APPENDIX A-1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 21, 2022
Lyle W. Cayce
Clerk

No. 22-10407

RUDOLFO GILL,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 5:19-CV-101

Before KING, JONES, and SMITH, *Circuit Judges*.

PER CURIAM:

Rudolfo Gill, Texas prisoner # 02159990, moves this court for a certificate of appealability (COA) to appeal the denial and dismissal of his 28 U.S.C. § 2254 application. Gill filed the application to challenge his jury trial convictions of three counts of sexual assault, for which he was sentenced to concurrent terms of 20 years of imprisonment.

In his pro se COA filings, Gill challenges the district court's determination that his § 2254 application, which raised 13 grounds for relief, is time barred. As to the time bar issue, Gill argues that the district court

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erred in determining the starting date of the one-year limitations period, and he asserts that he is entitled to equitable tolling. Gill also contends that the district court incorrectly determined that his claims of lack of subject matter jurisdiction, insufficient evidence, withheld exculpatory and impeachment evidence, and a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), are unexhausted and procedurally barred. Further, Gill argues the merits of several of his claims for relief, including the four claims mentioned above as well as claims that his counsel was ineffective due to a conflict of interest, he was denied the right to a speedy trial, he was denied counsel even though he did not waive the right to counsel, his indictment was flawed and duplicitous, his indictment was illegally amended during trial, his conviction of sexual assault was improper because it was not a lesser-included offense, and the jury was improperly instructed.

To obtain a COA, Gill must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For claims denied on procedural grounds, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the [application] 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).

Gill has not made the requisite showing, and accordingly his COA motion is DENIED. *See id.* As Gill fails to make the required showing for a COA, we do not reach his assertion that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RUDOLFO GILL,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

No. 5:19-CV-101-H

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Rudolfo Gill, a state prisoner, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 to challenge a conviction. Respondent filed an answer and an appendix with copies of relevant state-court records. Petitioner filed a reply. As explained below, the Court finds that the petition must be denied and dismissed with prejudice as time-barred, unexhausted, and wholly without merit.

1. Background

On September 13, 2017, Petitioner was convicted by a jury of three counts of sexual assault in Case No. DCR-5301-15 in the 154th District Court of Lamb County, Texas, and sentenced to 20 years as to each count, to be served concurrently. (Dkt. No. 15-1 at 3.[1]) Petitioner did not appeal.

On September 8, 2018, Petitioner filed his application for state writ of habeas corpus. (Dkt. No. 15-1 at 8.) On January 9, 2019, the Court of Criminal Appeals of Texas denied the application without written order on the findings of the trial court without hearing. (*Id.*

[1] Because the State's appendix contains a number of documents, the reference is to the "Page __ of __" number shown at the top right of the document on the Court's electronic filing system.

at 10.) On May 17, 2019, Petitioner signed his federal petition for writ of habeas corpus. (Dkt. No. 3 at 20.) He asserts thirteen grounds for relief:

(1) the trial court lacked subject matter jurisdiction;
(2) the evidence is insufficient to support the convictions;
(3) the State withheld the victim's written and oral videotaped statements;
(4) the State struck Hispanic and male veniremembers in violation of *Batson*;
(5) appointed counsel suffered from a conflict of interest;
(6) Petitioner was denied his right to a speedy trial;
(7) Petitioner was convicted of sexual assault, which is not a lesser included offense of bigamy for which he was indicted;
(8) Petitioner never waived his right to counsel but was denied trial counsel;
(9) the indictment was fatally flawed and duplicitous;
(10) the indictment was illegally amended during trial;
(11) the jury verdict was illegally reformed;
(12) the jury received an illegal instruction; and
(13) Petitioner's sentence exceeds the maximum allowed by law.

(*See* Dkt. No. 3.) Respondent answers that the petition is untimely under 28 U.S.C. § 2244(d). (*See* Dkt. No. 15 at 5.) In addition, some of the claims are unexhausted and cannot be pursued here. (*See id.* at 10-14.) And, in any event, the claims are without merit. (*See id* at 14-35.)

2. Standards of Review

A. Limitations

A one-year period of limitation applies to a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The period runs 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 diligence.

28 U.S.C. § 2244(d)(1). Typically, the time begins to run on the date the judgment of conviction becomes final. *United States v. Thomas*, 203 F.3d 350, 351 (5th Cir. 2000). A criminal judgment becomes final when the time for seeking direct appeal expires or when the direct appeals have been exhausted. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

The time during which a properly filed application for state post-conviction relief is pending does not count toward the period of limitation. 28 U.S.C. § 2244(d)(2). A state habeas petition is pending on the day it is filed through the day it is resolved. *Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009). A subsequent state petition, even though dismissed as successive, counts to toll the applicable limitations period. *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999). And, a motion for reconsideration of the denial of a state petition also counts to toll limitations. *Emerson v.* Johnson, 243 F.3d 931, 935 (5th Cir. 2001). A state habeas application filed after limitations has expired does not entitle the petitioner to statutory tolling. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

Equitable tolling is an extraordinary remedy available only where strict application of the statute of limitations would be inequitable. *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000). The doctrine is applied restrictively only in rare and exceptional circumstances. *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). The petitioner bears the burden to show that equitable tolling should apply. *Alexander v.* Cockrell, 294 F.3d 626, 629

(5th Cir. 2002). To do so, the petitioner must show that he was pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented the timely filing of his motion. *Holland v. Florida*, 560 U.S. 631, 649 (2010). The failure to satisfy the statute of limitations must result from factors beyond the petitioner's control; delays of his own making do not meet the test. *In re* Wilson, 442 F.3d at 875. Equitable tolling applies principally where the petitioner is actively misled by the government or is prevented in some extraordinary way from asserting his rights. *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002); *Patterson*, 211 F.3d at 930. Neither excusable neglect nor ignorance of the law is sufficient to justify equitable tolling. *Id.* Lack of legal acumen and unfamiliarity with legal process are not sufficient justification to toll limitations. *United States v. Petty*, 530 F.3d 361, 366 (5th Cir. 2008); *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

Finally, the Supreme Court has recognized actual innocence as an equitable exception to the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To meet the actual innocence exception to limitations, the petitioner must show that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Id.* at 386–87; *Merryman v. Davis*, 781 F. App'x 325, 330 (5th Cir. 2019). "Actual innocence" means factual innocence, not mere legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Moreover, such a claim requires the petitioner to support his allegations with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

B. Exhaustion

The exhaustion doctrine requires that the state courts be given the initial opportunity to address alleged deprivations of constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). The petitioner must present his claims to the highest court of the state, here, the Court of Criminal Appeals of Texas. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). And all of the grounds raised must be fairly presented to the state courts before being presented in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). That is, the state courts must have been presented with the same facts and legal theories presented in federal court. The petitioner cannot present one claim in federal court and another in state court. *Id.* at 275–76. Presenting a "somewhat similar state-law claim" is not enough. *Anderson*, 459 U.S. at 6; *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001).

For the Court to reach the merits of unexhausted claims, the petitioner must demonstrate either (1) cause for the procedural default and actual prejudice, or (2) that he is actually innocent of the offense for which he was convicted. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To establish actual innocence, the petitioner must provide the Court with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). In other words, actual innocence means factual innocence, not merely legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

C. Section 2254

A writ of habeas corpus on behalf of a person in custody under a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the petitioner shows that the prior adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts of the case. *Williams*, 529 U.S. at 407–09; *see also Neal v. Puckett*, 286 F.3d 230, 236, 244–46 (5th Cir. 2002)(*en banc*) (focus should be on the ultimate legal conclusion reached by the state court and not on whether that court considered and discussed every angle of the evidence). A determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both express and implied factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings, a federal court may imply fact findings consistent with the state court's disposition. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). Thus, when the Texas Court of Criminal Appeals denies relief without written order, such ruling is an

adjudication on the merits that is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Hill*, 210 F.3d at 486.

In making its review, the Court is limited to the record that was before the state court. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

3. Discussion

A. The petition is untimely.

Petitioner did not appeal his conviction. So, his judgment became final on October 13, 2017, when the time for filing a notice of appeal expired. Tex. R. App. P. 26.2(a). The limitations period was extended by 124 days—the time in which Petitioner's state habeas petition was pending. 28 U.S.C. § 2244(d)(2). Accordingly, his federal petition was due February 14, 2019. But he did not file this petition until May 17, 2019[2]—more than three months too late, absent tolling.

Petitioner argues that he is entitled to equitable tolling because the judgment originally signed erroneously reflected that he pled guilty to the charges. (Dkt. No. 3-2 at 40.) He says that he had to obtain a judgment *nunc pro tunc* before he could file his state habeas application. (Dkt. No. 3 at 20.) The argument makes no sense, especially since the time for filing a notice of appeal in a criminal case in Texas runs from imposition of sentence and not the date the judgment is actually signed. Tex. R. App. P. 26.2(a). Notices of appeal are construed liberally and the right to appeal "should not depend upon traipsing

[2]*See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) ('[A] prisoner's habeas petition is filed for purposes of determining the applicability of the AEDPA, when he delivers the papers to prison authorities for mailing.").

through a maze of technicalities." *Harkcom v. State*, 434 S.W.3d 432, 434 (Tex. Crim. App. 2016). Petitioner was not prevented from timely acting. Nor has he shown that equitable tolling should apply for any reason.[4] Thus, the petition must be denied and dismissed with prejudice as barred by the statute of limitations. *See* 28 U.S.C. § 2254(d).

B. The petition is partially unexhausted.

Petitioner admits that he failed to exhaust the first four grounds of the application. (Dkt. No. 3 at 4–7.) He alleges that he could not have known the factual basis for these claims until he arrived at a unit with an "adequate sized law library." (Dkt. No. 20 at 3.) He offers no proof, but it is obvious that he knew the facts supporting the claims at the time of trial. For example, as to his first ground, he knew that he was a resident of New Mexico being prosecuted in Texas. In any event, Petitioner has not shown cause and prejudice. Further, it is clear that Petitioner cannot now bring his unexhausted claims as they would be procedurally barred under the Texas abuse of the writ doctrine. Tex. Code Crim. P. art. 11.07; *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997). Thus, the Court cannot grant any relief with regard to those claims. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

Respondent contends that Petitioner's sixth ground is likewise unexhausted. (Dkt. No. 15 at 10–14.) The Court is not persuaded. Despite the trial court's finding to the contrary (Dkt. No. 15-1 at 57, ¶ 39), the state habeas petition does allege a violation of Petitioner's right to a speedy trial under the Sixth and Fourteenth Amendments. (*Id.* at 33.) That the majority of the cases Petitioner cited were state cases may have led the trial court

[4] Petitioner also argues that he is entitled to equitable tolling as to his unexhausted claims because he could not have discovered the factual predicate for them until his arrival at the Jordan Unit on January 30, 2019. (Dkt. No. 3 at 20.) Presumably, that is the day he met the person who is preparing the papers Petitioner has filed. Ignorance of the law and illiteracy do not entitle Petitioner to equitable tolling. *Felder v. Johnson*, 204 F.3d 168, 171–72 (5th Cir. 2000). And, for the reasons explained below, Petitioner cannot pursue his unexhausted claims.

to conclude that a federal claim was not being asserted. In any event, both federal and state constitutions guarantee an accused the right to a speedy trial and Texas courts apply the same test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Cantu v. State*, 253 S.W.3d 273 (Tex. Crim. App. 2008); *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002). The trial court analyzed the speedy trial claim and determined that the delays due to proceedings to determine and restore Petitioner's competency to stand trial were proper. (*Id.* at 56–57.) In other words, there was no violation of Petitioner's right to a speedy trial. Petitioner has not made any attempt to meet his burden under section 2254 of showing that the decision was contrary to clearly established federal law.[5] He is not entitled to any relief on this ground.

C. Petitioner's grounds for review are meritless.

As for the merits of Petitioner's claims, Respondent provides a thorough examination of why Petitioner cannot prevail. As Respondent notes, the trial court thoroughly addressed these claims and made findings and conclusions. (Dkt. No. 15 at 14–35.) The TCCA accepted the trial court's findings and denied relief. (Dkt. No. 15-1, 10.) Petitioner has not shown that the state courts' rejection of his claims was contrary to, or involved an unreasonable application of, clearly established federal law, or that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. Thus, even if the petition were not barred by the statute of limitations, or partially unexhausted, Petitioner has not met his burden to show entitlement to relief on the merits.

[5] Petitioner simply asks for de novo review or an evidentiary hearing (to which he is not entitled). (Dkt. No. 20 at 6.)

4. Conclusion

For the reasons discussed, the Court finds that Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 is denied and dismissed with prejudice. Also, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find this Court's "assessment of the constitutional claims debatable or wrong" or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." Thus, any request for a certificate of appealability should be denied. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

All relief not expressly granted, and any pending motions, are denied.

So ordered.

Dated January 31, 2022.

JAMES WESLEY HENDRIX
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RUDOLFO GILL,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

No. 5:19-CV-101-H

JUDGMENT

For the reasons stated in the Court's order entered today, it is ordered, adjudged, and decreed that the petition for writ of habeas corpus is dismissed with prejudice.

Dated January 31, 2022.

JAMES WESLEY HENDRIX
United States District Judge