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

DONALD EDWARD MCCORD,

Petitioner - Appellant,

v.

CARRIE BRIDGES, Warden,*

Respondent - Appellee.

No. 22-6169
(D.C. No. 5:21-CV-00559-PRW)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY**

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Petitioner Donald Edward McCord is an Oklahoma state prisoner convicted of thirty-one sexual offense counts. Mr. McCord, proceeding pro se,[1] filed a 28 U.S.C.

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* In accordance with Federal Rule of Appellate Procedure 43(c)(2), Carrie Bridges is substituted for Scott Nunn as the respondent in this action. *See* Fed. R. App. P. 43(c)(2) ("When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party.").

** This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. McCord proceeds pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

§ 2254 petition, challenging the validity of his plea agreement on the ground that the prosecution did not ensure satisfaction of the terms of the agreement. A magistrate judge recommended dismissing Mr. McCord's petition as untimely. Over Mr. McCord's objections, the district court adopted the magistrate judge's report and recommendation. The district court also denied a certificate of appealability ("COA"). Mr. McCord now petitions this court for a COA and moves for leave to proceed in forma pauperis. We deny a COA because reasonable jurists could not debate the district court's conclusion that Mr. McCord's § 2254 petition was untimely. Additionally, because Mr. McCord has not raised a nonfrivolous argument, we also deny his motion for leave to proceed in forma pauperis.

I. BACKGROUND

On May 17, 2018, Mr. McCord entered a plea of nolo contendere to thirty-one sexual offense counts. On August 3, 2018, Mr. McCord, represented by counsel, filed a motion to withdraw his plea. About two weeks later, Mr. McCord withdrew his motion. Thereafter, on May 16, 2019, Mr. McCord filed an application for state post-conviction relief. On November 19, 2019, the state trial court dismissed the application for post-conviction relief as "not proper for consideration . . . because [Mr. McCord] affirmatively waived his right to appeal or otherwise seek relief from his convictions." ROA at 39. On December 9, 2019, Mr. McCord filed a second motion to withdraw his plea. The state

court denied relief, concluding that Mr. McCord had not shown "that conditions of his plea agreement . . . [were] not honored by this [c]ourt or the prosecution." *Id.* at 31.

Mr. McCord filed an appeal to the Oklahoma Court of Criminal Appeals ("OCCA") on January 23, 2020. On March 6, 2020, the OCCA affirmed the state trial court's ruling. Mr. McCord filed a petition for rehearing but, on April 7, 2020, the OCCA denied the motion.

On March 18, 2020, Mr. McCord filed a document in federal district court entitled "Application to Order Oklahoma County District Court to Honor Plaintiff's/Appellant's Statuatory [sic] Ten (10) Day Right to Withdraw Plea." *McCord v. State of Okla.*, No. 5:20-cv-00249-PRW (W.D. Okla. Mar. 18, 2020), ECF No. 1 at 1. The district court construed the filing as an appeal from the state trial court's order denying Mr. McCord's motion to withdraw his plea and dismissed the action without prejudice as barred by the *Rooker-Feldman* Doctrine.[2] Mr. McCord did not file an appeal challenging the district court's construction of his filing or dismissal of his action.

In May 2021, more than one year after the OCCA denied rehearing on his direct appeal, Mr. McCord mailed the 28 U.S.C. § 2254 petition underlying this matter to the federal district court.[3] A federal magistrate judge screened Mr. McCord's petition and

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[2] *D.C. Ct. of App. v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923).

[3] Although the district court did not file the petition until June 1, 2021, the envelope bears a postmark of May 28, 2021, and Mr. McCord completed a form indicating that, on May 20, 2021, he provided prison officials with his § 2254 petition for

issued a report and recommendation, concluding the petition was untimely because (1) more than a year had elapsed from when his conviction became final; (2) his state court, post-conviction proceedings did not toll enough time to render his § 2254 petition timely; (3) Mr. McCord did not advance sufficient allegations for entitlement to equitable tolling; and (4) Mr. McCord did not allege actual innocence. Mr. McCord objected to the magistrate judge's report and recommendation. As to the calculation of the deadline to file his § 2254 petition, Mr. McCord argued only that his conviction never became final where he promptly sought to withdraw his plea and where the prosecutor had yet to satisfy the terms of his plea agreement. As to statutory tolling, Mr. McCord contested the date on which proceedings on his state post-conviction relief efforts concluded. Finally, as to equitable tolling, Mr. McCord contended that COVID-19 restrictions in prison impeded his ability to research his claim and that he had pursued the claim as diligently as possible. The district court overruled Mr. McCord's objections, adopted the magistrate judge's report and recommendations in full, dismissed Mr. McCord's petition as untimely, denied a COA, and denied Mr. McCord leave to proceed in forma pauperis.

Before this court, Mr. McCord seeks a COA. Relative to the timeliness of his § 2254 petition, Mr. McCord contends the district court should have granted him equitable tolling because his plea counsel failed to (1) timely file a motion to withdraw

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service on the Attorney General of Oklahoma. Under the prison mailbox rule, we "treat the petition as placed in the hands of prison authorities on the same day it was signed." *Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000).

his plea agreement and (2) place all the terms of his verbal plea agreement on the record, making it difficult for Mr. McCord to support the constitutional claim he seeks to advance through his § 2254 petition. Mr. McCord has also filed a motion for leave to proceed in forma pauperis.

II. DISCUSSION

A. Standard for a COA

Without a COA, we do not possess jurisdiction to review the denial of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court denies relief and denies a COA, we will issue a COA only "if the applicant has made a substantial showing of the denial of a constitutional right.'" *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 28 U.S.C. § 2253(c)(2)). "This standard requires 'a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Further, where a district court denies relief on procedural grounds such as timeliness, the petitioner must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478.

B. Standard for Leave to Proceed In Forma Pauperis

Section 1915 of Title 28 of the United States Code permits a prisoner to seek leave to proceed in forma pauperis and avoid prepayment of fees associated with docketing an

appeal. For a petitioner seeking a COA to obtain leave to proceed in forma pauperis, he must "demonstrate a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted); *see also Felvey v. Long*, 800 F. App'x 642, 646 (10th Cir. 2020) (unpublished). When an appellate court dismisses a proceeding and also denies leave to proceed in forma pauperis, the litigant seeking appellate review remains responsible for paying the filing fee. *Kinnell v. Graves*, 265 F.3d 1125, 1129 (10th Cir. 2001); *see also Knox v. Morgan*, 457 F. App'x 777, 780 (10th Cir. 2012) (unpublished) (reminding § 2254 litigant of responsibility to pay filing fee after denying a COA and denying leave to proceed in forma pauperis).

C. Analysis

Section 2244 of Title 28 of the United States Code establishes the applicable limitation period for commencing a § 2254 proceeding, stating that "[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." 28 U.S.C. § 2244(d)(1). Relevant to Mr. McCord's petition, the limitation period commenced 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). Furthermore, when calculating the limitation period, "[t]he 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. . . .” 28 U.S.C. § 2244(d)(2).

In his application for a COA, Mr. McCord does not contest the district court’s determination that he did not file his § 2254 petition within the one-year statutory time period provided by AEDPA. Nor could he. Put simply, even if Mr. McCord’s one-year limitations period did not commence until the OCCA denied rehearing on his appeal from the trial court’s denial of post-conviction relief, Mr. McCord’s § 2254 petition would still be untimely because he filed it on May 28, 2021, more than a year after the OCCA’s last ruling on April 6, 2020. Furthermore, although Mr. McCord filed an earlier action in the district court, the district court did not construe it as a § 2254 petition, and Mr. McCord has never contested this construction. Thus, Mr. McCord is entitled to a COA only if he can demonstrate the district court’s denial of equitable tolling was debatable or wrong.

“A ‘petitioner’ is ‘entitled to equitable tolling’ if he shows ‘(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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). For several independent yet sufficient reasons, Mr. McCord has not met this standard.

First, the arguments Mr. McCord raises for equitable tolling in his application for a COA in this court differ from the arguments he raised in his objection to the magistrate judge’s report and recommendation. *Compare* Appellant’s Opening Br. & COA Request at 3–4, *with* ROA at 48–50. Accordingly, pursuant to the firm waiver rule, the new

arguments Mr. McCord raise in his application for a COA are not properly before us. *See Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) ("We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate. The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions." (internal quotation marks, citation, and brackets omitted)); *see also Mathews v. Elhabte*, 2022 WL 3592550, at *2 (10th Cir. Aug. 23, 2022) (unpublished) (applying firm waiver rule to deny COA in § 2254 proceeding); *Morales v. Jones*, 417 F. App'x 746, 748–49 (10th Cir. 2011) (unpublished) (applying firm waiver rule in context of arguments regarding timeliness of § 2254 petition and observing that "[a] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue . . . for appellate review" (quotation marks omitted)).

Second, the arguments based on COVID-19 Mr. McCord advanced while before the district court were incapable of supporting equitable tolling. This is primarily because, as pointed out by the district court, the arguments were generalized and did not provide the court with any basis to determine the number of days of equitable tolling to which Mr. McCord might be entitled due to restrictions at his institution of confinement. Moreover, Mr. McCord failed to explain what legal research he needed to conduct before filing his § 2254 petition. Meanwhile, the record strongly suggests Mr. McCord did not need any access to legal research materials following his state court proceeding because his argument for relief—that the state did not fulfill terms of his plea agreement—has

remained exactly the same since he filed his first motion to withdraw his plea agreement in August 2018 in state court.

Third, even if not barred by the firm waiver rule, the arguments Mr. McCord raises in his application for a COA before this court are incapable of satisfying the standard for equitable tolling. Specifically, Mr. McCord presents arguments about purported failings by his plea counsel—that counsel did not timely file a motion to withdraw his plea and that counsel did not place all the terms of the verbal plea agreements on the record. These purported failings, however, occurred well before the OCCA denied rehearing on his appeal from the denial of post-conviction relief. And more than one year elapsed between the OCCA's denial of rehearing and when Mr. McCord filed the § 2254 petition underlying this matter. Accordingly, these purported failings by plea counsel are not capable of tolling the one-year limitation period.

We conclude the district court's determination that Mr. McCord filed his § 2254 out of time and was not entitled to equitable tolling is therefore not debatable or wrong. Furthermore, because Mr. McCord fails to offer a nonfrivolous reason in support of issuance of a COA, he has not satisfied the standard for proceeding in forma pauperis.[4]

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[4] Mr. McCord also has more than ample funds in his prison trust account to pay the appellate filing fee, which serves as an additional ground for denying his motion for leave to proceed in forma pauperis. *See Brown v. Dinwiddie*, 280 F. App'x 713, 715 (10th Cir. 2008) (unpublished) (denying motion to proceed *in forma pauperis* because Mr. Brown's bank statements noted $850 which was sufficient to cover the $455 filing fee for his appeal).

When an appellate court dismisses a proceeding and also denies leave to proceed in forma pauperis, the litigant seeking appellate review remains responsible for paying the filing fee. Thus, Mr. McCord shall be responsible for paying the full amount of the filing fee, which is due and payable to the district court immediately.

III. CONCLUSION

We DENY Mr. McCord's application for a COA, DENY Mr. McCord's motion for leave to proceed in forma pauperis, and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge