FILED
United States Court of Appeals
Tenth Circuit

August 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARLEY DAVID SHARP,

Petitioner - Appellant,

v.

BARRY GOODRICH, Warden, C.C.C.F.; DEAN WILLIAMS, Executive Director of the Department of Corrections; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 21-1229
(D.C. No. 1:21-CV-00207-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

Harley David Sharp, a Colorado state prisoner proceeding pro se, seeks a certificate of appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2254 application for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

court"). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.[1]

I. BACKGROUND

A Colorado state court jury convicted Mr. Sharp of sexual assault on a child, sexual assault on a child as a pattern of abuse, and sexual assault on a child by one in a position of trust. The Colorado Court of Appeals affirmed the judgment of conviction, and the Colorado Supreme Court denied his petition for writ of certiorari. He attempted and failed to gain post-conviction relief in the state courts.

The federal district court dismissed his § 2254 application as untimely under 28 U.S.C. § 2244(d)(1)(A), which provides that "[a] 1-year period of limitation . . . shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[2] The magistrate judge found that Mr. Sharp's conviction became final on June 20, 2016, and that he commenced this action on January 15, 2021, which exceeded § 2244(d)(1)(A)'s one-year limitation period.

The magistrate judge next addressed whether Mr. Sharp's post-conviction proceedings tolled the limitation period to make his § 2254 application timely. Section 2244(d)(2) provides:

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[1] Because Mr. Sharp appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

[2] The magistrate judge found that Mr. Sharp had not argued the limitation period should be based on the other provisions of § 2244(d)(1)—that is (B), (C), or (D).

> 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 magistrate judge found that the limitations period ran for 119 days from June 21, 2016 to October 18, 2016, and then stopped when Mr. Sharp moved in state court for post-conviction relief. He found that tolling ended on March 30, 2020, when the Colorado Supreme Court denied Mr. Sharp's petition for certiorari, restarting the limitation period on March 31, 2020, until it expired 246 days later on December 1, 2020, well before Mr. Sharp commenced this action.

The magistrate judge then addressed Mr. Sharp's contention that he should be entitled to equitable tolling of the limitation period because COVID-19 protocols and limited law library access hindered his ability to pursue federal habeas relief. The magistrate judge rejected this argument, finding that Mr. Sharp had not pursued his claims diligently and had not shown how COVID restrictions prevented him from doing so.

The magistrate judge recommended that Mr. Sharp's § 2254 application be denied as untimely. The district court agreed and entered an order and a judgment accordingly. The court later entered an order denying a COA.

II. **DISCUSSION**

A. ***COA Standard***

We must grant a COA before we can consider Mr. Sharp's appeal from the district court's dismissal of his § 2254 application. *See Miller-El v. Cockrell*, 537 U.S. 322,

335-36 (2003). Where, as here, the district court dismissed the application on procedural grounds, we will grant a COA only if the applicant can demonstrate both "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 district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. ***Mr. Sharp's Arguments***

Mr. Sharp seeks a COA based on three arguments.

1. **Statutory Tolling**

Mr. Sharp argues that, under § 2244(d)(2), the district court should have added 48 days to the statutory tolling period so the one-year limitation period thus should have expired on January 18, 2021, rather than the date determined by the district court, December 1, 2020.

Mr. Sharp argues that the district court should have added (1) 7 days because he gave his state post-conviction relief petition to prison officials to mail on October 11, 2016 (it was filed on October 18, 2016); (2) 1 day because he submitted his § 2254 application to prison officials for mailing on January 15, 2021;[3] (3) 27 days because his state post-conviction proceedings ended on April 27, 2020, when judgment became final

[3] The magistrate judge said the action was commenced January 16, 2021. The district court docket shows the § 2254 application was filed on January 21, 2021. The record shows that Mr. Sharp submitted his application to prison officials on January 15, 2021, for mailing to the court. ROA at 737. We give him the benefit of the prisoner mailbox rule and accept January 15, 2021 as the filing date. *See Houston v. Lack*, 487 U.S. 266, 270 (1988).

in the state trial court, rather than March 30, 2020, when the Colorado Supreme Court denied certiorari; and (4) 13 days because he filed a mittimus clarification request on May 4, 2020, and an amended mittimus issued on May 18, 2020. Aplt. Br. at 26-28.

In his objections to the magistrate judge's recommendation, Mr. Sharp presented only the first two statutory tolling arguments. ROA at 708-09. We nonetheless address only the third argument to resolve the statutory tolling issue. The tolling period ended when the Colorado Supreme Court denied Mr. Sharp's certiorari petition because the state post-conviction proceedings, under § 2244(d)(2), were no longer "pending." This court has recognized this end point in numerous decisions. *See e.g., Lopez v. Edelen*, 853 F. App'x 290, 290-91 (10th Cir. 2021); *Brim v. Zavaras*, 371 F. App'x 885, 886 (10th Cir. 2010); *Nguyen v. Golder*, 133 F. App'x 521, 524 n.4 (10th Cir. 2005); *Armijo v. Marr*, 201 F.3d 447 at *1 (10th Cir. 1999).[4]

Without the extra 27 days Mr. Sharp seeks for tolling, his § 2254 application remains untimely. Reasonable jurists would not debate the district court's resolution of this issue.

2. **Equitable Tolling**

The standard of appellate review for a district court's denial of equitable tolling is abuse of discretion. *See Al-Yousef v. Trani*, 779 F.3d 1173, 1177 (10th Cir. 2015). The district court did not find Mr. Sharp's COVID-19 and library-access arguments

[4] We cite these unpublished decisions for their persuasive value. *See* Fed. R. App. 32.1(a); 10th Cir. R. 32.1(A).

persuasive. Mr. Sharp states in his brief, "I did the best I could with what I had." Aplt. Br. at 30. We have reviewed the record and cannot say the district court abused its discretion in denying equitable tolling or that reasonable jurists would debate its ruling.[5]

3. **Claims Not Time Barred**

Mr. Sharp contends that his first two § 2254 claims were timely based on 28 U.S.C. § 2244(d)(1)(D), which provides for the limitation period to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." In each claim, he argues the prosecution failed to provide evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As the magistrate judge noted, Mr. Sharp did not adequately make this timeliness argument in district court. ROA at 670, *see* ROA 572-88, 698-757. He therefore has waived it here. *See Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) (observing in the habeas context that arguments not advanced in district court are generally waived); *see also United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (denying COA in light of court's "general rule against considering issues for the first time on appeal").

[5] Mr. Sharp's argument that the magistrate judge sent him a § 2241 form rather than one for § 2254, Aplt. Br. at 30, does not alter our view of the district court's equitable tolling determination.

III. **CONCLUSION**

Reasonable jurists would not debate the district court's dismissal of Mr. Sharp's § 2254 application as untimely. We therefore deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge