

No. 21-3908

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN LAFONTE PRYOR, aka Ne LaFonse)
Pryor,)
)
Petitioner-Appellant,)
)
v.)
)
RONALD ERDOS, Warden,)
)
Respondent-Appellee.)
)

FILED
Mar 31, 2022
DEBORAH S. HUNT, Clerk

ORDER

Before: GUY, Circuit Judge.

Norman Lafonte Pryor, a pro se Ohio prisoner, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. This court construes Pryor's notice of appeal as a request for a certificate of appealability. *See* Fed. R. App. P. 22(b). Pryor also moves to proceed in forma pauperis on appeal.

In 2017, Pryor was found guilty of kidnapping, in violation of Ohio Revised Code § 2905.01(A)(2) and (A)(3); three counts of rape, in violation of Ohio Revised Code § 2907.02(A); felonious assault, in violation of Ohio Revised Code § 2903.11(A)(2); and failure to provide notice of change of address, in violation of Ohio Revised Code § 2950.05(A), (F)(1). He was sentenced to an aggregate term of 52 years in prison. The Ohio Court of Appeals affirmed. *State v. Pryor*, No. 2017CA00122, 2018 WL 3385704 (Ohio Ct. App. July 9, 2018). Pryor did not seek further review in the Ohio Supreme Court.

On September 20, 2018, Pryor filed an application to reopen his appeal under Ohio Rule of Appellate Procedure 26(B). On January 18, 2019, the Ohio Court of Appeals denied the application, and, on May 1, 2019, the Ohio Supreme Court declined to exercise jurisdiction, *State v. Pryor*, 121 N.E.3d 409 (Ohio 2019) (table).

On October 21, 2019, Pryor filed a motion for a delayed appeal, which the Ohio Supreme Court denied on December 17, 2019. *State v. Pryor*, 136 N.E.3d 498 (Ohio 2019) (table).

Then, on June 26, 2020, Pryor filed a petition for post-conviction relief. The trial court denied the petition, the Ohio Court of Appeals found Pryor's appeal to be untimely in a judgment entry dated January 11, 2021, and the Ohio Supreme Court declined jurisdiction. *See State v. Pryor*, No. 2021-0164 (Ohio April 13, 2021).

Meanwhile, on December 16, 2020, Pryor filed his § 2254 petition by placing it in the prison mail. A magistrate judge recommended that the petition be dismissed as untimely. Over Pryor's objections, the district court agreed, dismissed Pryor's petition, and declined to issue a certificate of appealability.

Standard of Review

A certificate of appealability may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is based on a procedural ruling, the movant must demonstrate that "jurists of reason would find it debatable whether the [motion] 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).

Statute of Limitations

No reasonable jurist could debate the district court's conclusion that Pryor's petition was untimely. Pursuant to § 2244(d)(1)(A), a state prisoner must file his habeas petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The Ohio Court of Appeals affirmed Pryor's convictions on July 9, 2018, and he did not seek further review in the Ohio Supreme Court. Pryor's convictions therefore became final forty-five days later, on August 23, 2018. *See Ohio S. Ct. Prac. R. 7.01(A)(1)(a)(i); Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). Accordingly, the limitations period began to run the following day, i.e., on August 24, 2018, and expired one year later. But

Pryor did not file the present petition until December 16, 2020. So, absent statutory or equitable tolling, his petition is untimely.

Statutory Tolling

The limitations period ran for 27 days and stopped when Pryor filed a Rule 26(B) application on September 20, 2018. *See* 28 U.S.C. § 2244(d)(2) (providing that the running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending”). After the Ohio Court of Appeals denied the application, the Ohio Supreme Court declined jurisdiction on May 1, 2019. The statute of limitations then ran for another 172 days until October 21, 2019, when Pryor filed his delayed motion to appeal with the Ohio Supreme Court. The limitations period was again tolled until December 18, 2019, the day after the Ohio Supreme Court denied Pryor’s motion. The limitations period expired 166 days later, on June 1, 2020, making Pryor’s December 16, 2020, petition late. And his June 26, 2020, petition for post-conviction relief was filed outside of the limitations period and thus had no effect on the running of the statute-of-limitations clock. *See Eberle v. Warden, Mansfield Corr. Inst.*, 532 F. App’x 605, 608-09 (6th Cir. 2013); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 459-60 (6th Cir. 2012). Thus, reasonable jurists could not debate the district court’s conclusion that Pryor’s habeas petition is time-barred under § 2244(d)(1)(A).

Equitable Tolling

Section 2244(d) is subject to equitable tolling when a petitioner 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)).

Pryor argues that the untimeliness of his petition is attributable to his lack of adequate access to the law library and legal materials due to restrictions implemented because of the COVID-19 pandemic. There is some authority from district courts within this circuit indicating that the COVID-19 pandemic could amount to an extraordinary circumstance warranting tolling.

See, e.g., United States v. Marshall, No. 5:18-cr-00122-KKC-MAS-1, 2021 WL 3854469 at *2 (E.D. Ky. Aug. 5, 2021), *report and recommendation adopted*, No. 5:18-cr-00122-KKC-MAS-1, 2021 WL 3844749 (E.D. Ky. Aug. 27, 2021); *Taylor v. Valentine*, 5:20-cv-00139-TBR, 2021 WL 864145 at *2 (W.D. Ky. Mar. 8, 2021). But at least one circuit court disagrees, as do some district courts in other circuits. *See, e.g., Powell v. United States*, No. 21-12432-J, 2022 U.S. App. LEXIS 3495, *3 (11th Cir. Feb. 8, 2022); *Mims v. United States*, No. 4:20-cv-1538, 2021 WL 409954, at *3 (E.D. Mo. Feb. 5, 2021); *United States v. Thomas*, No. 18-cr-135, 2020 WL 7229705, at *2-3 (E.D. La. Dec. 8, 2020).

Regardless, though, reasonable jurists would not disagree with the district court that Pryor is not entitled to equitable tolling. Pryor admittedly knew on December 24, 2019, that the Ohio Supreme Court had denied his delayed application for leave to appeal. Not only did Pryor have access to the law library and legal materials from that point until COVID-19 restrictions were imposed in March 2020, he also had access to at least one legal book regarding habeas corpus law after the restrictions were in place. Nor do other grounds presented by Pryor warrant equitable tolling: ignorance of the law is not an extraordinary circumstance warranting equitable tolling, *see, e.g., Keeling*, 673 F.3d at 464, nor is the mere fact of being segregated in prison, *see, e.g., Socha v. Boughton*, 763 F.3d 674, 685 (7th Cir. 2014). Indeed, as noted above, Pryor pursued post-conviction relief in the state courts and the present petition *after* COVID-19 restrictions were put in place. He therefore was capable of timely pursuing his rights notwithstanding any limitations on his access to a law library or legal materials. No reasonable jurist therefore could debate the district court's rejection of Pryor's equitable tolling argument.

Finally, a demonstration of actual innocence may also serve as a gateway to review an otherwise barred claim, but Pryor must present new evidence showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *See McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Pryor did not make a colorable showing that he is actually innocent of his crimes of conviction.

Accordingly, the court **DENIES** the application for a certificate of appealability and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt", is written above a horizontal line.

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORMAN PRYOR,)	CASE NO. 5:20 CV 2863
)	
Petitioner,)	JUDGE PAMELA A. BARKER
)	
v.)	MAGISTRATE JUDGE
)	WILLIAM H. BAUGHMAN, JR.
WARDEN RONALD ERDOS,)	
)	<u>ORDER</u>
Respondent.)	

Upon the filing of the petitioner's petition in this case, a notice of electronic filing was transmitted to the Attorney General for the State of Ohio via the Court's Electronic Case Filing system.

Within 23 days of the filing of this show cause order, the Attorney General must:

- (1) File an answer certifying the true cause of the detention in accordance with 28 U.S.C. §2243. The answer must strictly comply with the requirements of Rule 5 of the Rules Governing §2254 Cases ("Habeas Rules") and address all legal issues raised in the petition.
- (2) In accordance with 28 U.S.C. §2249 and Habeas Rule 5, file with the answer certified copies of the indictment, the petitioner's plea, and the judgment of the state trial court, and copies of the opinion of the Court of Appeals, the decision of the Supreme Court, briefs on appeal and such portion of the transcripts of pretrial, trial sentencing, and post-conviction proceedings as the Attorney

General deems relevant. These copies must be bound separately from the answer, have a cover containing the case caption and the title "State Court Record," and have a separate pagination appearing in the lower right hand corner of each page. This State Court Record must contain an index listing each document included in the record and the page of the record on which each document begins. All references in the answer to documents included in the State Court Record must cite to the appropriate page or pages thereof.

If the Attorney General seeks an extension of time within which to file an answer to the petition, he must file his motion for an extension of time within the above-stated 23-day time limitation. Any motion for an extension of time within which to file an answer must state the reasons for the extension with particularity in strict compliance with Federal Rule of Civil Procedure 6(b).

No more than 30 days after the filing of the answer, the petitioner must file a response. All references in the response to documents included in the State Court record must cite to the appropriate page or pages thereof. The Court will not extend the time for this response except upon motion in strict compliance with Federal Rule of Civil Procedure 6(b).

No more than 15 days after the filing of the response, the Attorney General may file a reply. All references in the reply to documents included in the State Court Record must cite to the appropriate page or pages thereof. The Court will not extend the time for this reply except upon motion in strict compliance with Federal Rule of Civil Procedure 6(b).

Failure to comply with the above requirements may result in summary disposition of the case or the immediate setting of an evidentiary hearing.

IT IS SO ORDERED.

Dated: January 5, 2021

s/ William H. Baughman, Jr.
United States Magistrate Judge