FILED
United States Court of Appeal[s]
Tenth Circuit

December 7, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPE[ALS]

FOR THE TENTH CIRCUIT

JOHN PATRICK FLETCHER,

Petitioner - Appellant,

v.

JASON LENGERICH, BVCF Warden, et al.,

Respondents - Appellees.

No. 17-1288

ORDER

Before **LUCERO**, **BALDOCK**, and **MORITZ**, Circuit Judges.

This matter is before the court on Appellant's Motion to File [Petition for Rehearing] Three Days Out of Time. The motion to file the petition out of time is granted.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX-E

FILED
United States Court of Appeals
Tenth Circuit

November 13, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN PATRICK FLETCHER,

Petitioner - Appellant,

v.

JASON LENGERICH, BVCF Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 17-1288
(D.C. No. 1:17-CV-01022-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **BALDOCK,** and **MORITZ**, Circuit Judges.

Petitioner John Patrick Fletcher, a Colorado state prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A). In a written order, the district court denied the motion as time-barred under § 2244(d)(1). Because Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

APPENDIX- D

district court was correct in its procedural ruling," we summarily deny Petitioner a COA and dismiss his appeal. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

We need not detail Petitioner's arguments challenging application of §2244(d)(1)'s one-year limitation period to his petition. Suffice to say we have carefully reviewed his "Combined Opening Brief and Application for a Certificate of Appealability," the record on appeal, and the district court's written order denying his petition as time-barred. Based on our review, we conclude the district court accurately analyzed the statute of limitations issue and properly dismissed the petition. Where the district court accurately analyzes an issue and articulates a cogent rationale, we see no useful purpose in writing at length. Thus, we reject Petitioner's argument that his petition for a writ of habeas corpus is timely substantially for the reasons set forth in the district court's written order which ably explains why Petitioner is not entitled to a COA.

COA DENIED; APPEAL DISMISSED. Motion for IFP DENIED as moot

Entered for the Court,

Bobby R. Baldock
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01022-GPG

JOHN PATRICK FLETCHER,

Applicant,

v.

JASDON LENGERICH, BVCF, Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER OF DISMISSAL

Applicant John Patrick Fletcher is a state prisoner in the custody of the Colorado Department of Corrections and currently is incarcerated at the Buena Vista Correctional Facility in Buena Vista, Colorado. Applicant filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in which he challenges the validity of his conviction and sentence in the Denver County and City District Court Case No. 1992CR1583.

On April 26, 2017, Magistrate Judge Gordon P. Gallagher directed Respondents to file a Pre-Answer Response that addresses the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). Respondents submitted a Response on June 9, 2017, and Applicant filed a Reply on June 19, 2017.

APPENDIX– C

The Court must construe liberally the Application and Reply because Applicant is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court does not "assume the role of advocate for the *pro se* litigant." *See Hall*, 935 F.2d at 1110. For the reasons stated below, the Court will dismiss the action as barred by the one-year limitation period in 28 U.S.C. § 2244(d).

The state proceedings in this case are summarized in the Colorado Court of Appeals' (CCA's) opinion addressing Applicant's Crim. R. Civ. P. 35(c) as follows:

> I. Background
>
> In 1993, a jury found defendant guilty of first degree murder in the death of his girlfriend's roommate, and the trial court sentenced him to life in prison without the possibility of parole. A division of this court affirmed his conviction on direct appeal. *See People v. Fletcher*, (Colo. App. No. 93CA1584, Dec. 28, 1995) (not published pursuant to C.A.R. 35(f)).
>
> In 2015, defendant filed a pro se Crim. P. 35(c) motion. The district court denied defendant's motion without a hearing.

People of the State of Colo. v. Fletcher, No. 15CA1707, 1 (Colo. App. Oct. 17, 2016); ECF No. 11-4 at 3. The CCA affirmed the district court's denial of Applicant's Rule 35(c) postconviction motion. *Id.* at 4. The CCA found that Applicant's claims were either conclusory and vague, not raised in the postconviction motion before the trial court, or could have been raised on direct appeal. *Fletcher*, No. 15CA1707 at 3-7.

Respondents argue that this action is untimely under the one-year limitation period set forth in 28 U.S.C. § 2244(d)(1). Section 2244(d)(1) provides as follows:

> 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.

The parties do not disagree on the dates stated above regarding when Applicant filed his direct appeal and Rule 35(c) motion and when each were denied by the state courts. The issue is whether any time from when the case was final until when Applicant filed the Rule 35(c) postconviction motion is tolled for the purpose of 28 U.S.C. § 2244(d) and whether equitable tolling applies. For the following reasons, the Court will dismiss this action because it is barred by the one-year limitation period in 28 U.S.C. § 2244(d) and Applicant fails to demonstrate equitable tolling should apply.

On July 22, 1996, the Colorado Supreme Court (CSC) denied Applicant's petition for certiorari review of his direct appeal. *See* ECF No. 11-2. Although Applicant did not file a petition for a writ of certiorari in the United States Supreme Court on direct appeal, he had ninety days to do so after the CSC denied his petition for certiorari review. *See* Sup. Ct. R. 13.1. Figuring from July 22, 1996, the day the writ for certiorari was denied, *see Holland v. Florida*, 560 U.S. 631, 635 (2010), Applicant's conviction became final October 21, 1996, ninety-one days later, when the time for seeking review in the United States Supreme Court expired, *see Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001) (citing *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999); see also Sup. Ct. R. 30.1 (if the last day of the period for filing a petition for certiorari review is a Sunday the period is extended until the end of the next day). Accordingly, for purposes of § 2244(d), time began to run on October 21, 1996, the day Applicant's sentence became final.

The Court next must determine whether any of Applicant's state postconviction motions tolled the one-year limitation period. Pursuant to 28 U.S.C.§ 2244(d)(2), a properly filed state court post-conviction motion tolls the one-year limitation period while the motion is pending.

Applicant filed the Rule 35(c) postconviction motion on May 1, 2015. *See* ECF 11-1 at 2. The CCA affirmed the denial of the Rule 35(c) motion on October 27, 2016, *see* ECF No. 11-4, and the CSC denied Applicant's petition for certiorari review on March 20, 2017, *see* ECF No. 11-5. Therefore, the statute of limitations period ran from October 21, 1996, until April 30, 2015, almost nineteen years.

"Only state petitions for post[ ]conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations." *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006); see also 28 U.S.C. § 2244(d)(2). The 2015 Rule 35(c) postconviction motion was not filed within the one-year time limitation that ran from October 21, 1996.

Applicant argues, however, that the Rule 35(c) postconviction motion was timely because there is no time limitation under state law for collateral review when the conviction, like in his case, involved a class one felony. ECF No. 12 at 2. The fact that Applicant's postconviction Rule 35(c) motion was timely under state law, at least with respect to his class one felony conviction, does not mean the motion automatically tolls the one-year limitation period under federal law. The Court, therefore, finds that the one-year time limitation ran on October 21, 1997, and the action is time-barred.

Applicant does not allege in the Application or the Reply that there are any constitutional rights newly recognized by the Supreme Court that apply to his claims. § 2244(d)(1)(C). Nor is Applicant able to assert that he could not have discovered the factual predicate of his claim through the exercise of due diligence. § 2244(d)(1)D). Applicant also does not assert that the state caused inexcusable or inordinate delay. § 2244(d)(1)(B).

"[T]he timeliness provision in the federal habeas corpus statute is subject to equitable tolling." *Holland*, 560 U.S. at 634. "[A] 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." *Id.* at 2562 (internal quotation marks and citation omitted); *accord Yang v. Archuleta*, 525 F.3d 925, 929 (10th Cir. 2008) (" 'Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.' ") (quoting *Wallace v. Kato*, 549 U.S. 384, 396 (2007)). "[A]n inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." *Mack v.*

Falk, 509 F. App'x 756, 760 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008)) (quotation marks and citations omitted). The inmate must allege with specificity the steps he took to pursue his federal claims. *Yang*, 525 F.3d at 930.

Applicant asserts extraordinary circumstances because his appellate counsel informed him that his conviction was final after his direct appeal was completed. ECF No. 12 at 3. Applicant asserts due diligence because once the jailhouse lawyer informed him in January 2015 that appellate counsel was wrong Applicant filed a postconviction motion in May 2015. *Id.* at 4. The Court finds neither of these arguments convincing.

Applicant asserts that he approached appellate counsel about the unlawful warrantless entry and juror issues, but counsel told him these were nonissues. *Id.* at 3. Applicant, therefore, was aware of his claims as early as October 1996. Also, Applicant's reliance on counsel's statement that the conviction was "final" after the direct appeal was completed is a conclusory statement and does not support a finding of extraordinary circumstances. Furthermore, Applicant asserts that he learned about the ability to file a postconviction motion in January 2015, yet he waited until May 2015, four months, to proceed with the motion. Waiting four months to file a postconviction motion does not *per se* support a finding of due diligence.

The Court finds that Applicant's supporting arguments of extraordinary circumstances and due diligence are no more than an ignorance of the law argument. It is well established that "ignorance of the law, even for an incarcerated pro se [applicant], generally does not excuse prompt filing." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (internal quotation marks and citation omitted).

Finally, to the extent that Applicant attempts to assert a claim of innocence, he is required "to support his allegations of constitutional error 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). "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Mcquiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (quoting *Schlup*, 513 U.S. at 329). Applicant provides no new reliable evidence that supports his innocence claim.

Because Applicant fails to demonstrate that (1) he pursued his claims diligently; (2) some extraordinary circumstance stood in his way preventing him from doing so; or (3) he is actually innocent, the Application is time-barred under 28 U.S.C. § 2244(d). Applicant, therefore, has not met his burden to demonstrate a finding of equitable tolling under *Holland*. *See Mack*, 509 F. App'x at 760.

The Court will dismiss this action with prejudice as time-barred. *See Brown v. Roberts*, 177 F. App'x 774, 778 (10th Cir. 2006) (dismissal as time barred operates as a dismissal with prejudice).

The Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order is not taken in good faith, and, therefore, *in forma pauperis* status is denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is denied and this action is dismissed as barred by the one-year limitation period in 28 U.S.C. § 2244(d). It is

FURTHER ORDERED that no certificate of appealability shall issue because Applicant has failed to show that jurists of reason would find it debatable that the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied.

DATED at Denver, Colorado, this 14th day of July, 2017.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

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