nothing in Applicant's filing demonstrates the need to correct a clear error of law, a misapprehension of the facts or a party's position, or that the action should be reinstated based on new evidence previously unavailable.

Applicant first asserts that he failed to cure filing deficiencies in *Sharp v.[No Named Respondents],* Civil Action No. 20-cv-03517-GPG (D. Colo. Jan. 11, 2021)

because he was "mistakenly sent [ ] the incorrect [§2241] form." (ECF No. 22 at 5-6). Applicant, however, did not make any attempt to file a habeas application on a court-approved form, address the filing fee, or seek an extension of time in that action. As such, his argument that equitable tolling in this action is warranted based on his first habeas action, which appears to be timely under the one-year limitations period but was dismissed for failure to cure filing deficiencies, is without merit.

Applicant next contends that he exercised due diligence but was denied access to the law library and was in solitary confinement or lockdowns for some of the one-year limitations period. (ECF No. 22 at 7-8). A habeas petitioner's general allegations that he was denied adequate access to the prison's law library and to legal materials is insufficient to demonstrate extraordinary circumstances that would warrant an entitlement to equitable tolling. *See Marsh v. Soares*, 223 F.3d 1217, 1220-21 (10th Cir. 2000) (holding delays caused by prison inmate law clerk and law library closures do not justify equitable tolling); *Miller*, 141 F.3d at 978 ("It is not enough to say that the . . . facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."); *Gibson*, 232 F.3d at 808 ("a claim of insufficient access to relevant law . . . is not enough to support equitable tolling"); *Heinken v. Higgins*, 175 F. App'x 986, (10th Cir. 2006) (unpublished) (a habeas petitioner's "general claims of lack of access to either an adequate law library or a person trained in law do not suffice to establish equitable tolling"). Thus, the Court finds that Applicant's allegations regarding his limited law library access do not demonstrate he is entitled to equitable tolling.

Accordingly, it is

ORDERED that Applicant's Motion to Object (ECF No. 22) filed May 26, 2021 is **denied**.

DATED at Denver, Colorado, this 2nd day of June, 2021.

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

Civil Action No. 21-cv-00207-LTB-GPG

HARLEY DAVID SHARP,

Applicant,

v.

BARRY GOODRICH, Warden, C.C.C.F., and
DEAN WILLIAMS, Executive Director of the Department of Corrections,

Respondents.

ORDER DENYING MOTION TO ALTER OR AMEND
THE JUDGMENT PURSUANT TO FED. R. CIV. P. 59(E)

This matter is before the Court on the Motion to Alter or Amend the Judgment Pursuant to Fed. R. Civ. P. 59(e) (ECF No. 26) filed *pro se* by Applicant on June 9, 2021. In this action, Applicant filed an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 5) challenging to the validity of his conviction in Adams County District Court case number 11CR1307. On May 27, 2021, the Court dismissed the action as untimely. (*See* ECF Nos. 23 and No. 24). On June 2, 2021, the Court entered an Order (ECF No. 25) denying Applicant's Motion to Object (ECF No. 22) filed on May 26, 2021 by finding that the objections were untimely and denying the motion to the extent it could be construed as a motion for reconsideration.

The Court must construe Applicant's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). For the reasons discussed below, Applicant's Rule 59(e) motion will be denied.

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). Here, Applicant's Motion to Alter or Amend the Judgment Pursuant to Fed. R. Civ. P. 59(e) (ECF No. 26) was filed within twenty-eight days after the Judgment was entered in this action and will be considered pursuant to Rule 59(e).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) also is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A motion to reconsider should not be used to revisit issues already addressed or advance arguments that could have been raised earlier. *Id.*

Applicant first contends that his Motion to Object (ECF No. 22) was filed within 14 days after service of the May 5, 2021 Recommendation of United States Magistrate Judge (ECF No. 20). (*See* ECF No. 26 at 2). Applicant specifically alleges that he submitted his Motion to Object to the facility's legal mailing filing system on May 17, 2021, and he attaches a copy of the facility's mail log history. (*Id.* at 2, 8, and 10). As set forth in the June 2, 2021 Order denying reconsideration, the Motion to Object was

filed with the Court on May 26, 2021. The Court determined that the motion was untimely because it did not include a certificate of mailing that satisfies the requirements of the prisoner mailbox rule in order to establish a filing date prior to when the motion actually was received by the Court. *See Price v. Philpot*, 420 F.3d 1158, 1163-66 (10th Cir. 2005). However, in the Rule 59(e) Motion, Applicant provides documentary evidence demonstrating that he gave the document to prison officials for mailing on May 17, 2021, or two days before the objection deadline expired. As such, the Court will consider the Motion to Object timely filed under the prisoner mailbox rule. *See Price v. Philpot*, 420 F.3d 1158, 1165 (10th Cir. 2005) (under prisoner mailbox rule, documents are deemed filed when inmate gives them to prison officials for mailing). Regardless, as set forth in the June 2, 2021 Order, Applicant's allegations in the Motion to Object do not demonstrate that he is entitled to equitable tolling. (*See* ECF No. 25). Thus, the Court will overrule Applicant's timely objections.

Applicant further argues in the Rule 59(e) motion that "this Court is now intentionally trying to sabotage and hinder my ability to obtain legal redress addressing my absolutely meritorious claims as far as extending itself to intentionally send me erroneous forms, misconstrue my filings de[liberately], suppress the 'Newly Discovered Evidence' introduced in a Motion to Expand the Record." (ECF No. 26 at 2).

Upon consideration of Applicant's Rule 59(e) Motion and the entire file, the Court finds that he fails to demonstrate some reason why the Court should reconsider and vacate the order to dismiss this action. The Rule 59(e) motion does not alter the Court's conclusion that this action properly was dismissed as untimely. Further, none of

Applicant's additional allegations or proffered "newly discovered evidence" demonstrate he is entitled to federal habeas relief. And Applicant is reminded that for those claims analyzed under the deferential AEDPA standard of review, the federal habeas court's "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011). This means that "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.* at 1400.

Accordingly, it is

ORDERED that Applicant's Motion to Alter or Amend the Judgment Pursuant to Fed. R. Civ. P. 59(e) (ECF No. 26) filed on June 9, 2021 is DENIED. 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.

DATED at Denver, Colorado, this 18th day of June, 2021.

BY THE COURT:

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

#

#
#