United States Court of Appeals for the Fifth Circuit

No. 23-50314

United States Court of Appeals
Fifth Circuit
FILED
July 20, 2023
Lyle W. Cayce
Clerk

BRYAN SCOTT CAVETT,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-1042

UNPUBLISHED ORDER

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges.*

PER CURIAM:

Bryan Scott Cavett, Texas prisoner # 2124183, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application challenging his conviction for indecency with a child by sexual contact. The district court dismissed Cavett's application as barred by the one-year limitations period of 28 U.S.C. § 2244(d). Cavett

argues that he is entitled to equitable tolling of the limitations period and that he can demonstrate cause and prejudice for the untimely filing of the application because he received ineffective assistance of counsel. He also asserts that he was entitled to an evidentiary hearing because deference should not have been given to the state court's decision.

To obtain a COA, Cavett must make "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, 336 (2003). Because the district court rejected the habeas application on a procedural ground, Cavett must show "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). Cavett has not made the requisite showing. *See id.*

As Cavett fails to make the required showing for a COA, we do not reach the issue whether 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).

Cavett's motion for a COA is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRYAN SCOTT CAVETT,	§	
PETITIONER,	§	
	§	
V.	§	**CIVIL NO. A-22-CV-1042-RP**
	§	
BOBBY LUMPKIN,	§	
RESPONDENT.	§	

ORDER

Before the Court are Petitioner Bryan Scott Cavett's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, Respondent's Answer, and Petitioner's reply. Petitioner, proceeding *pro se*, was granted leave to proceed *in forma pauperis*. After consideration of the above-referenced pleadings, the Court dismisses Petitioner's petition as time-barred.

According to Respondent, he has custody of Petitioner pursuant to the judgment and sentence of the 452nd Judicial District Court of McCulloch County, Texas, in cause number 6132. Petitioner was charged by indictment with indecency with a child by sexual contact. A jury found Petitioner guilty as alleged in the indictment. On March 7, 2017, Petitioner was sentenced to 20 years' imprisonment.

On October 17, 2018, the Seventh Court of Appeals of Texas affirmed Petitioner's judgment. *Cavett v. State*, No. 07-17-00141-CR, 2018 WL 5075101, at *5 (Tex. App. – Amarillo Oct. 17, 2018, no pet.). Petitioner did not file a petition for discretionary review.

Petitioner did, however, challenge his conviction in two state applications for habeas corpus relief. Petitioner filed his first application on April 12, 2021. On July 7, 2021, the Texas Court of

Criminal Appeals denied the application without written order. *Ex parte Cavett*, No. WR-44,795-03. Petitioner filed his second state application on July 12, 2021. On November 17, 2021, the Texas Court of Criminal Appeals dismissed the application as subsequent. *Ex parte Cavett*, No. WR-44,795-04.

Respondent asserts the petition is time-barred. Petitioner argues the limitations period should be tolled because he is actually innocent.

Federal law establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. *See* 28 U.S.C. § 2244(d). That section provides, in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run 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 due diligence.
>
> (2) 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.

Petitioner's conviction became final on November 16, 2018, at the conclusion of time during which he could have filed a petition for discretionary review with the Texas Court of Criminal Appeals, which according to Tex. R. App. R. 68.2, is 30 days following the court of appeals' judgment affirming his conviction. *Gonzalez v. Thaler*, 623 F.3d 222 (5th Cir. 2010) (holding conviction becomes final when time for seeking further direct review in state court expires).

Therefore, Petitioner's federal petition was due on or before November 16, 2019. Petitioner did not file his federal petition until October 10, 2022, nearly three years after the limitations period expired.

Petitioner's state applications did not operate to toll the limitations period, because they were filed after the limitations period had already expired. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (state application for habeas corpus relief filed after limitations period expired does not toll the limitations period).

In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Supreme Court held a prisoner filing a first-time federal habeas petition could overcome the one-year statute of limitations in § 2244(d)(1) upon a showing of "actual innocence" under the standard in *Schlup v. Delo*, 513 U.S. 298, 329 (1995). A habeas petitioner, who seeks to surmount a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 326–27 (1995); *see also House v. Bell*, 547 U.S. 518 (2006) (discussing at length the evidence presented by the petitioner in support of an actual-innocence exception to the doctrine of procedural default under *Schlup*). "Actual innocence" in this context refers to factual innocence and not mere legal sufficiency. *Bousley v. United States*, 523 U.S. 614, 623–624 (1998).

In this case, Petitioner has not presented any new evidence that would undermine this Court's confidence regarding the findings of guilt by the jury at trial. Petitioner assumes a missing report from Child Protective Services would have found "no actual abuse" and would prove Petitioner was actually innocent. He further claims two potential witnesses failed to testify on his behalf because they were threatened or intimidated. Petitioner appears to allege that they could have testified that

the victim's mother purchased drugs while the victim was present. Petitioner admits the two witnesses were on adult supervision for probation for drug-related offenses. Although Petitioner vehemently denies the offense, the victim testified at trial that Petitioner placed his penis in her hand while the victim's mother was sleeping nearby. The jury by their verdict found this testimony credible. None of Petitioner's purported new evidence shows he was actually innocent of the crime for which he was convicted.

Petitioner also alleges no other facts showing any equitable basis exists for excusing his failure to timely file his federal habeas corpus application. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."). Petitioner bears the burden of establishing equitable tolling is appropriate. *See Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir.), *modified on reh'g*, 223 F.3d 797 (2000) (*per curiam*). He fails to meet this burden.

It is hereby **ORDERED** that Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DISMISSED WITH PREJUDICE** as time-barred and a certificate of appealability is **DENIED**.

SIGNED on April 10, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE