No. 17-3326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 28, 2017
DEBORAH S. HUNT, Clerk

ISAIAH HARRIS,

Petitioner-Appellant,

v.

DAVE MARQUIS, Warden,

Respondent-Appellee.

ORDER

Isaiah Harris, a pro se Ohio prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Harris moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

In May 2009, Harris was convicted after a bench trial of domestic violence, violating a protection order, rape, aggravated burglary, and intimidation. The trial court sentenced Harris to an aggregate term of twenty-three-and-a-half years of imprisonment. The Ohio Court of Appeals affirmed Harris's convictions, *State v. Harris*, Nos. 09CA009605, 09CA009606, 09CA009607, 2010 WL 1016085 (Ohio Ct. App. Mar. 22, 2010), and the Ohio Supreme Court denied leave to appeal, *State v. Harris*, 932 N.E.2d 339 (Ohio 2010). Harris did not seek state post-conviction relief.

In April 2014, Harris filed a § 2254 petition, and in February 2015 a supplement to the petition, raising a total of five claims: (1) he is actually innocent of the crimes of conviction; (2) the evidence was insufficient to find him guilty beyond a reasonable doubt; (3) the habeas statute of limitations should be equitably tolled; (4) and (5) he received ineffective assistance of appellate counsel. Over Harris's objections, the district court adopted a magistrate judge's report

and recommendation that concluded that Harris's claims were barred by the one-year 28 U.S.C. § 2244(d)(1) statute of limitations and that Harris was not entitled to equitable tolling based on his asserted inability to access the prison law library or his claim of actual innocence. The district court declined to issue a COA.

When a district court denies a habeas petition on procedural grounds, the court may issue a certificate of appealability only if the applicant shows "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).

Harris's claims are untimely under § 2244(d)(1)(A) because he filed his petition in 2014, more than one year after his convictions became final in November 2010, when his time for filing a petition for a writ of certiorari in the United States Supreme Court expired. *See Payton v. Brigano*, 256 F.3d 405, 409 n.3 (6th Cir. 2001). Harris does not argue that his petition is timely under any other provision of § 2244(d)(1). Reasonable jurists therefore would not debate the district court's conclusion that Harris's petition is barred by the statute of limitations.

The statute of limitations is not jurisdictional, however, and may be equitably tolled by the court upon a credible showing of actual innocence by the petitioner. *See Souter v. Jones*, 395 F.3d 577, 588-89 (6th Cir. 2005). The petitioner must support his actual innocence claim with new, reliable evidence that establishes that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012). Harris's actual innocence claim is based on allegedly newly discovered evidence that the victim in the case, his former girlfriend K.T., had falsely accused him of domestic violence in the past. Harris claims that the prosecution failed to disclose this evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that it could have been used to impeach K.T. at trial, and that he probably would not have been convicted because the outcome of his trial hinged on her credibility. The district court concluded that Harris failed to make a credible showing of actual innocence.

Although the trial record shows that the prosecution did not disclose to Harris that K.T. had previously made domestic violence allegations against him that the police determined were unfounded, the record also shows that Harris's attorney acquired this information independently before trial. Consequently, the prosecution's failure to disclose the impeaching evidence was harmless. *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (stating that there is no *Brady* violation if the information was available to the defendant from another source). Moreover, the trial judge permitted Harris to testify, albeit in a limited fashion, that K.T. had previously made false accusations against him. Additionally, K.T. admitted on cross-examination that she had previously lodged false domestic violence charges against Harris and that she was nearly charged with making a false complaint. Consequently, the allegedly new impeachment evidence is cumulative and does not show that it is more likely than not that no reasonable juror would have convicted Harris. *See Byrd v. Collins*, 209 F.3d 486, 518-49 (6th Cir. 2000). Reasonable jurists therefore would not debate the district court's conclusion that Harris is not entitled to equitable tolling of the statute of limitations because he has not made a credible showing of actual innocence.

Finally, reasonable jurists would not debate the district court's conclusion that Harris is not entitled to equitable tolling based on his asserted inability to access the prison law library while he was on lockdown status. *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 751 (6th Cir. 2011).

Accordingly, the court **DENIES** Harris's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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