United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 17, 2023
Lyle W. Cayce
Clerk

No. 21-20599

DAVID ALEXANDER HUNTER,

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 Southern District of Texas
USDC No. 4:21-CV-437

ORDER:

David Alexander Hunter, Texas prisoner #1760132, seeks a certificate of appealability (COA) to appeal the time-bar dismissal of his 28 U.S.C. § 2254 application challenging his convictions for aggravated sexual assault of a child under the age of six and indecency with a child by exposure. Relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), Hunter contends that the adjudication of his initial-review state habeas application asserting claims of ineffective assistance constituted direct review of his convictions under 28 U.S.C. § 2244(d)(1)(A), such that

the convictions did not become final and trigger the one-year limitations period until 90 days after the Texas Court of Criminal Appeals denied the application, when the time for filing a certiorari petition in the Supreme Court expired. Because he has not shown that reasonable jurists would debate the district court's procedural ruling that the application was time barred, a COA is DENIED. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Hunter's motion for leave to proceed in forma pauperis is DENIED as well.

Don R. Willett

DON R. WILLETT
United States Circuit Judge

Certified as a true copy and issued as the mandate on May 16, 2023

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID ALEXANDER HUNTER, (TDCJ # 1760132) Petitioner, vs. BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-21-437

MEMORANDUM OPINION AND ORDER

David Alexander Hunter, a Texas state inmate proceeding *pro se*, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2011 state-court convictions for aggravated sexual assault of a child under age six and indecency with a child by exposure. (Dkt. 1). The respondent, Bobby Lumpkin, filed a motion to dismiss arguing that Hunter is not entitled to the relief he seeks. (Dkt. 12). Hunter filed a response. (Dkt. 17). Having considered the petition, the motion and response, all matters of record, and the applicable legal authorities, the Court determines that the petition should be dismissed for the reasons that follow.

I. BACKGROUND

On November 4, 2011, a jury in the 410th District Court in Montgomery County, Texas, convicted Hunter in Cause Number 10-07-08140-CR of one count of aggravated sexual assault of a child under age six and one count of indecency with a child by exposure.

(Dkt. 13-16, pp. 29-36). The court accepted the jury's recommended sentences and sentenced Hunter to 50 years' imprisonment on the aggravated sexual assault conviction and a concurrent 10 years' imprisonment on the indecency conviction. (*Id.*). The Ninth Court of Appeals affirmed Hunter's convictions and sentences on September 25, 2013. *See Hunter v. State*, No. 09-11-00691-CR, 2013 WL 5425707 (Tex. App.—Beaumont 2013, pet. ref'd) (mem. op., not designated for publication). The Texas Court of Criminal Appeals refused Hunter's petition for discretionary review on March 12, 2014. *See Hunter v. State*, PD-1573-13 (Tex. Crim. App. 2014). Hunter did not seek further review of his conviction and sentence.

On April 10, 2019, Hunter, through counsel, filed a petition for a state writ of habeas corpus, raising four claims of ineffective assistance of trial counsel. (Dkt. 13-38, pp. 18-34). The state trial court entered findings of fact and conclusions of law and recommended denying relief. (Dkt. 13-41, pp. 25-34). On January 8, 2020, the Court of Criminal Appeals denied the petition without written order on findings of the trial court without a hearing and on the court's independent review of the record. (Dkt. 13-27; *Ex parte Hunter*, Writ No. 90,489-01).

Proceeding *pro se*, Hunter executed a second petition for a state writ of habeas corpus on January 5, 2020, raising one additional claim of ineffective assistance of trial counsel and adding a claim for ineffective assistance of appellate counsel. (Dkt. 13-51, pp. 35-54). The petition was not received for filing by the state court clerk until January 27, 2020. (*Id.* at 35). The state habeas court determined that Hunter's second petition was not, in fact, placed in the hands of prison officials before he received the Court of Criminal

Appeals' denial of his original petition, and it recommended dismissal of the petition. (*Id.* at pp. 462-67). The Court of Criminal Appeals dismissed Hunter's second petition as a subsequent application on December 9, 2020. (Dkt. 13-42, *Ex parte Hunter*, Writ No. 90,489-02).

One year after his first state petition was denied and one month after his second state petition was dismissed, Hunter placed his petition for writ of habeas corpus under 28 U.S.C. § 2254 into the prison mail system for mailing on January 8, 2021. (Dkt. 1, p. 20). In his petition, he raises five claims of ineffective assistance of trial counsel and one claim of ineffective assistance of appellate counsel. (*Id.* at 6-17). He asks this court to vacate his conviction and sentence, order a new trial, require the State to reoffer its pretrial 20-year plea offer, and permit him to file a new direct appeal. (*Id.* at 7).

II. ONE-YEAR LIMITATIONS PERIOD

Hunter's petition is governed by provisions of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), which contains a one-year limitations period. *See* 28 U.S.C. § 2244(d). That one-year period runs from the "latest of" four accrual dates:

> (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.

28 U.S.C. § 2244(d)(1). Although this limitations period is an affirmative defense, district courts may raise the defense *sua sponte* and dismiss a petition prior to an answer if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Kiser v. Johnson,* 163 F.3d 326, 328 (5th Cir. 1999) (quoting Rule 4, Rules Governing Section 2244 Cases). Here, however, Lumpkin raised the defense in his motion to dismiss and requested dismissal of Hunter's petition as barred by limitations.

The pleadings and matters of record show that Hunter's conviction became final for purposes of federal habeas review on June 10, 2014, which was 90 days after the Court of Criminal Appeals refused his petition for discretionary review on March 12, 2014. *See Roberts v. Cockrell,* 319 F.3d 690, 693 (5th Cir. 2003) (holding that a state prisoner's judgment becomes final for purposes of § 2244 "when the time to file a petition for writ of certiorari with the Supreme Court has expired"); Sup. Ct. R. 13.1 (a petition for writ of certiorari to review a judgment entered by a state court of last resort is timely when filed within ninety days after entry of the judgment). Hence, the deadline for Hunter to file a timely federal habeas petition was one year later, on June 10, 2015. But Hunter did not file his federal habeas petition until January 8, 2021—more than five years after the one-year limitations period expired. His petition is therefore time-barred unless a later accrual

date applies.

Under 28 U.S.C. § 2244(d)(2), the time during which a properly filed application for state habeas relief or other collateral review is pending is not counted toward the limitations period. *See Artuz v. Bennett,* 531 U.S. 4, 5 (2000). However, a state habeas petition filed after the federal limitations period has expired does not extend the limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (a state habeas petition did not extend the § 2244(d)(1) deadline when it was filed after that deadline expired). Hunter's state habeas petition, executed on January 8, 2021, was filed five-and-a-half years after the expiration of the federal limitations period on June 10, 2015. The filing of this belated state habeas petition did not extend the already-expired federal habeas limitations period.

In his response to Lumpkin's motion to dismiss, Hunter argues that his petition should be considered timely under 28 U.S.C. § 2244(d)(1)(A) and § 2244(d)(2) because he is seeking relief only for ineffective assistance of trial counsel and such claims generally cannot be raised on direct appeal. (Dkt. 17). He points to the Supreme Court decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), as standing for the proposition that his state habeas petition should be considered the "initial direct review" of his ineffective-assistance-of-counsel claims. From that, he argues that the conclusion of his state habeas petition proceedings, rather than the conclusion his direct appeal, should trigger the one-year limitations period.

But *Martinez* nor *Trevino* address whether the lack of counsel on state habeas review can provide the "cause" necessary to excuse a procedural default on ineffective-

assistance-of-counsel claims. *See Martinez*, 566 U.S. at 17; *Trevino*, 569 U.S. at 423; *see also Ramey v. Davis*, 942 F.3d 241, 255 (5th Cir. 2019). Neither case considers or addresses whether claims of ineffective assistance of counsel excuse late filing under the AEDPA limitations period. Because *Martinez* and *Trevino* concerned only the procedural default doctrine and *not* the AEDPA limitations period, those cases are inapplicable and do not excuse Hunter's failure to seek federal relief in a timely manner. *See Shank v. Vannoy*, No. 16-30994, 2017 WL 6029846, at *2 (5th Cir. Oct. 26, 2017) ("*Martinez* does not apply to section 2244(d)'s one-year limitations period.") (citing *Lombardo v. United States*, 860 F.3d 547, 557-58 (7th Cir. 2017); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014); and *Bland v. Superintendent Greene SCI*, No. 16-3457, 2017 WL 3897066, at *1 (3d Cir. Jan. 5, 2017)).[1] Hunter's petition is therefore time-barred unless a later accrual date applies.

But Hunter has failed to allege facts to show that any of the remaining statutory exceptions to the limitations period apply. Hunter has not alleged that any unconstitutional state action prevented him from filing his federal habeas petition before the expiration of the limitations period. *See* 28 U.S.C. § 2244(d)(1)(B). He has not alleged facts to show that his claims are based on a newly recognized constitutional right. *See* 28 U.S.C. § 2244(d)(1)(C). And he has not alleged facts to show that the factual basis for his claims could not have been timely discovered if he had acted with due diligence. *See* 28 U.S.C. § 2244(d)(1)(D). Thus, the record does not establish a statutory basis sufficient to

[1]Notably, even petitioners who fall within the narrow exception created by *Martinez* "must still comply with the statute of limitations to assert their claims." *Lombardo*, 860 F.3d at 557.

allow Hunter to avoid the effect of the limitations period.

Further, equitable tolling does not extend the limitations period in this case. Equitable tolling is an extraordinary remedy that applies only "when strict application of the statute of limitations would be inequitable." *Mathis v. Thaler*, 616 F.3d 461, 475 (5th Cir. 2010); *see also Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (holding that equitable tolling applies, at the district court's discretion, only "in rare and exceptional circumstances"). 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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The failure to meet the statute of limitations "must result from external factors beyond [the petitioner's] control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). Thus, a "garden variety claim of excusable neglect" does not support equitable tolling. *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (citations omitted). Neither does an unawareness of the law, lack of knowledge of filing deadlines, *pro se* status, or lack of legal training. *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000) (citing cases). The habeas petitioner has the burden of establishing that equitable tolling is warranted. *See Holland*, 560 U.S. at 649; *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009).

Hunter has not alleged any facts to show that any extraordinary circumstance not of his own making prevented him from timely filing his federal habeas petition. And even if some delay was excusable, the record does not show that he pursued relief with the

requisite due diligence since Hunter waited more than five years after his petition for discretionary review was denied to file his first state habeas petition. Equitable tolling is not intended for those who "sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) (quoting *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)). Hunter has not shown that equitable tolling is warranted in this case.

Because there is no statutory or equitable basis to save Hunter's untimely federal habeas petition, his petition is barred by AEDPA's one-year limitations period.

III. CERTIFICATE OF APPEALABILITY

Habeas corpus actions under § 2254 require a certificate of appealability to proceed on appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard this requires a petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). When the denial of relief is based on procedural grounds the petitioner must show not only that "jurists of

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Although a district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument, *see Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000), Hunter requested that a certificate of appealability be issued in his response to Lumpkin's motion. However, because Hunter has not shown that reasonable jurists would find the Court's resolution of the constitutional issues debatable or wrong, this Court will not issue a certificate of appealability.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The respondent's motion to dismiss, (Dkt. 12), is **GRANTED**.

2. The petition for writ of habeas corpus is **DENIED**, and this case is **DISMISSED** with prejudice.

3. A certificate of appealability is **DENIED**.

The Clerk shall also send a copy of this Order to the parties.

SIGNED at Houston, Texas on OCT 25 2021.

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE