FILED
United States Court of Appeals
Tenth Circuit

October 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH R. HEDDLESTEN,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 21-6080
(D.C. No. 5:20-CV-00438-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Kenneth R. Heddlesten, an Oklahoma state inmate proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal the district court's denial of his Rule 60(b)(4) motion for relief from judgment. *See* Fed. R. Civ. P. 60(b)(4). The judgment in question dismissed Heddlesten's habeas corpus petition under 28 U.S.C. § 2254 as untimely. Because reasonable jurists would not dispute the district court's

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Because Heddlesten is not represented by counsel, we "review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). But we will not assume "the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

conclusion that a procedural timeliness bar does not deprive a litigant of due process when it precludes review on the merits, we decline to issue a COA and dismiss this matter. We also deny Heddlesten's request to proceed on appeal *in forma pauperis*.

I.

In 2009, Heddlesten pleaded no contest to two counts of child sexual abuse in Oklahoma state court. He moved to withdraw his plea shortly after sentencing. The district court denied the motion and the Oklahoma Court of Criminal Appeals affirmed in January 2011. The judgment became final in April 2011 once the time for filing a petition for a writ of certiorari before the United States Supreme Court passed. So concluded Heddlesten's direct appeal period, and so commenced the one-year statute of limitations for habeas relief in federal court under the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2244(d)(1)(A) (one-year statute of limitations 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").

Heddlesten first sought habeas relief in the Western District of Oklahoma in April 2011, well within the limitations period. As that court addressed the petition's exhaustion problems, Heddlesten was advised several times that the applicable "limitations period was not tolled while the federal habeas petition was pending." R. at 51. Ultimately, in September 2012, the petition was voluntarily dismissed without prejudice. In 2013, Heddlesten turned to state court, where he filed a series of applications for post-conviction relief, all of which were denied.

In May 2020, Heddlesten filed a new habeas petition in the Western District of Oklahoma alleging that he received ineffective assistance of counsel, his sentence violated the Ex Post Facto Clause, and there were constitutional problems with the conduct of both the judge and the prosecutor in his case. Applying AEDPA's one-year statute of limitations, the district court concluded that the habeas petition was untimely and neither statutory nor equitable tolling could preserve Heddlesten's suit. Finding that reasonable jurists could not dispute these conclusions, the court declined to issue a COA. On appeal, we likewise declined to issue a COA. 817 F. App'x 663, 665 (10th Cir. 2020). The Supreme Court denied Heddlesten's petition for a writ of certiorari. 2021 WL 1520879.

On June 21, 2021, Heddlesten moved for relief from judgment under Rule 60(b)(4), which permits a district court to "relieve a party . . . from a final judgment," where "the judgment is void." Fed. R. Civ. P. 60(b)(4). As grounds for his motion, Heddlesten stated that "[t]he term 'final' under [the AEDPA statute of limitations] is a term that has resulted in unfair, arbitrary, or unreasonable treatment of individuals whose constitutional claims cannot be reviewed by the Federal Courts because it (final) has been interpreted as only applicable to procedural due process." R. at 73. The district court treated Heddlesten's motion as a "true" Rule 60(b) motion because instead of relitigating the habeas claims, it "allege[d] a defect in the habeas proceeding" itself. *Id.* at 92; *see also Spitznas v. Boone*, 464 F.3d 1213, 1215–16 (10th Cir. 2006). Specifically, the motion contended that the timeliness dismissal

deprived Heddlesten of his substantive due process rights by foreclosing merits review.

The district court denied Heddlesten's motion on June 28, 2021. First, the court noted that a judgment is void under Rule 60(b)(4) "in the rare instance" that it is based on "a violation of due process that deprives a party of notice or the opportunity to be heard." R. at 93 (quoting *Johnson v. Spencer*, 950 F.3d 680, 794 (10th Cir. 2020)). Next, the court discussed a case where our court rejected a nearly identical claim. *See Weldon v. Pacheco*, 715 F. App'x 837, 843 (10th Cir. 2017) (unpublished). As a result, the district court concluded that Heddlesten's motion raised "no arguable grounds for relief under Rule 60(b)(4)." R. at 93. The court declined to issue a COA and Heddlesten now seeks one from this court.

II.

The threshold question is whether Heddlesten should be granted a COA. If not, we do not reach the merits. To receive a COA from the district court's substantive decision that his motion was meritless, Heddlesten must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has interpreted this language to require a demonstration that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In denying Heddlesten's motion, the district court relied on this court's unpublished decision in *Weldon v. Pacheco*. 715 F. App'x at 842–43.[2] In *Weldon*, we confronted a very similar Rule 60(b)(4) motion attacking the procedural dismissal of a habeas petition. Discussing the same due process argument at the core of Heddlesten's current attempt to show the denial of a constitutional right, we said:

> "[Petitioner] contends application of the procedural bar deprived him of his due process right to be heard on his substantive-competency claim. He mistakes the opportunity required by due process to argue a claim (which he was given) with a right to prevail on the merits regardless of procedural obstacles. We know of no authority for the notion that procedural-bar rulings—or rulings on such other procedural matters as statute[s] of limitations or exhaustion, which also pretermit relief on the merits of a claim—violate due process and are 'void' under Rule 60(b)(4) if they are in error." *Id.* at 843.

We granted a COA to get that far in *Weldon* but see no need to do so here. *Id.* at 842–43. In *Weldon*, we knew of "no authority" supporting the proposition that Heddlesten advances today. *Id.* at 843. In his application for a COA, Heddlesten provides us with none. *See* Aplt. Br. 2–6. His other arguments are improperly intertwined with the merits of his habeas petition.[3] Far from denying Heddlesten due process, the applicable statute of limitations is process itself. That federal courts

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[2] Although not precedential, we find *Weldon*'s discussion of this issue instructive. *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

[3] Heddlesten has filed a motion for leave to supplement his brief. We grant the motion and have reviewed this filing, which contends that the statute of limitations had not run on Heddlesten's habeas petition when the district court dismissed it as untimely. These arguments may be relevant to a claim that the district court's judgment was error, a claim we rejected in Heddlesten's prior appeal, but they are not relevant to the claim advanced in Heddlesten's application for a COA: that the judgment below was void for constitutional error.

cannot reach the merits of his claims because of it does not amount to a constitutional violation. Reasonable jurists could not debate whether the AEDPA statute of limitations violates due process, so Heddlesten has failed to show any denial, let alone a substantial denial, of his constitutional rights. *See Slack*, 529 U.S. at 484.

Finally, we address Heddlesten's motion to proceed *in forma pauperis*. Heddlesten fails to make a "reasoned, nonfrivolous argument on the law and facts in support of the issues raised in the action." *Lister v. Dep't of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005). As a result, we deny his motion.

III.

We deny Heddlesten's requests for a COA and to proceed on appeal *in forma pauperis*, and dismiss this matter.

Entered for the Court

Allison H. Eid
Circuit Judge