United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 17, 2021
Decided February 23, 2022

Before

MICHAEL Y. SCUDDER, Circuit Judge

CANDACE JACKSON-AKIWUMI, Circuit Judge

No. 21-2064

TIMOTHY STEEL,
Petitioner-Appellant,

v.

DAN WINKLESKI,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-C-0033

Lynn Adelman,
Judge.

ORDER

Timothy Steel has filed an application for a certificate of appealability following the denial of his petition under 28 U.S.C. § 2254. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TIMOTHY M. STEEL,
Petitioner,

v. **Case No. 21-C-0033**

DAN WINKLESKI,
Respondent.

DECISION AND ORDER

Timothy Steel filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Before me now is the respondent's motion to dismiss the petition.

I. BACKGROUND

On November 13, 2000, Steel pleaded guilty to one count of felony murder as a party to a crime with the underlying crime of armed robbery. On December 5, 2000, the trial court sentenced him to 37 years' initial confinement and 20 years' extended supervision.

After sentencing, Steel's appointed appellate counsel filed a no-merit appeal pursuant to Wisconsin's procedure for complying with *Anders v. California*, 386 U.S. 738 (1967). Counsel's no-merit report identified two potential issues and concluded that neither had arguable merit: (1) whether the petitioner was entitled to withdraw his guilty plea because the plea was not knowing and voluntary, and (2) whether the trial court imposed an excessive sentence. On January 16, 2002, the Wisconsin Court of Appeals accepted the no-merit report. As to the first issue discussed in the report, the court concluded that Steel entered his guilty plea knowingly and voluntarily. The court found that the trial court "explained the various constitutional rights waived by the plea, the

elements of the crime, and the maximum penalty Steel faced." ECF No. 10-3. As to the second issue, the court found that the trial court properly exercised its discretion in imposing the sentence and did not impose a sentence that was excessive or unduly harsh. The court also stated that it had conducted an independent review of the record as required by *Anders* and had found no other issues that counsel could have raised. The court discharged appointed counsel and summarily affirmed Steel's conviction.

Now proceeding pro se, Steel filed a petition for review in the Wisconsin Supreme Court. When Steel failed to file a statement in support of his petition, the supreme court summarily dismissed it. *See* ECF No. 10-5. The order dismissing the petition was entered on April 8, 2002. Steel did not seek certiorari review by the Supreme Court of the United States.

During the ensuing eight years, Steel did not commence another state or federal proceeding with respect to his conviction. Then, in September 2010, he filed a postconviction motion in the state circuit court to vacate a DNA surcharge that had been assessed upon his conviction. On September 27, 2010, the court granted the motion. Steel initiated no other proceedings involving his conviction during the following seven years.

In April 2017, Steel filed a second postconviction motion in the trial court. In this motion, he argued that his sentence exceeded the maximum term authorized by the statutes under which he was charged. The trial court denied the motion in a written order, finding that Steel's understanding of the relevant statutes was erroneous. *See* ECF No. 10-9. Steel did not appeal.

In November 2017, Steel filed a third postconviction motion in the trial court. Once again, he argued that his sentence exceeded the maximum statutory term. The trial court entered a written order denying the motion for the same reasons it gave in its order denying Steel's second postconviction motion. This time, Steel appealed. On December 18, 2018, the Wisconsin Court of Appeals affirmed. It reasoned that Steel's sentence satisfied all requirements of the relevant statutes. In its written opinion, however, the court alluded to another potential issue that the state had identified in its response brief. The court noted that, during the plea colloquy in November 2000, the trial court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80. *See* ECF No. 10-12 at 5 n.3. The court of appeals stated that it would not consider this issue because Steel had neither raised it in his motion nor responded to the state's identification of the issue in his reply brief. *Id.*

On March 11, 2019, Steel filed a fourth postconviction motion in the trial court. This time, he argued that he was entitled to withdraw his guilty plea because, during the plea colloquy, the trial court misinformed him that the maximum sentence was 60 years rather than 80. Steel also argued that the colloquy was deficient because the court did not ensure that he understood the nature of the felony murder charge and the elements of the crime. Finally, Steel argued that his appointed appellate counsel was ineffective for failing to raise these two issues on direct appeal, and that the court of appeals, which failed to identify these issues during the no-merit appeal, must have failed to conduct an independent review of the record, as *Anders* required. The trial court denied the motion. Steel then filed a motion for reconsideration, which the trial court also denied.

On February 24, 2020, the Wisconsin Court of Appeals affirmed the denial of Steel's fourth postconviction motion. It affirmed based on the procedural rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 168 (1994), which holds that, absent a "sufficient reason," a defendant cannot raise an issue in a postconviction motion that could have been raised either in a prior postconviction motion or on direct appeal. The court concluded that this rule barred Steel's latest postconviction motion because it raised issues that could have been raised in Steel's prior postconviction motions and Steel had not shown a sufficient reason for failing to raise his current issues in those motions. *See* ECF No. 10-17 at 6. Thus, the court affirmed the denial of Steel's fourth postconviction motion without reaching the merits of his claims. Steel filed a petition for review in the Wisconsin Supreme Court, which the court denied on July 15, 2020.

Steel filed his federal petition for a writ of habeas corpus on January 8, 2021. He alleges two grounds for relief. First, he contends that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the issues involving the plea colloquy, *i.e.*, that the trial court stated the wrong maximum sentence, failed to identify the elements of the crime, and failed to ensure that Steel understood the nature of the crime. Second, he contends that, when on direct appeal the Wisconsin Court of Appeals accepted counsel's no-merit report and summarily affirmed his conviction, it rendered a decision that was contrary to, or involved an unreasonable application of, *Anders v. California*. Steel contends that because the court failed to identify the issues involving the plea colloquy as having arguable merit, it must have failed to conduct the independent review of the record that *Anders* requires.

The respondent now moves to dismiss the petition, raising two grounds. First, the respondent contends that, because the petition was filed well more than one year after Steel's conviction became final by the conclusion of direct review, it is barred by 28 U.S.C. § 2244(d). Second, the respondent contends that, because the Wisconsin Court of Appeals refused to consider the merits of the issues Steel raises in his petition based on an independent and adequate state law ground, Steel's federal claims are procedurally defaulted. Below, I discuss only the respondent's first ground (untimeliness) because it is dispositive.

II. DISCUSSION

Under 28 U.S.C. § 2244(d)(1), a one-year period of limitation applies to an application for a writ of habeas corpus filed by a person in custody pursuant to the judgment of a state court. The one-year period is measured from the latest of certain specified events. In the present case, the relevant event is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For Steel's conviction, this date was July 8, 2003, which was the latest date on which Steel could have sought review of his conviction in the Supreme Court of the United States. Under § 2244(d)(1), Steel had one year from that date to file his federal petition. However, he did not file his petition until January 8, 2021, more than 17 years too late.

Steel filed various state postconviction motions in 2010, 2017, and 2019. And proceedings on his latest postconviction motion remained pending until July 15, 2020. Although under § 2244(d)(2) the one-year period is tolled during the time in which "a properly filed application for State post-conviction or other collateral review" is pending,

this provision does not help Steel. By the time he filed any state postconviction motion, his federal time had already expired, and therefore there was nothing left to toll. *See De Jesus v. Acevedo*, 567 F.3d 941, 942–44 (7th Cir. 2009); *Graham v. Borgen*, 483 F.3d 475, 482–83 (7th Cir. 2007).

In his response to the motion to dismiss, Steel does not dispute that he failed to meet his one-year deadline under § 2244(d). Instead, he contends that he is entitled to equitable tolling. A habeas petitioner is entitled to 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. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Here, Steel cannot satisfy either element.

Steel contends that the Wisconsin Court of Appeals's handling of his no-merit appeal qualifies as an extraordinary circumstance that prevented him from filing a timely petition. He contends that, because the court of appeals did not notice that the plea colloquy was defective, it must have failed to independently review the record, as *Anders v. California* requires. But this is not the kind of circumstance that could give rise to equitable tolling. To qualify for tolling, Steel must show that some barrier beyond his control prevented him from filing his federal petition on time. *See Perry v. Brown*, 950 F.3d 410, 412 (7th Cir. 2020). A legal error committed by the state court while deciding the direct appeal does not interfere with a petitioner's ability to raise that error in a timely federal habeas petition. Once the court of appeals accepted the no-merit report and summarily affirmed his conviction, Steel had it within his control to conduct legal research and determine for himself whether the court made any errors. He points to nothing that prevented him from conducting this research and filing a federal petition within the one-

year period prescribed by § 2244(d). Although Steel did not have the assistance of counsel during this one-year period, lack of counsel and lack of legal knowledge are not, by themselves, extraordinary circumstances. *See Socha v. Boughton*, 763 F.3d 674, 685 (7th Cir. 2014); *Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008).

Steel claims that if the court of appeals would have complied with *Anders*, it would have identified the issues with his plea colloquy and required his appointed counsel to file a proper appellate brief. But even if I agreed that the court failed to comply with *Anders*, I could not excuse Steel's failure to raise the court's error in a federal petition within one year from when his conviction became final. If an error by the state court under *Anders* could provide grounds for equitable tolling, then a federal court would always have to toll the limitations period when a petitioner asserts that the state court overlooked an issue of arguable merit during its independent review of the record. Such a common occurrence cannot be described as an "extraordinary" circumstance. *See Socha*, 763 F.3d at 685 (noting that statutory deadlines would be meaningless if "common problems" were enough to override the normal rules).

Steel has also failed to demonstrate that he has been diligently pursuing his rights. His alleged external impediment—the court of appeals's mishandling of his direct appeal—occurred in 2002. Steel does not explain why it took him until 2019, when he filed his first state postconviction motion on the issue, to challenge the defective plea colloquy in state court. Steel does state that "[i]it wasn't until the year of 2019 after years of legal research" that he was able to identify this issue. Br. at 7. But Steel does not claim that he was conducting legal research continuously for 17 years and finally had a breakthrough in 2019. Moreover, the history of this case in state court shows that Steel

did not conduct his own research until approximately 2017, when he challenged the length of his sentence. During proceedings relating to that issue, the Wisconsin Court of Appeals noted that the trial court had misstated the maximum penalty for felony murder during the plea colloquy. This seems to have alerted Steel to the issue, and a few months later he filed a state postconviction motion in which he raised the issue for the first time. Even if Steel diligently pursued his rights between 2017 and the present, there remains a delay of approximately 15 years that Steel cannot justify. Accordingly, he cannot satisfy the diligence element of equitable tolling.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that Steel's petition for a writ of habeas corpus is **DISMISSED**. The Clerk of Court shall enter final judgment. Pursuant to Rule 11 of the Rules Governing § 2254 Cases, I find that the petitioner has not made the showing required by 28 U.S.C. § 2253(c)(2), and therefore I will not issue a certificate of appealability.

Dated at Milwaukee, Wisconsin, this 24th day of May, 2021.

s/Lynn Adelman
LYNN ADELMAN
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 7, 2022

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 21-2064

TIMOTHY STEEL,
Petitioner-Appellant,

v.

DAN WINKLESKI,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:21-cv-00033-LA

Lynn Adelman,
Judge.

ORDER

On consideration of the petition for rehearing filed by Petitioner-Appellant on March 28, 2022, all judges voted to deny rehearing. Accordingly, the petition for panel rehearing is **DENIED**.

Additional material from this filing is available in the Clerk's Office.