FILED
United States Court of Appeals
Tenth Circuit

August 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLINT TIRONE BARGER,

Defendant - Appellant.

No. 19-5028
(D.C. No. 4:19-CV-00020-JHP-FHM &
4:17-CR-00032-JHP-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Clint Tirone Barger, a federal prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to challenge the district court's dismissal of his habeas application under 28 U.S.C. § 2255 as time-barred. For the reasons below, we deny his request for a COA and dismiss the matter.

On March 29, 2017, Barger pleaded guilty to distribution and possession of child pornography. For these crimes, on July 10, 2017, the district court sentenced

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[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Because Barger is proceeding pro se, we liberally construe his filings. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) ("[W]e must construe [a pro se litigant's] arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.").

him to 262 months' imprisonment and eight years' supervised release. As part of the plea agreement, Barger waived his appellate rights and his right to collaterally attack his conviction or sentence under § 2255, except for claims of ineffective assistance of counsel. He did not attempt to file a direct appeal. But on January 11, 2019, he moved to vacate, set aside, or correct his sentence under § 2255. After the district court ordered a response, the United States moved to dismiss the § 2255 motion as untimely. On March 13, 2019, the district court summarily dismissed Barger's § 2255 motion as time-barred and entered judgment in favor of the United States. On April 5, 2019, the district court denied Barger's request for a COA. Because the district court denied Barger a COA, he renews his request with this court.

Under 28 U.S.C. § 2253(c)(1), a federal prisoner may appeal from a final order dismissing his § 2255 motion only when a COA has been issued. *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1263 (2016). We may grant a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant satisfies this standard when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Barger has failed to satisfy his burden.

Because Barger's plea agreement contained a waiver of his right to file a § 2255 motion, we begin there. A waiver of the defendant's appellate rights will be upheld only if (1) the issue before us falls within the scope of the waiver, (2) the defendant knowingly and voluntarily waived his appellate rights, and (3) enforcing

the waiver will not result in a miscarriage of justice. *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam). Because Barger's plea agreement excluded claims of ineffective counsel from his waiver and his § 2255 motion concerns only three claims of ineffective counsel, the motion falls outside the waiver and fails to satisfy the first *Hahn* factor. We therefore will not apply the waiver in this matter. But his § 2255 motion is precluded for another reason: it is time-barred.

A habeas petitioner must file a § 2255 motion within one year of the date on which his conviction becomes final. *See* 28 U.S.C. § 2255(f)(1). Where a defendant does not file a direct criminal appeal, his conviction becomes final when the time to file an appeal expires—14 days after judgment is entered. *See* Fed. R. App. P. 4(b)(1)(A)(i); *United States v. Prows*, 448 F.3d 1223, 1227–28 (10th Cir. 2006). Here, because Barger did not file a direct appeal and the district court entered judgment against him on July 10, 2017, his conviction became final on July 24, 2017. Thus, under § 2255(f)(1), Barger had until July 24, 2018 to file a timely § 2255 motion. Unfortunately, he didn't file until January 11, 2019. Accordingly, absent statutory or equitable tolling, his § 2255 motion is untimely. Barger does not argue that statutory tolling could apply and does not claim to be factually innocent such that he potentially could be entitled to an exception to the limitations period. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But construing Barger's COA Application liberally, we understand Barger to argue that equitable tolling is warranted because his mental incompetency constitutes an extraordinary circumstance that prevented his timely filing of a § 2255 motion.

Equitable tolling is "a judicially-crafted stopping of the clock," *Fisher v. Gibson*, 262 F.3d 1135, 1143 (10th Cir. 2001), that we apply "only in rare and exceptional circumstances," *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (citation and internal quotation marks omitted). To invoke equitable tolling, a habeas petitioner must "show[] (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) (citation and internal quotation marks omitted). "An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (alteration and citation omitted).

Mental incapacity may be an extraordinary circumstance warranting equitable tolling "only when there is a severe or profound mental impairment, such as that resulting in institutionalization or adjudged mental incompetence." *Del Rantz v. Hartley*, 577 F. App'x 805, 810 (10th Cir. 2014); *see id.* (collecting cases). Accordingly, the habeas petitioner must offer some "evidence that the individual is not 'capable of pursuing [his] own claim because of mental incapacity.'" *Rawlins v. Newton-Embry*, 352 F. App'x 273, 276 (10th Cir. 2009) (alterations omitted) (quoting *Hendricks v. Howard,* 284 F. App'x 590, 591 (10th Cir. 2008)); *see also Reupert v. Workman,* 45 F. App'x 852, 854 (10th Cir. 2002). Here, Barger has asserted in his § 2255 affidavit that he has "a low I.Q.," is "mentally a child," and "ha[s] other mental health problems" because of "brain damage." ROA at 68. He further states, without providing any

evidence from the Social Security Administration, that he was "declared mentally incompetent by Social Security" in 2011.[2] *Id.*

Even if we were to accept as true his allegation regarding mental incompetence, Barger would still need to show that his alleged mental impairment caused the untimeliness. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (equitable tolling requires a showing "that the failure to timely file was caused by extraordinary circumstances beyond his control"). "In other words, 'mental impairment is not *per se* a reason to toll a statute of limitations.'" *Del Rantz*, 577 F. App'x at 810 (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009)). For instance, even where a court had previously found a defendant incompetent to stand trial, we still declined to apply equitable tolling to his otherwise time-barred habeas petition because the defendant "provided no evidence, except his conclusory allegations, that his mental illness prevented him from filing a timely habeas petition." *Maynard v. Chrisman*, 568 F. App'x 625, 627 (10th Cir. 2014). Barger's

[2] Because he has not offered any administrative evidence, it is unclear whether Barger was found mentally incompetent or mentally disabled by the Social Security Administration. We note that a finding of mental disability for purposes of the Social Security Act means only that "he's incapable of 'substantial gainful activity'—a standard different than that" for legal incompetence. *Veren v. United States*, 575 F. App'x 841, 842 (10th Cir. 2014) (quoting 42 U.S.C. § 423(d)(2)(A)); *see Stussy v. Office of Pers. Mgmt.*, 662 F. App'x 972, 975 (Fed. Cir. 2016) (noting that "mental disability and mental incompetence are not the same thing" (citation omitted)); *Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (explaining that a finding of mental disability has a specific definition in the social security context). We assume Barger was found mentally incompetent and proceed accordingly.

alleged mental incompetency therefore must be "a but-for cause of any delay" in his seeking habeas relief. *Bills v. Clark*, 628 F.3d 1092, 1100 (9th Cir. 2010).

Barger attempts to establish the required nexus between his alleged incompetency and untimely filing by arguing that "he had no knowledge of his federal sentence until his state sentence was completed" and that he could not "understand the law or procedure necessary to prepare and file a habeas petition on his own." COA Application at 3. He further argues in his § 2255 motion that he cannot read or write. Without more, these assertions are not enough to satisfy his burden. Ignorance of the law and required procedures, even for a pro se prisoner, is not an extraordinary circumstance and cannot be the basis on which a habeas petitioner is excused from meeting the one-year limitations period. *See, e.g.*, *Marsh*, 223 F.3d at 1220 ("[I]t is well established that ignorance of the law, even for an incarcerated pro se prisoner, generally does not excuse prompt filing." (internal quotation marks omitted)). Indeed, "[w]e have squarely held that the fact that a prisoner did not know about [a habeas petition's] limitations period does not entitle the prisoner to equitable tolling." *Brown v. Dinwiddie*, 280 F. App'x 713, 715 (10th Cir. 2008) (citing *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)). Moreover, his alleged low IQ and "illiteracy [are] insufficient to toll the statute of limitations." *Rawlins*, 352 F. App'x at 275; *see Yang,* 525 F.3d at 929–30 (10th Cir. 2008) (collecting cases rejecting illiteracy as an extraordinary circumstance that would warrant equitable tolling); *Green v. Hinsley*, 116 F. App'x 749, 751 (7th Cir. 2004) (holding that

allegations of low IQ, without accompanying evidence showing that it prevented the habeas petitioner from timely filing, were insufficient to warrant equitable tolling).

For the foregoing reasons, we conclude that reasonable jurists would not debate the district court's dismissal of Barger's § 2255 motion as time-barred. We therefore deny Barger's request for a COA and dismiss this matter. We grant Barger's motion to proceed in forma pauperis and deny as moot his motion to compel defense counsel to surrender his case file.

Entered for the Court

Gregory A. Phillips
Circuit Judge