

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 30, 2018

Elisabeth A. Shumaker
Clerk of Court

GREGORY THERMAN PIERCE,

Petitioner - Appellant,

v.

JOE M. ALLBAUGH,

Respondent - Appellee.

No. 18-7024
(D.C. No. 6:17-CV-00213-JHP-KEW)
(E.D. Oklahoma)

**ORDER DENYING
CERTIFICATE OF APPEALABILITY***

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

Petitioner Gregory Pierce, an Oklahoma state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his habeas petition brought under 28 U.S.C. § 2254. The district court dismissed Mr. Pierce’s petition as untimely under 28 U.S.C. § 2244(d)’s one-year limitations period. We deny Mr. Pierce’s COA request 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*This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

¹ Because Mr. Pierce is 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).

I. BACKGROUND

A jury convicted Mr. Pierce of trafficking methamphetamine, possessing marijuana, possessing a firearm during the commission of a felony, and possessing a firearm after conviction of a felony. After his conviction, Mr. Pierce filed a direct appeal to the Oklahoma Court of Criminal Appeals (“OCCA”) which affirmed the conviction and sentence on December 11, 2013.

Almost one year later, on September 25, 2014, Mr. Pierce filed an application for state post-conviction relief with the Carter County District Court. The trial court denied Mr. Pierce’s application on July 7, 2015. He then had thirty days to file his petition in error and brief in support with the OCCA. *See* Okla. Stat. tit. 22, ch. 18, app., R. 5.2(C)(2) (2008) (amended 2018).² Mr. Pierce did file a notice of appeal with the trial court; however, he did not file the requisite documents with the OCCA to perfect his appeal.

After Mr. Pierce missed the thirty-day deadline to file his petition in error with the OCCA, he alleges he mailed an application for out-of-time appeal to the trial court on August 11, 2015. But the court never received that application. Nearly two months later, Mr. Pierce checked the status of his appeal online and discovered the trial court had not

² On February 5, 2018, the rules were changed to extend the deadline to file a petition in error with supporting brief from thirty to sixty days; however, this new rule became effective after the relevant time period. *See In re Revision of Portion of Rules of Court of Criminal Appeals*, 2018 OK CR 1. Accordingly, Mr. Pierce’s petition was untimely and did not perfect his appeal.

filed his application. Because the appeal was not filed, Mr. Pierce claims he sent another out-of-time appeal application on October 2, 2015.

On November 2, 2015, Mr. Pierce petitioned for a writ of mandamus in the OCCA, alleging he had mailed the two out-of-time appeals but claiming the trial court had failed to file them. On November 24, 2015, the OCCA ordered the trial court to determine if it had received the pleadings but had not filed them. The trial court responded to the OCCA that the pleadings did not appear on the record, but did advise that the post-conviction notice of appeal was timely filed.

Mr. Pierce's filing errors continued. Instead of resubmitting an application for post-conviction relief to seek an appeal out-of-time to the trial court, Mr. Pierce filed his appeal in the OCCA. The OCCA dismissed the appeal because Mr. Pierce had not obtained permission for an out-of-time appeal from the trial court.

Eventually, Mr. Pierce did follow the correct procedure for seeking an out-of-time post-conviction appeal. On March 21, 2016, he filed an application requesting an appeal out-of-time in the trial court. Both the district court and the OCCA granted Mr. Pierce's request for an out-of-time appeal. But on April 4, 2017, the OCCA affirmed the denial of his July 7, 2015 post-conviction application on the merits.

On June 7, 2017, Mr. Pierce filed a petition for Writ of Habeas Corpus and accompanying brief in the Eastern District of Oklahoma. The State subsequently filed a motion to dismiss, alleging Mr. Pierce had failed to file his habeas petition within one year of his conviction becoming final as required by 28 U.S.C. § 2244(d). The district court granted the motion to dismiss and declined to grant Mr. Pierce a COA. Mr. Pierce

now seeks a COA from this court, arguing the district court failed to consider all of the pleadings he filed with the Oklahoma state courts that he believes tolled the statute of limitations pursuant to § 2244(d).

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) conditions a state prisoner’s right to appeal a denial of habeas relief on the grant of a COA, which requires the applicant to demonstrate “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). Where, as here, the district court denies a habeas petition on procedural grounds, we issue a COA only when the prisoner shows that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Pierce cannot make that showing, and we deny his request.

AEDPA provides a one-year limitations period for habeas corpus petitions filed by state prisoners. See 28 U.S.C. § 2244(d)(1). Section 2244(d)(1) provides four dates that may commence the limitations period, but only one is implicated here—“the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” § 2244(d)(1)(A).

Mr. Pierce filed a direct appeal to the OCCA after he was convicted. The OCCA affirmed his conviction on December 11, 2013. Once the OCCA affirmed his conviction, he had ninety days to petition the U.S. Supreme Court for a writ of certiorari. See Sup. Ct. R. 13.1. Mr. Pierce did not exercise this right. Therefore, his conviction became final

after the ninety-day period expired on March 11, 2014. *See Fleming v. Evans*, 481 F.3d 1249, 1257–58 (10th Cir. 2007) (holding that a conviction becomes final for habeas petitions when the ninety-day period for filing a petition for a writ of certiorari to the Supreme Court has expired). The statute of limitations for Mr. Pierce to file a habeas petition began running the next day and would expire on March 12, 2015. *See Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011) (stating that the one-year statute of limitations ends on the anniversary date of when the judgment becomes final).

Mr. Pierce did not file his habeas petition until June 7, 2017. Thus, we will consider Mr. Pierce’s petition only if the limitations period was either statutorily or equitably tolled.

A. Statutory Tolling

In calculating the statute of limitations for a habeas petition, the one-year period is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Mr. Pierce filed a post-conviction application on September 25, 2014, tolling the statute of limitations. On July 7, 2015, the trial court denied the post-conviction application, after which Mr. Pierce had thirty days to file a petition in error. *See Okla. Stat. tit. 22, ch. 18, app., R. 5.2(C)(2)* (2008) (amended 2018). But Mr. Pierce did not perfect this appeal. Accordingly, on August 6, 2015, the tolling of the statute of limitations ceased. The period that the statute of limitations was tolled extended Mr. Pierce’s deadline to file a habeas petition 316 days. The 316 days are added to the end of the one-year anniversary of when the conviction became final, extending Mr. Pierce’s

filing deadline to January 22, 2016. *See Harris*, 642 F.3d at 906 n.6 (noting days that the statute of limitations is tolled extend the deadline for filing a federal habeas petition).

Mr. Pierce argues that *all* his various filings in the Oklahoma state courts tolled the limitations period and that he is thus within the limitations period because there was less than one-year's time when he did not have anything pending in state court. But the limitations period is tolled only when an application for "post-conviction or other collateral review" is "*properly filed*." § 2244(d)(2) (emphasis added). An "application is 'properly filed' if it satisfies the State's requirements for filing such a pleading."

Robinson v. Golder, 443 F.3d 718, 720 (10th Cir. 2006).

While Mr. Pierce did file a notice of post-conviction appeal with the trial court, he did not perfect the appeal. To perfect the appeal he needed to file a timely petition in error and brief, with a certified copy of the trial court's order, within thirty days. *See* Okla. Stat. tit. 22, ch. 18, app., R. 5.2(C) (2008) (amended 2018). Because Mr. Pierce did not file his petition in error and brief on time, it was not properly filed. Accordingly, the statute of limitations was tolled only during the 316-day period after he first filed his application for post-conviction relief until his August 6, 2015 deadline for filing his appeal in the OCCA.

Mr. Pierce claims he twice mailed a request for an out-of-time appeal to the trial court—in August 2015 and again in October 2015. But the trial court has no record of receiving these documents, and it therefore never filed them. To toll the statute of limitations, § 2244(d)(2) requires the application to be "*properly filed*." A document that

is never filed cannot toll the statute of limitations any more than an improperly filed document can.

Similarly, Mr. Pierce's various petitions for writs of mandamus do not toll the statute of limitations. Under Oklahoma law, "[m]andamus is a command from a court of law of competent jurisdiction in the name of the state or sovereign to [an] inferior court, . . . requiring the performance of a duty therein specified." *Woolen v. Coffman*, 676 P.2d 1375, 1376–77 (Okla. Crim. App. 1984). Only a "properly filed application for State post-conviction or other collateral review," § 2244(d)(2) (emphasis added), will toll the statute of limitations. Mr. Pierce's petition did not seek review of the judgment—instead it alleged he had mailed two applications seeking an appeal out-of-time that had not been filed. Thus, the petition did not challenge the judgment pursuant to which Mr. Pierce is incarcerated. Rather, the circumstances surrounding Mr. Pierce's conviction were entirely irrelevant to the OCCA ordering the state trial court to respond to the petition. *See Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (holding that mandamus does not qualify as collateral review). As a result, these petitions do not toll the statute of limitations on Mr. Pierce's habeas petition.

Nor does Mr. Pierce's out-of-time appeal toll the relevant limitations period. After the January 22, 2016 deadline had passed, the OCCA granted Mr. Pierce an out-of-time appeal and affirmed his conviction. Because the deadline had already elapsed, this appeal cannot toll the statute of limitations. *See Fisher v. Gibson*, 262 F.3d 1135, 1142–43 (10th Cir. 2001) (only applications for state post-conviction relief filed before the deadline toll the limitations period).

In summary, jurists of reason would not find it debatable that the district court was correct in ruling that Mr. Pierce was entitled to statutory tolling only for the 316-day span from September 25, 2014 to August 6, 2015.

B. Equitable Tolling

Mr. Pierce is “‘entitled to equitable tolling’ only 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)). “The diligence required for equitable tolling purposes is ‘reasonable diligence,’ not ‘maximum feasible diligence.’” *Id.* at 653 (first quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996), then quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)). Equitable tolling applies “only ‘in rare and exceptional circumstances,’” *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). Extraordinary circumstances that could warrant equitable tolling include “when an adversary’s conduct—or other uncontrollable circumstances—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period,” *id.*, but such circumstances do not include “a garden variety claim of excusable neglect,” *Holland*, 560 U.S. at 651 (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Because of this high standard, Mr. Pierce bears a strong burden to establish equitable tolling. *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008).

Mr. Pierce is not entitled to equitable tolling because he does not identify any extraordinary circumstances that prevented him from timely filing. Before the district court, he argued that the “extraordinary circumstances presented . . . ent[itle]d him to equitable tolling.” ROA at 89. He further stated “it is . . . obvious that some extraordinary circumstances stood in his way.” *Id.* But the only hurdle he specifies is being forced to rely on untrained law clerks. This does not qualify as an extraordinary circumstance and his pro se status does not warrant equitable tolling. *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

In his application for a COA, Mr. Pierce also alleges for the first time that his prison facility was on lock-down status for two months inhibiting access to the law library which prevented him from timely appealing the denial of his state post-conviction application. This argument is forfeited because “we adhere to our general rule against considering issues for the first time on appeal.” *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012).³

³ Even if we considered Mr. Pierce’s petition for a writ of mandamus as either statutorily or equitably tolling the limitations period, his petition would still be late. Mr. Pierce’s conviction became final on March 11, 2014, so his one-year statute of limitations for a habeas petition would expire on March 12, 2015. The limitations period was tolled from September 25, 2014, when Mr. Pierce filed his application for post-conviction relief, until the deadline elapsed for filing his appeal of the denial of his post-conviction application on August 6, 2015. This extended the statute of limitations until January 22, 2016. Mr. Pierce filed a petition for writ of mandamus on November 2, 2015, and the mandamus was dismissed as moot on January 25, 2016. This would have extended the deadline only 85 days, or until April 16, 2016. Then on March 21, 2016, Mr. Pierce properly filed his application for post-conviction appeal out-of-time. The OCCA affirmed the trial court on April 4, 2017, extending the deadline 380 days. This would establish a deadline to file a petition for habeas

III. CONCLUSION

Because Mr. Pierce has not shown that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” we need not reach the substantive merit of his claims. For the foregoing reasons, we DENY Mr. Pierce’s request for a COA and DISMISS this appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

relief of May 1, 2017 (after accounting for Saturday and Sunday). Thus, any petition filed after May 1, 2017 would be untimely. Mr. Pierce did not file his habeas petition until June 7, 2017.