FILED
United States Court of Appeals
Tenth Circuit

July 14, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DAVID MICHAEL JENKINS,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 19-5083
(D.C. No. 4:19-CV-00184-JED-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **HOLMES**, **MURPHY**, and **CARSON**, Circuit Judges.

Pro se Petitioner-Appellant David Michael Jenkins[1] seeks a certificate of appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring COA to appeal denial of § 2254 petition). The district court held that his petition was untimely under

[*] This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Jenkins is proceeding pro se, we construe his filings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *accord Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but "we will not 'assume the role of advocate,'" *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

28 U.S.C. § 2244(d)(1) and denied him a COA. Because he has not shown "that reasonable jurists could find the district court's decision on timeliness debatable or wrong," we, too, deny him a COA. *United States v. Hoon*, 762 F.3d 1172, 1173 (10th Cir. 2014); *accord Kenneth v. Martinez*, 771 F. App'x 862, 864 (10th Cir. 2019) (unpublished).

I. BACKGROUND

In 2010, Oklahoma convicted Mr. Jenkins, after a jury trial, of first-degree murder in violation of OKLA. STAT. tit. 21, § 701.7, and sentenced him to life in prison. On August 3, 2011, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the judgment of conviction. Mr. Jenkins did not petition the U.S. Supreme Court for a writ of certiorari. The judgment, therefore, became final on November 1, 2011. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (explaining that when a section 2254 petitioner does not "pursue direct review all the way to this Court," his "judgment becomes final at the 'expiration of the time for seeking such review'—when the time for pursuing direct review in this Court . . . expires" (quoting 28 U.S.C. § 2244(d)(1)(A))); *see also* SUP. CT. R. 13(1) (providing that "a petition for a writ of certiorari to review a judgment in any case . . . entered by a state court of last resort . . . is timely when it is filed . . . within 90 days after entry of the judgment"); *United States v. Faulkner*, 950 F.3d 670, 677 n.8 (10th

Cir. 2019) (noting that the OCCA is "Oklahoma's court of last resort for criminal appeals").

For nearly four years, Mr. Jenkins did not further challenge his judgment of conviction. On October 19, 2015, however, he applied to an Oklahoma trial court for state post-conviction relief. After the state trial court denied his application, the OCCA affirmed the denial in October 2018.

On April 3, 2019, Mr. Jenkins petitioned a federal district court for a writ of habeas corpus under 28 U.S.C. § 2254. He claimed, relying on *Lafler v. Cooper*, 566 U.S. 156 (2012) (holding that the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), was satisfied where, among other things, a defendant had rejected a favorable plea offer based on the unreasonable advice of counsel), that his trial lawyer was ineffective for advising him to reject a plea offer and that his appellate counsel was ineffective for failing to raise on appeal his trial lawyer's plea-related ineffectiveness.

The district court promptly examined Mr. Jenkins's petition, concluded it "is subject to being dismissed as time-barred and that nothing in [it] demonstrates that [he could] overcome that time bar" and ordered him to show cause as to why it should not be dismissed. R. at 43 (Dist. Ct.'s Op. & Order, filed Apr. 8, 2019); *see* 28 U.S.C. § 2244(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.").[2] The district court noted that Mr. Jenkins filed his petition more than seven years after his judgment became final, *see* 28 U.S.C. § 2244(d)(1)(A); that the Supreme Court in *Lafler* did not recognize a new constitutional right to effective assistance of counsel, *see id.* § 2244(d)(1)(C); and that, even if *Lafler* had recognized a new right, his petition would still be untimely because he filed it over one year after *Lafler* was decided. The district court further observed that because Mr. Jenkins "filed his first application for state postconviction relief on October 19, 2015, nearly three years after his AEDPA deadline expired, he is not entitled to statutory tolling." R. at 41 (citing

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[2] 28 U.S.C. § 2244(d)(1) provides further as follows:

> 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.

28 U.S.C. § 2244(d)(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 . . . ." (emphasis added))).

Mr. Jenkins timely responded to the district court's show-cause order. He focused his response primarily on the proposition that *Lafler* had recognized a new Sixth Amendment right and that his petition under *Lafler*, seven years later, was still timely because he had been "in a maximum security prison without access to legal materials, or updates from [counsel]," and thus "did not learn of the *Lafler* decision until shortly before he submitted his application for [state] post conviction [relief in October 2015]." *Id.* at 46 (Pet'r's Resp., filed Apr. 29, 2019) (italics added) (bold in original omitted). He also asserted that Oklahoma should have reviewed his post-conviction challenges for plain error under Federal Rule of Criminal Procedure 52(b) and that, if Oklahoma had provided him with an evidentiary hearing, he would have established plain error. Mr. Jenkins, however, did not provide any reasons or authorities in support of his bald assertion that *Lafler* recognized a new constitutional right, and he did not elaborate further as to why incarceration in a maximum security prison prevented him from filing a timely petition.

The district court reviewed Mr. Jenkins's response and then dismissed his petition with prejudice "as time-barred." *Id.* at 63 (Dist. Ct.'s Op. & Order, filed Aug. 22, 2019). The court observed that it had already held the petition "untimely under [28 U.S.C.] § 2244(d)(1)(A)" because Mr. Jenkins's judgment of conviction became final in November 2011 "and his one-year limitation period therefore . . . expired [in November] 2012." *Id.* at 58. The court also noted that it had held that Mr. Jenkins "could not rely on *Lafler* to support application of § 2244(d)(1)(C) because *Lafler* was not the first Supreme Court case to recognize the constitutional right [he had] asserted—i.e., the Sixth Amendment right to the effective assistance of plea counsel." *Id.*; *see United States v. Greer*, 881 F.3d 1241, 1245 (10th Cir. 2018) (stating that "a rule is not new [for federal habeas purposes] if it is 'merely an application' of an existing right or principle" (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013))). The court further observed that it had concluded that Mr. Jenkins's "application for postconviction relief, filed October 19, 2015, had no tolling effect, under § 2244(d)(2), regardless of whether his one-year limitation period commenced under § 2244(d)(1)(A) or (d)(1)(C)." R. at 59; *see Kenneth*, 771 F. App'x at 864 ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations [under § 2244(d)(2)]." (quoting *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006))).

The district court rejected Mr. Jenkins's arguments as to why his petition, filed on April 3, 2019, was nonetheless timely. The court held first that, even if *Lafler* recognized a new constitutional right, Mr. Jenkins's "general allegation regarding his lack of access to legal materials and legal assistance—without reference to when or how long those circumstances existed—lacks the specificity required to support equitable tolling." R. at 59; *see Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014*)* (explaining that "equitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action"); *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) ("An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." (quoting *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008))). The court held next that Mr. Jenkins's alleged lack of access to legal materials and assistance and his late discovery of *Lafler* also did not entitle him to a later-commencing limitations period under 28 U.S.C. § 2244(d)(1)(B)–(D). R. at 60–61. The court held last that Mr. Jenkins's challenges to Oklahoma's resolution of his application for state post-conviction relief, including its alleged denial of an evidentiary hearing and plain-error review, did "not address, let alone support, his request for equitable tolling." *Id.*

at 63. The court, therefore, dismissed Mr. Jenkins's petition as time-barred and declined to grant him a COA. *Id.*

Mr. Jenkins timely appeals from the district court's order dismissing his 28 U.S.C. § 2254 petition, and he now applies to us for a COA.

II. DISCUSSION

"Before a petitioner may appeal the [dismissal] of a § 2254 petition, he or she must obtain a COA." *Vreeland v. Zupan*, 906 F.3d 866, 875 (10th Cir. 2018) (citing 28 U.S.C. § 2253(c)(1)(A)). We may grant a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *Okyere v. Rudek*, 732 F.3d 1148, 1149 (10th Cir. 2013) (quoting 28 U.S.C. § 2253(c)(2)). If, as here, the petition was dismissed "on procedural grounds, the applicant faces a double hurdle." *Id.* at 1150. "Not only must [he] make a substantial showing of the denial of a constitutional right, but he must also show 'that jurists of reason would find it debatable . . . whether the district court was correct in its procedural ruling.'" *Id.* (omission in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "Rather than addressing these two threshold requirements in order, we may 'resolve the issue whose answer is more apparent from the record and arguments.'" *Frost v. Pryor*, 749 F.3d 1212, 1230–31 (10th Cir. 2014) (quoting *Slack*, 529 U.S. at 485). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not

conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Okyere*, 732 F.3d at 1150 (quoting *Slack*, 529 U.S. at 484).

Mr. Jenkins asserts in his application for a COA that the district court wrongly focused on his petition's untimeliness "without consideration of the fact that [he] properly filed a state post conviction [relief application], that was accepted and ruled on." Aplt.'s Opening Br. at 6. However, the record establishes that the district court considered his October 2015 "application for state postconviction relief," but concluded it did not entitle him "to statutory tolling" under 28 U.S.C. § 2244(d)(2) because he filed it "nearly three years after his AEDPA deadline expired" under 28 U.S.C. § 2244(d)(1). R. at 41; *see id.* at 59. In other words, the district court correctly held that Mr. Jenkins is not entitled to tolling based on that application because he filed it too late—i.e., after AEDPA's one-year limitations period had expired. *Kenneth*, 771 F. App'x at 864 ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations." (quoting *Clark,* 468 F.3d at 714)).

Mr. Jenkins also argues that he merely "forfeited" his claims by filing an untimely petition and, thus, that the district court should have reviewed them for plain error. Aplt.'s Opening Br. at 15. He, however, is mistaken: when a habeas petition is untimely, courts generally dismiss it. *See, e.g.*, *Kenneth*, 771 F. App'x

at 863 (holding that "the district court correctly dismissed [the petitioner's § 2254] application as untimely under 28 U.S.C. § 2244(d)(1)"); *Kilgore v. Attorney Gen. of Colo.*, 519 F.3d 1084, 1089 (10th Cir. 2008) (noting that a court may "dismiss [a] petition when it is clear that the petition is, in fact, untimely"); *see also In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam) (determining that the "dismissal" of a "habeas petition as time-barred [i]s a decision on the merits"). A petition's untimely claims are not reviewed for plain error since their untimeliness operates as a bar, not a forfeiture. *See McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (calling a claim's untimeliness under 28 U.S.C. § 2244(d)(1) a "statutory time bar"); *Kenneth*, 771 F. App'x at 864 (calling it a "procedural bar").

The remainder of Mr. Jenkins's briefing is primarily devoted to contending that Oklahoma should have granted him an evidentiary hearing and plain-error review of his collateral challenges in his state post-conviction proceedings. *See* Aplt.'s Opening Br. at 8–14. We agree with the district court that Mr. Jenkins's "attacks" on the Oklahoma courts' rulings "do not address, let alone support, his request for equitable tolling." R. at 63. For we do not see how the denial of both an evidentiary hearing and plain-error review at a state post-conviction proceeding years after his judgment became final could form an "extraordinary

circumstance prevent[ing] him from bringing a timely [petition]." *See Lozano*, 572 U.S. at 10.

Mr. Jenkins "must show that reasonable jurists could find the district court's decision on [the] timeliness [of his petition] debatable or wrong" to obtain a COA. *Hoon*, 762 F.3d at 1173. He has failed to shoulder that burden. Indeed, in his application for a COA, Mr. Jenkins does not even contend that the district court erred in holding that his petition is untimely under 28 U.S.C. § 2244(d)(1). "The first task of an appellant," however, "is to explain to us why the district court's decision was wrong." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). By not telling us why the district court erred in deeming his petition untimely, Mr. Jenkins has waived his challenge to that determination. *Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015) (holding that petitioner "waived any potential challenge" to the district court's decision that his habeas claims were "time-barred" by "failing to address it in his opening brief on appeal"); *accord United States v. Hernandez*, 444 F. App'x 230, 232–33 (10th Cir. 2010) (unpublished).[3]

As a pro se applicant, Mr. Jenkins is certainly entitled to have us "construe his arguments liberally," but "this rule of liberal construction stops . . . at the

[3] Mr. Jenkins, in his opening brief, repeatedly argues the merits of his claims for habeas relief. We, however, cannot address the merits of those claims unless and until a COA has been issued pertaining to them. *Gonzalez*, 565 U.S. at 142; *accord Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003).

point at which we begin to serve as his advocate." *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). We, in other words, "cannot make arguments for him." *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347, 1351 (10th Cir. 2017). For that reason, we enforce against him, as we generally do with pro se litigants, his waiver of a challenge due to his failure to raise it. *See, e.g.*, *United States v. Wells*, 873 F.3d 1241, 1254 (10th Cir. 2017) ("Even given our liberal construction of pro se briefing, Mr. Lyman has not adequately presented this argument in his opening brief; accordingly, we may deem it waived."); *Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) ("This court has not hesitated to apply this waiver rule to prisoner litigants, even to prisoners who proceed pro se and therefore are entitled to liberal construction of their filings." (citations omitted)). More specifically, we deem waived his challenge to the district court's limitations ruling. In any event, for substantially the reasons that the district court gave, we see no room for reasonable debate concerning the correctness of the court's determination that Mr. Jenkins's petition is time-barred under 28 U.S.C. § 2244(d)(1).

III. CONCLUSION

We conclude that Mr. Jenkins has not shown "that reasonable jurists could find the district court's decision on timeliness debatable or wrong." *Hoon*, 762

F.3d at 1173; *see Frost*, 749 F.3d at 1230–31; *Okyere*, 732 F.3d at 1150. We, thus, **DENY** Mr. Jenkins's application for a COA and **DISMISS** this appeal.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge