FILED
United States Court of Appeals
Tenth Circuit

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALONZO G. DAVISON,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 22-5080
(D.C. No. 4:21-CV-00515-CVE-CDL)
(N.D. Okla.)

ORDER AND JUDGMENT*

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

Alonzo G. Davison, an Oklahoma inmate proceeding pro se,[1] brought four claims under 28 U.S.C. § 2241. After determining three claims were untimely, the district court dismissed them with prejudice. Finding the remaining claim was an unauthorized second or successive claim under 28 U.S.C. § 2254, the district court

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* 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Mr. Davison proceeds pro se, we construe his filings liberally. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we do not act as his attorney. *See id.*

dismissed it without prejudice for lack of jurisdiction. The court then granted a certificate of appealability (COA) as to the claims it dismissed as untimely. Mr. Davison challenges the dismissal of one of those claims. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm.

BACKGROUND

A jury convicted Mr. Davison in 2002 of one count of lewd molestation (Count 1), and one count of sexually abusing a minor child (Count 2). The state trial court sentenced him to 50 years of imprisonment on Count 1 and 75 years of imprisonment on Count 2, to be served consecutively. On appeal, the Oklahoma Court of Criminal Appeals (OCCA) affirmed the convictions, but it modified the sentences to 45 years of imprisonment on each count, to be served concurrently.

Mr. Davison was under the impression he would be eligible for parole once he had served 1/3 of his sentences. *See* Okla. Stat. tit. 57, § 332.7(B) (2000). In 2017, having served 15 years of the 45-year sentences, he wondered why he had not yet heard about parole. He discovered the Oklahoma Department of Corrections (ODOC) was administering his sentence for Count 1 under the 85% rule, *see* Okla. Stat. tit. 21, §§ 12.1, 13.1, meaning he would not be eligible for parole until he had served 85% of his sentence and could not accrue credits that would reduce the sentence to less than 85% of the sentence imposed. In contrast, ODOC was administering the sentence for Count 2 under the 1/3 rule. Upon Mr. Davison's inquiry and request for a correction with regard to Count 1, however, ODOC determined the 85% rule applied to *both* sentences. While he was grieving the

application of the 85% rule, Mr. Davison also came to believe he was missing earned credits from 2002 until 2009. ODOC responded that the state auditor had audited his file in 2009 and any discrepancies had been corrected at that time.

Mr. Davison unsuccessfully pursued relief in state court, then filed his federal-court application under § 2241. He asserted four claims: (1) the state was improperly executing his sentence for Count 2 with regard to the percentage of time he was required to serve and the denial of earned credits; (2) the state had improperly denied him earned credits between 2002 and 2009; (3) the state trial court "lacked . . . jurisdiction to impose an 85% sentence [for] Count One," R. at 9; and (4) his "[j]udgment and [s]entences should be amended to say what it is meant to say," R. at 10. The state responded, not only invoking timeliness and exhaustion, but also arguing claims three and four properly were § 2254 claims and, as such, were barred as unauthorized second or successive claims.

The district court rejected the state's § 2254 argument as to claim four, but it held that claim three was an unauthorized second or successive § 2254 claim. It also held that claims one, two, and four were barred by the one-year limitations period in 28 U.S.C. § 2244(d)(1). The district court later granted a COA as to claims one, two, and four. Mr. Davison appeals only the dismissal of claim four.[2]

[2] In his opening brief, Mr. Davison challenges the dismissal of claims one, two, and four, and he requests a COA for claim three. In his reply brief, however, he explicitly abandons claims one, two, and three, stating "claims one and two of [the] section 2241 [h]abeas [p]etition can be consolidated into claim [f]our" and "Petitioner request[s] leave from this court to have claims one, two, and three

DISCUSSION

Claim four alleged Mr. Davison's "[j]udgment and [s]entences should be amended to say what it is meant to say." R. at 10. The state argues the district court lacked jurisdiction to decide this claim. Mr. Davison contends the district court erred in holding the claim was untimely.

I. Claim four was not a second or successive § 2254 claim.

Before the district court, Mr. Davison explained his argument in claim four is "that his Judgment and Sentences do not indicate the percentage he is required to serve before parole consideration[,] . . . and the infirmity . . . [is] causing ODOC to administer his sentences in Count one and two under the 85% Rule." R. at 250. Based on this explanation, the district court rejected the state's suggestion that claim four was an unauthorized second or successive § 2254 claim. On appeal, the state renews its assertion that the district court lacked jurisdiction to decide this claim.

"Petitions under § 2241 are used to attack the execution of a sentence, in contrast to § 2254 habeas and § 2255 proceedings, which are used to collaterally attack the validity of a conviction and sentence." *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (citation omitted). It does not appear claim four challenges the validity of the judgment and sentences themselves—Mr. Davison would remain convicted of the offenses and sentenced to the same terms of imprisonment. Rather, claim four alleges certain omissions from the documents

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dismissed from these pleadings." Aplt. Reply Br. at 1-2. We therefore treat this appeal as challenging only the dismissal of claim four.

affect the administration of the sentences. Because Mr. Davison tied claim four to the execution of his sentence, we cannot conclude the district court erred in allowing the claim to proceed under § 2241.[3]

II. Claim four was untimely.

A. Legal Standards

Under § 2244(d)(1), "[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." This limitation applies to applications under § 2241 as well as under § 2254. *See Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006). The statute provides for tolling to allow a prisoner to exhaust state-court remedies: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." § 2244(d)(2). We review the application of § 2244(d)(1) de novo, *see Fleming v. Evans*, 481 F.3d 1249, 1254 (10th Cir. 2007), but we review underlying findings of fact for clear error, *see Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006).

[3] The district court stated that "reasonably construed, claim four, as described in the petition, does not state a cognizable habeas claim under either § 2241 or § 2254." R. at 281-82. Nevertheless, it considered the timeliness of the claim. Because we affirm the district court's determination regarding timeliness, we need not consider further whether or to what extent claim four's allegations state a cognizable habeas claim.

B. Timeline

The record establishes the following timeline of events relevant to claim four:

- February 6, 2018: Mr. Davison exhausted his administrative remedies
- February 7, 2018: the one-year limitations period began
- June 8, 2018: Mr. Davison filed a state postconviction application
- April 8, 2019: the OCCA affirmed the denial of the application
- June 24, 2019: Mr. Davison filed a state motion to alter or amend the judgment
- September 18, 2019: the state trial court denied the motion to alter or amend
- December 23, 2019: Mr. Davison filed a notice of intent to appeal
- January 21, 2020: Mr. Davison filed a petition in error with the OCCA
- April 30, 2020: the OCCA declined jurisdiction and dismissed the appeal as untimely
- May 11, 2020: Mr. Davison filed a state-court motion for an out-of-time appeal
- October 5, 2021: Mr. Davison filed a mandamus petition seeking an order directing the state trial court to rule on his motion
- October 15, 2021: the OCCA denied relief on the merits

C. The district court did not err in calculating excludable time.

The district court excluded the period between June 8, 2018, and April 8, 2019, while Mr. Davison's state postconviction application was pending. Neither party disputes the decision to exclude that time. As of April 9, 2019, therefore, Mr. Davison had 243 days of the one-year period remaining.

The district court also excluded time for Mr. Davison's state-court motion to alter or amend. Specifically, it excluded the period from June 24, 2019, when Mr. Davison filed the motion, until October 18, 2019, the date the court determined he failed to perfect an appeal from the state court's denial of the motion.[4] By the district court's calculation, that left 167 days—the 243 days remaining as of April 9, 2019, minus the 76 days between April 9 and June 24. The 167 days ran out before Mr. Davison filed his May 11, 2020, state-court motion for leave to pursue an out-of-time appeal. The district court therefore declined to exclude any dates related to the motion for an out-of-time appeal.

Mr. Davison challenges the calculation of excludable periods attributable to the motion to alter and amend and the motion for an out-of-time appeal. He asserts he did not receive a copy of the state court's September 18, 2019, order denying his motion to alter or amend until December 16, 2019. He points out he filed a notice of intent to appeal on December 23, 2019, and a petition in error on January 21, 2020. Then, after the OCCA dismissed his appeal as untimely on April 30, 2020, he filed his May 11, 2020, motion for an out-of-time appeal. The state trial court never ruled on that motion, forcing Mr. Davison to file a petition for a writ of mandamus with the OCCA on October 5, 2021, which the OCCA denied (on the merits) on October 15,

[4] The district court excluded 30 days for the time to appeal. Before this court, the state notes that authorities differ over whether the time to take an appeal from a post-conviction motion is 20 days, 30 days, or 60 days. In declining jurisdiction, the OCCA held Mr. Davison had 60 days to file his appeal. But because the result does not change even if the district court should have excluded 60 days rather than 30 days, we need not decide which appeal period applies.

2021. Based on these events, Mr. Davison argues the district court should have excluded the entire time period from June 24, 2019, to October 15, 2021.

The district court correctly declined to do so because the December 2019/January 2020 appeal of the denial of the motion to alter or amend was not "properly filed" as required by § 2244(d)(2). "[A] 'properly filed' application is one filed according to the filing requirements for a motion for state post-conviction relief," including the "time of filing." *Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000) (internal quotation marks omitted). Because the OCCA declined jurisdiction and dismissed the appeal because it was not timely filed, the district court did not err in declining to exclude time for that appeal. *See Loftis v. Chrisman*, 812 F.3d 1268, 1272 (10th Cir. 2016) ("[B]ased on the OCCA's conclusion that Petitioner's state post-conviction appeal was untimely as a matter of state law, the district court correctly held that this appeal did not statutorily toll the federal limitations period, which expired while Petitioner's post-conviction appeal was still languishing in the state court."); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n.4 (10th Cir. 1998) ("We may not count the additional time during which Hoggro appealed the denial of his application for post-conviction relief because that appeal was untimely.").

With 167 days left to run as of October 19, 2019 (the day after Mr. Davison failed to perfect his state-court appeal), the limitations period expired on April 2, 2020, before Mr. Davison filed his May 11, 2020, state-court motion to file an out-of-time appeal. That being so, the district court correctly declined to exclude any time

attributable to that motion. *See Clark*, 468 F.3d at 714 ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations.").[5]

Before this court, Mr. Davison invokes equitable tolling, asserting the state court hindered him in pursuing a timely appeal because it did not promptly mail him a copy of the September 18, 2019, order, and he diligently sought relief. But the district court stated it did not "construe any of Davison's arguments as demonstrating that the circumstances of this case would support equitable tolling," R. at 286, and Mr. Davison does not challenge the district court's understanding or point to where he made equitable-tolling factual assertions or arguments in the district court.[6] We do not generally consider arguments made for the first time on appeal, *see Harris v. Sharp*, 941 F.3d 962, 975 & n.5 (10th Cir. 2019), and we decline to depart from the general rule here.

[5] This conclusion holds true even if the district court should have excluded 60 days for the appeal period. If 167 days remained as of November 19, 2019, then the limitations period expired on May 4, 2020, still a week before Mr. Davison filed the May 11 motion.

[6] In his response to the state's motion to dismiss, Mr. Davison stated that he did not receive a copy of the September 18, 2019, order until December 2019. He did not allege the state court failed to promptly mail him a copy.

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Allison H. Eid
Circuit Judge