FILED
United States Court of Appeals
Tenth Circuit

September 13, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICHARD BRIAN COLLUM,

Petitioner - Appellant,

v.

LARRY BENZON, Warden, Utah State Prison,

Respondent - Appellee.

No. 19-4062
(D.C. No. 2:17-CV-00892-RJS)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Richard Collum, a Utah prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal the district court's order dismissing his 28 U.S.C. § 2254 petition. For the reasons explained below, we deny Collum's request for a COA and dismiss this matter.

In 2010, Collum pleaded no contest to sexual abuse of a child, and the Utah state court sentenced him to up to fifteen years in prison. *See Collum v. State*, 360

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* This order isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[1] Because Collum appears pro se, we liberally construe his pleadings. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). But we won't act as his advocate. *See id.*

P.3d 13, 14 (Utah Ct. App. 2015). Collum didn't file a direct appeal or move to withdraw his plea. *See id.* Nearly three years later, he filed a motion for postconviction relief; the state court denied it, and the United States Supreme Court declined review. *See id.*

Then, on November 28, 2017, Collum filed this § 2254 petition, alleging in part that the state denied him his right to a direct appeal. The state moved to dismiss the petition as untimely, and the district court agreed. *See* 28 U.S.C. § 2244(d) (providing one-year statute of limitation for federal habeas petitions).

The district court first noted that the state court entered its judgment against Collum on July 8, 2010, and the time for Collum to file a direct appeal expired on August 9, 2010. *See* Utah. R. App. P. 4(a). So, the district court reasoned, the one-year period in which Collum could file a federal habeas petition began to run on August 9, 2010, and it expired a year later—over six years before Collum filed his petition. *See* § 2244(d)(1)(A) (providing that one-year statute of limitation begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"). The district court further concluded that Collum wasn't entitled to statutory tolling because he filed his state postconviction motion in June 2013, well after the expiration of his one-year federal habeas deadline. *See* § 2244(d)(2) (providing for statutory tolling while state postconviction petition is pending); *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) ("Only state petitions for post[]conviction relief filed within the one[-]year [limitation period] will toll the statute of limitation[].").

Next, the district court rejected Collum's arguments in favor of equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 645 (2010) (holding that equitable tolling applies to deadline for § 2254 petitions). It noted that neither the alleged inadequacy of the prison law library nor Collum's alleged ignorance of the law supported an equitable-tolling claim. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (noting that legal ignorance doesn't excuse prompt filing); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("It is not enough to say that the . . . facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."). It also concluded that Collum's allegations about the unhelpfulness of the prison's contract attorneys didn't support an equitable-tolling claim because there's no right to counsel in postconviction proceedings. *See Thomas v. Gibson*, 218 F.3d 1213, 1222 (10th Cir. 2000). Overall, the district court concluded that Collum failed to meet "his burden of showing that—during the running of the federal period of limitation and well beyond—he faced extraordinary circumstances that stopped him from timely filing." R. 173. It further found that Collum failed to show that he diligently pursued his federal claims. *See Miller*, 141 F.3d at 978 (providing that equitable tolling "requires inmates to [diligently] pursue claims").

The district court also rejected Collum's actual-innocence argument. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (holding that "actual innocence, if proved," can overcome procedural bars like untimeliness). In particular, it noted that the evidence Collum presented in support of his actual-innocence claim was not new. *See id.* (noting that evidence of actual innocence must be new evidence). In sum, the

district court found that no exceptions saved Collum's untimely petition, dismissed the petition, and declined to issue a COA.

Collum now seeks to appeal, but he must first obtain a COA. *See* 28 U.S.C. 2253(c)(1)(A). To do so, Collum must "show[], at least, 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).

Collum doesn't challenge the district court's rulings on the relevant dates, statutory tolling, or actual innocence; instead, he focuses his appellate arguments on equitable tolling. He first repeats his vague allegations of diligence, legal ignorance, and lack of access to prison contract attorneys. We reject those assertions for the same reason the district court did: they aren't sufficient to support equitable tolling. *See Thomas*, 218 F.3d at 1222; *Miller*, 141 F.3d at 978.

More substantially, Collum points out that 23 days after the district court issued its decision, the state court reinstated his right to a direct appeal. He contends that the state court's decision reinstating his right to a direct appeal "also reinstated his right to [a] federal appeal." Aplt. Br. 3. But Collum, a state prisoner, has no right to a federal appeal. *Cf. Cleaver v. Bordenkircher*, 634 F.2d 1010, 1011 (6th Cir. 1980) (noting that state prisoner "has no federal constitutional right to appeal his state[-]court conviction"). Moreover, because the state court's decision to reinstate Collum's right to appeal occurred *after* Collum filed his habeas petition, it doesn't

affect the timeliness of that petition. *See O'Neal v. Kenny*, 579 F.3d 915, 919 (8th Cir. 2009) (holding that petitioner's habeas petition remained untimely even though state court reinstated petitioner's right to appeal his state-court conviction after petitioner filed habeas petition); *cf. Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (holding narrowly "that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, *but before the defendant has first sought federal habeas relief*, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)" (emphasis added) (quoting § 2244(d)(1)(A)). We therefore conclude that reasonable jurists could not debate the district court's procedural timeliness ruling. *See Slack*, 529 U.S. at 484.

Accordingly, we deny Collum's COA request and dismiss this matter. We further deny his motions for an evidentiary hearing, to appoint counsel, and to reconsider our refusal to file documents submitted on Collum's behalf by a nonattorney. *See Perry v. Stout*, 20 F. App'x 780, 782 (10th Cir. 2001) (unpublished) ("Non[]attorney pro se litigants cannot represent other pro se parties.").

Entered for the Court

Nancy L. Moritz
Circuit Judge