FILED
United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARNEAU VERSILL PEPPER,

Petitioner - Appellant,

v.

DEAN WILLIAMS; LARRY SCHULTZ; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 21-1210
(D.C. No. 1:21-CV-00313-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Petitioner-Appellant Darneau Pepper, a state inmate appearing pro se, seeks a Certificate of Appealability (COA) to appeal from the district court's dismissal of his habeas petition under 28 U.S.C. § 2254 as time barred. See Pepper v. Williams, No. 21-cv-00313 (D. Colo. May 6, 2021). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Background

In 2009, a Colorado state jury found Mr. Pepper guilty of two counts of first-degree murder, multiple counts of attempted murder, and one count of possessing a weapon as a former offender. 1 R. 30, 192. The Colorado Court of Appeals affirmed on direct appeal in 2012, 1 R. 121, and the Colorado Supreme Court denied certiorari on March 11, 2013. 1. R. 119. Mr. Pepper filed a federal habeas petition in Colorado federal district court in August 2013, but he voluntarily dismissed it to exhaust his claims in state court. 1 R. 194. On June 17, 2014, Mr. Pepper filed a motion for postconviction relief in state court. And on February 1, 2021, he filed the instant federal habeas action. 1 R. 195. Upon recommendation of a magistrate judge, the district court dismissed the action with prejudice as untimely. 1 R. 204.

Discussion

To obtain a COA, Mr. Pepper must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has rejected a habeas petition on procedural grounds, the petitioner must demonstrate that reasonable jurists would find debatable both the district court's resolution of the procedural issue and whether the petition states a valid constitutional claim regarding the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Mr. Pepper argues that the district court erred in concluding that his habeas petition is time barred and alternatively that equitable tolling should apply because of an actual innocence exception based on ineffective assistance of counsel. Aplt. Br. at A-4 to A-5.

The district court's resolution of the procedural issue is not reasonably debatable. The one-year limitation period begins running 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." 28 U.S.C. § 2244(d)(1)(A). For Mr. Pepper, that date was June 10, 2013 — that is, 90 days after the Colorado Supreme Court denied review of his direct appeal on March 11, 2013, when his period for seeking certiorari in the United States Supreme Court expired. See Sup. Ct. R. 13.1; see also Gonzalez v. Thaler, 565 U.S. 134, 150 (2012); 1 R. 194. Thus, on June 10, 2014, § 2244(d)'s limitations period closed Mr. Pepper's window for federal habeas relief. See 1 R. 194–95.

Mr. Pepper argues that the magistrate judge and district court failed to account for 15 days of tolling. Aplt. Br. at A-5 to A-8. He submits that state court proceedings from April 9 to April 24, 2013, should toll his 90-day clock for appeal to the United States Supreme Court, and thus delay by 15 days the dates when § 2244(d)'s time bar began running and eventually barred further habeas petition. Id. This argument was not raised below and is waived, see Morales-Fernandez v. I.N.S., 418 F.3d 1119, 1119 (10th Cir. 2005), but in any event appears incorrect. The state court "reopened" Mr. Pepper's case on April 9, 2013, and then issued a writ of habeas corpus on April 18 to transfer him for a hearing set for April 25 to unseal the record. 1 R. 85–86. It "closed" the case on April 24 and unsealed the record on April 25 after Mr. Pepper had withdrawn his objection. 1 R. 85–86. These activities have nothing to do with an entry of final judgment, and thus have no effect on the 90-day period. Compare Sup. Ct. R. 13.1, 13.3, with 1 R. 85–86.

Alternatively, Mr. Pepper asserts that the limitations period should be equitably tolled on account of an actual innocence claim on the basis of ineffective counsel. Aplt. Br. at A-11 to A-12. Equitable tolling and the actual innocence exception are separate paths over § 2244(d)'s time bar. Compare Holland v. Florida, 560 U.S. 631, 649 (2010), with McQuiggin v. Perkins, 569 U.S. 383, 392–94 (2013).

For equitable tolling to apply, Mr. Pepper must show "'that some extraordinary circumstance stood in his way' and prevented timely filing." Holland, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Because he alleges no extraordinary circumstances concerning the years 2013 or 2014, equitable tolling is not available. See Davidson v. McKune, 191 F. App'x 746, 748 (10th Cir. 2006) (unpublished) (explaining that "attorney miscalculation or mistake as to the limitations period" does not qualify as extraordinary circumstances).

For Mr. Pepper to succeed on an actual innocence claim based on ineffective assistance of counsel, he needs to show (1) new evidence and (2) "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." McQuiggin, 569 U.S. at 386 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). Mr. Pepper claims, "[T]here was ready [sic] available witnesses to provide material evidence and ready [sic] available scientific evidence." COA Application at 12. These vague references, presumably including a disappeared defense witness at trial, see 1 R. 130–34, and defense counsel's lack of expert witnesses concerning scientific evidence, see 1 R. 140–43, 186–89, do not constitute the "truly extraordinary" case needed for a successful actual innocence claim. Schlup, 513 U.S. at 327 (quotation and

citation omitted). Where evidence offered "merely corroborates defense evidence that the jury rejected," it does not constitute the "showing of factual innocence" required. Park v. Reynolds, 958 F.2d 989, 996 (10th Cir. 1992).

We DENY a COA, DENY IFP, and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge