

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 15, 2023

Christopher M. Wolpert
Clerk of Court

ROBERT EUGENE KING,

Petitioner - Appellant,

v.

STEVEN HARPE, Director, Oklahoma
Department of Corrections,

Respondent - Appellee.

No. 23-5041
(D.C. No. 4:23-CV-00094-TCK-SH)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Robert Eugene King, proceeding pro se,¹ is an Oklahoma prisoner serving sentences following convictions in 1980 for arson, rape, robbery, and assault and battery with intent to kill. The district court dismissed Mr. King’s 28 U.S.C. § 2254 petition, holding the petition was untimely. Mr. King seeks a certificate of appealability (“COA”), arguing that because he challenges the state court’s jurisdiction over his criminal case, the one-year statute of limitations governing § 2254 petitions does not apply. Because

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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. King proceeds 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).

Mr. King’s challenge to the convicting court’s jurisdiction is a due process challenge for purposes of § 2254, his petition is subject to the one-year limitations period and the district court’s dismissal is not debatable or wrong. Accordingly, we deny a COA and dismiss this matter.

I. BACKGROUND

In 1972, Mr. King sustained unspecified criminal convictions. Mr. King asserts that while he entered a guilty plea, he was not first advised of the rights he was surrendering by doing so or of his right to appeal his convictions. While Mr. King completed service of his sentence for the 1972 convictions, such was not the end of his interactions with the criminal justice system. In 1979, Oklahoma charged Mr. King with arson in the first degree, rape in the first degree, robbery, and assault and battery with intent to kill. A jury found Mr. King guilty on all four charges. The trial court sentenced Mr. King to a combined sentence of 1700 years’ imprisonment. This sentence rested on enhancements based on Mr. King having sustained a prior felony conviction in 1972. Mr. King appealed, and in 1982, the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed his convictions and sentences.

In 1986 and 1992, Mr. King unsuccessfully sought post-conviction relief in a Tulsa County district court. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which created a one-year statute of limitations for claims under § 2254 seeking relief from a state conviction. 28 U.S.C. § 2244(d); *see also Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998) (stating that individual convicted prior to passage of AEDPA had one year from AEDPA’s passage to timely file § 2254 petition).

Mr. King did not seek further relief from his convictions until 2021, when he filed a third application for post-conviction relief in the Tulsa County district court. In that application, Mr. King contended the convicting court lacked jurisdiction over his case and improperly relied on his 1972 convictions to enhance his sentence on the 1980 convictions. The Tulsa County district court dismissed the application as procedurally barred, concluding nothing prevented Mr. King from raising these arguments in one of his earlier applications for post-conviction relief. The OCCA affirmed.

Mr. King then turned to federal court, filing the § 2254 petition that underlies this matter. In his petition, Mr. King argued the convicting court (1) lacked jurisdiction over his case because the case was not supported by probable cause; and (2) lacked jurisdiction to enhance his sentence based on the 1972 convictions because he was not advised of his right to appeal in the 1972 proceeding. On the section of the § 2254 petition form asking about the timeliness of the petition, Mr. King responded that because he challenged the convicting court's jurisdiction and issues of jurisdiction are non-waivable, AEDPA's one-year statute of limitations did not apply.

The district court dismissed Mr. King's § 2254 petition as untimely, concluding a claim challenging a convicting state court's jurisdiction is a due process claim subject to AEDPA's one-year statute of limitations.² The district court also denied a COA. Before this court, Mr. King seeks a COA, renewing his argument that a challenge to a convicting

² In the alternative, the district court concluded the claims in Mr. King's petition were subject to a procedural bar. Because the district court's timeliness conclusion is not debatable or wrong, we need not consider the procedural bar issue.

state court’s jurisdiction may be raised at any time and is not subject to AEDPA’s one-year statute of limitations.

II. DISCUSSION

A. COA Standard

Without a COA, we do not possess jurisdiction to review the dismissal of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court dismisses a petition and denies a COA, we will issue a COA only “if the applicant has made a substantial showing of the denial of a constitutional right.” *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 28 U.S.C. § 2253(c)(2)). “This standard requires ‘a demonstration that . . . includes showing 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.’” *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Further, where a district court denies relief on procedural grounds such as timeliness, the petitioner must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 478.

B. Analysis of Timeliness Issue

Section 2244 of Title 28 of the United States Code establishes the applicable limitation period for commencing a § 2254 proceeding, stating that “[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.” 28 U.S.C. § 2244(d)(1). Relevant to Mr. King’s petition, the limitation period commenced in April 1996 when Congress

passed AEDPA. *See Miller*, 141 F.3d at 977. Accordingly, Mr. King needed to file his § 2254 petition no later than April 1997. Mr. King, however, did not file his § 2254 petition until March 2023, nearly twenty-six years after the limitations period expired. And none of Mr. King's efforts to obtain state post-conviction relief tolled the statute of limitations because (1) the state court resolved his second application in 1992, before the limitations period began to run; and (2) he did not file his third application until 2021, well after the one-year statute of limitations expired. *See* 28 U.S.C. § 2244(d)(2). Accordingly, Mr. King's § 2254 petition is unquestionably untimely for purposes of § 2244(d).

In an attempt to avoid § 2244(d)'s time-bar, Mr. King argues his claims are exempt from the statute of limitations because they challenge the convicting court's jurisdiction. Assuming for the sake of argument that Mr. King's claims for relief challenge the convicting court's jurisdiction,³ Mr. King is legally incorrect when he contends a challenge to a state convicting court's jurisdiction is not subject to § 2244(d)'s limitation period.

³ This proposition appears dubious for two reasons. First, Mr. King fails to identify any case law holding that a challenge to the probable cause supporting the commencement of criminal proceedings is a challenge to a court's jurisdiction. Second, although Mr. King has identified Oklahoma precedent standing for the proposition that a trial court lacks jurisdiction where it does not advise a defendant of his rights and makes a record of such, *see* Appellant's Br. at 7 (citing *Trammel v. Page*, 444 P.2d 472, 474–75 (Okla. Crim. App. 1968)), Mr. King's § 2254 petition challenges the ability of the court in his 1980 convictions to rely upon his 1972 convictions to enhance his sentence where the 1972 court allegedly did not advise him of his rights. Importantly, however, he does not directly attack the jurisdiction of the 1980 court to preside over the convictions from which he seeks federal habeas relief.

A challenge to a convicting court’s jurisdiction is a due process claim. *See Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924 (10th Cir. 2008) (“Absence of jurisdiction in the convicting court is indeed a basis for federal habeas corpus relief cognizable under the due process clause.”). Recognizing it as such, this court has routinely applied § 2244(d)’s time-bar to due process claims with underlying contentions that the convicting court lacked jurisdiction. *Schemmer v. Crow*, 2023 WL 2924627, at *3 (10th Cir. Apr. 13, 2023) (unpublished); *Warnick v. Harpe*, 2022 WL 16646708, at *2 (10th Cir. Nov. 3, 2022) (unpublished); *Lamarr v. Nunn*, 2022 WL 2678602, at *2 (10th Cir. July 12, 2022) (unpublished); *Murrell v. Crow*, 793 F. App’x 675, 678–79 (10th Cir. 2019) (unpublished); *Morales v. Jones*, 417 F. App’x 746, 749 (10th Cir. 2011) (unpublished); *see also Gibson v. Klinger*, 232 F.3d 799, 803, 808 (10th Cir. 2000) (affirming dismissal of § 2254 petition raising due process claim as time-barred). And such a conclusion is entirely consistent with the language of § 2244(d), which does not include any exception to the statute of limitations for claims challenging the jurisdiction of the court of conviction. Accordingly, the district court’s decision to dismiss Mr. King’s § 2254 petition as untimely is not debatable or wrong.

III. CONCLUSION

We DENY a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge