FILED
United States Court of Appeals
Tenth Circuit

April 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSHUA DANIEL ALBERT GORDON,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 22-6172
(D.C. No. 5:21-CV-00571-SLP)
(W.D. Okla.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY[*]

Before **TYMKOVICH**, **KELLY**, and **ROSSMAN**, Circuit Judges.[**]

Joshua Daniel Albert Gordon, an Oklahoma state prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal from the district court's denial of his 28 U.S.C. § 2254 habeas petition as time barred under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). A COA is a jurisdictional prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003). We deny a COA and dismiss the appeal.

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[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[**] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Background

In 2016, Mr. Gordon was convicted of various offenses involving sexual abuse of a child and possession of child pornography and received a lengthy prison sentence and a fine. R. 68. On November 2, 2017, the Oklahoma Court of Appeals (OCCA) affirmed the judgment and sentence. Id. 68–69. Mr. Gordon's one-year limitations period began to run on February 1, 2018, after the expiration of the 90 day-period during which he could appeal to the Supreme Court. Almost seven months later, on August 23, 2018, Mr. Gordon filed an application for post-conviction relief in state district court. Id. 303. He would then file a reply brief in that case on November 29, 2018. Id. 328. The state district court filed its order denying his application on December 3, 2018. But it apparently did not provide a copy to Mr. Gordon, who learned of the order on March 4, 2020. The OCCA allowed an out-of-time post-conviction appeal and affirmed the district court's denial of Mr. Gordon's application for state post-conviction relief on March 1, 2021.

Mr. Gordon then filed his federal habeas petition. Upon recommendation of the magistrate judge, the district judge dismissed the petition as time-barred under a one-year limitation period, 28 U.S.C. § 2244(d)(1)(A). Mr. Gordon's state conviction became final on January 31, 2018, and he was entitled to statutorily toll the time during which his state post-conviction application was pending, but he would have had to file his federal habeas by June 6, 2019, for it to be timely. R. 307–08. The federal petition was not filed until April 19, 2021.

The district court declined to apply equitable tolling because Mr. Gordon

could not show diligence, even though the state district court's failure to provide Mr. Gordon notice of its 2018 order constituted extraordinary circumstances. The narrow issue is whether Mr. Gordon was diligent in waiting approximately 15 months from the time of filing his post-conviction reply brief (November 29, 2018) and the time he made inquiry and learned of the state district court's denial of his post-conviction application (March 4, 2020).

Discussion

Mr. Gordon must obtain a COA to appeal from the denial of his § 2254 petition. See 28 U.S.C. § 2253(c)(1)(A). To do so, he must make "a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). Where a district court (as here) denies a petition on procedural grounds, the petitioner must show that the district court's procedural ruling would be debatable among jurists of reason, as would whether the petition states a valid claim of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 484 (2000). We need not address the second requirement, in the event the first is not met.

Section 2244(d) is subject to equitable tolling if a habeas petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Equitable tolling is a "rare remedy to be applied in unusual circumstances" and it places a strong burden on an inmate "to show specific facts to support his claim of

extraordinary circumstances and due diligence." Al-Yousif v. Trani, 779 F.3d 1173, 1179 (10th Cir. 2015) (internal quotation marks omitted). Although dismissal under § 2244(d) is a legal question, the standard of review for a district court's decision on equitable tolling is abuse of discretion. Id. at 1177.

Mr. Gordon reminds us that he need only show reasonable diligence, not "maximum feasible diligence." Holland, 560 U.S. at 653 (internal quotation marks omitted). Further, that there is no set time period for a state district court to rule on an application for post-conviction relief, and "that it is not outside the realm of reasonableness" for a court to take more than 14 months to decide such a motion. He cites Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990), a hear and decide case where this court granted a writ of mandamus holding that 14 months was too long for the district court to act on a federal habeas petition, notwithstanding court congestion. That case suggests that 14 months would be too long, at least in the federal context. Mr. Gordon also claims reliance on statutory tolling when a state post-conviction appeal is pending, the need to exhaust his federal claims in state court, and state court rules that require notice and mailing of an order. He also relies upon his diligence **after** he learned of the order, a view confirmed by the magistrate judge.

When assessing equitable tolling, we are mindful "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (emphasis omitted).

"As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules." Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999); see also Yang v. Archuleta, 525 F.3d 925, 928 (10th Cir. 2008) ("An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." (bracket and citation omitted)). For example, "[w]hat a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." Jackson v. Davis, 933 F.3d 408, 411 (5th Cir. 2019).

Given the standard of review that would apply, the district court's procedural ruling is not reasonably debatable as to the 14-month period at issue. Exercising its discretion, the federal district court noted that Mr. Gordon's reliance on Johnson's 14-month timeline is belied by the fact that Mr. Gordon waited 15 months to inquire after filing his reply. The court also rejected the notion that one inquiry in March 2020 (to the facility law library after an unspecified inquiry to the state district court clerk) to learn the status of his case would suffice.

Mr. Gordon relies upon Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2002) (per curiam). In that case, the petitioner was not informed of a ruling issued September 9, 1996, until March 4, 1998, and the entire period was equitably tolled. The panel excused the petitioner's not inquiring until February 1998, in large part because he had been assured by the court clerk (after he filed an application for review) that he would be notified "as soon as a decision was issued." Id. at 710–11.

After over a year, the petitioner inquired again. Mr. Gordon argues that the existence of court rules[1] requiring that he be provided a response should be tantamount to an inquiry; but that would result in equitable tolling in every case where notice was not received, a result rejected by Knight. Id. at 711 ("We should note that not in every case will a prisoner be entitled to equitable tolling until he receives notice.").

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[1] Respondent contends that Mr. Gordon's reliance on the state court rule for why he waited 14 months is waived. Regardless, Mr. Gordon's argument is unpersuasive for the reasons stated above.