FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PHILLIP R. PARKS,

Petitioner - Appellant,

v.

SAM CLINE, Warden,

Respondent - Appellee.

No. 19-3112
(D.C. No. 5:19-CV-03061-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Phillip Parks, a Kansas state prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to challenge the district court's order dismissing as untimely his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We deny his request and dismiss this 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[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Parks is a pro se litigant, we liberally construe his pleadings, but we will not serve as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

BACKGROUND

On January 24, 1997, Parks pleaded no contest to premeditated first-degree murder for the 1978 strangulation and drowning of his wife. *State v. Parks*, 962 P.2d 486, 488 (Kan. 1998). He was originally charged with the murder soon after the crime occurred, but in 1981 the prosecution dismissed the charge without prejudice after Parks' original statement to law enforcement was suppressed by court order and the ruling was affirmed on appeal. *See id.* (citing *State v. Parks*, 623 P.2d 516 (Kan. App. 1981)).

In 1993, Parks returned to the criminal-justice system, this time charged and convicted for the attempted murder of his second wife. *Id.* During that trial, "it was revealed that [Parks] had stated to his wife that he had to kill her just like he had killed Rachel" (the name of his first wife). *Id.* On April 15, 1996, the state then refiled a first-degree-murder charge against Parks for killing his first wife. *Id.* The parties entered into a plea agreement, which the trial court accepted. *Id.* at 488. The court then sentenced Parks to life imprisonment, running consecutive with his sentence from the attempted-murder case. *Id.* at 489. Parks appealed, and on July 10, 1998 the Supreme Court of Kansas affirmed his sentence. *See id.* at 488.

Seventeen years later, on January 26, 2015, Parks sought post-conviction relief in state court, filing a motion to set aside a void judgment. *See State v. Parks*, 417 P.3d 1070 (Kan. 2018). After appointing counsel and conducting a hearing, the district court denied the motion as untimely and without excusable neglect. *Id.* at

1072. Parks appealed, and on June 1, 2018, the Kansas Supreme Court affirmed. *Id.* at 1073.

On April 5, 2019, Parks then sought federal habeas relief and filed the § 2254 petition now before us in the District of Kansas. On April 17, 2019, the district court issued an order directing Parks to show cause why his petition should not be dismissed as untimely. Parks responded that "he is clearly pursuing an ongoing battle with the Kansas Court System asserting that his sentence was illegal or void, and has tried to move the Courts to vacate, because his sentence can be corrected at any time," ROA at 69, and that his motion "attacking judgment as void under Rule 60(b)(4) had no time limit," *id.* at 70. He also asserted possible grounds for the court to apply equitable tolling:

> 1) [he is] allowed to file a void judgment or illegal sentence at anytime, 2) that he is also actually innocent of his charge/conviction/sentence, 3) that the prosecutor knowingly used perjured testimony in order to gain an illegal conviction, and 4) that the prosecutor knowingly misled the petitioner into taking a plea that the prosecutor knowingly knew was defective, and that the Court did not have the authority to sentence him on.

Id. at 74.

The district court rejected these bases for equitable tolling, noting that Parks had entered into a no-contest plea and had failed to introduce any new evidence supporting a claim of actual innocence. Thus, the court dismissed the petition and declined to issue a COA. Parks then filed a notice of appeal and a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. The district court extended Parks' leave to proceed *in forma pauperis* on appeal, but

denied his Rule 59(e) motion because Parks failed to "present any argument concerning the grounds for dismissal." *Id.* at 87.

Parks now renews his request for a COA and argues that the district court erred in dismissing his petition as time-barred. He raises three arguments to support his contention: (1) the prosecutor knowingly misled him into taking a defective plea, (2) his trial counsel provided constitutionally ineffective assistance of counsel, and (3) the trial court erred by accepting a defective plea.

DISCUSSION

Where, as here, a district court dismisses a § 2254 petition on procedural grounds, we may issue a COA only if the petitioner demonstrates "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). Parks has failed to satisfy this burden. There is no dispute whether the district court's procedural ruling is correct.

Under 28 U.S.C. § 2244(d)(1), a petitioner must comply with a one-year statute of limitations. As relevant here, the one-year limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." § 2244(d)(1)(A). On July 10, 1998, the Kansas Supreme Court affirmed Parks' sentence on direct review, but

Parks delayed filing his federal habeas petition until April 5, 2019. Parks waited nearly twenty-one years to seek federal habeas relief.[2] Thus, his petition is untimely.

But that is not the end of the analysis. The district court may still entertain the merits of his otherwise-untimely petition if equitable tolling applies. Parks 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) (citation omitted). This is an exceedingly rare remedy, and as such, Parks "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) (citation omitted). Parks has failed to establish both diligence and extraordinary circumstances.

In his combined opening brief and COA application, Parks does not attempt to argue that he has been diligently pursuing his rights. Nor could he. For equitable-tolling purposes, we do not require a prisoner to exercise maximum diligence; the prisoner need show only "reasonable diligence." *Holland*, 560 U.S. at 653. But not only did Parks wait twenty-one years to seek review in federal court, he also did not file a petition for state post-conviction relief until 2015—seventeen years after the

[2] Parks did not seek state post-conviction relief until January 26, 2015, well beyond the expiration of § 2244's one-year limitations period. Thus, Parks is not entitled to statutory tolling. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2018) (explaining petitions for state post-conviction relief must be filed within the one-year limitations period for statutory tolling to apply).

Kansas Supreme Court affirmed his conviction on direct appeal. Waiting twenty-one years (or seventeen years, for that matter) to file the petition did not display reasonable diligence.

Parks has also failed to show that an extraordinary circumstance prevented his timely filing. Relying on the test applied in the context of procedural default, Parks has identified what he calls "external factors" causing his "impeded efforts to comply with the State's procedural rule." Appellant's Combined Opening Br. & COA Application at 3.2. Though he does not identify which state procedural rule he is attempting to overcome, he names the following "causes" for default: the trial judge not accepting the plea agreement's proposed sentence, the prosecutor's defective plea deal, and the alleged ineffectiveness of trial counsel. In other words, he relies on the same three issues presented in his combined opening brief and COA application. The standard and arguments that Parks has presented are applied when a state prisoner has failed to comply with a state procedural rule, and a federal court must assess whether to nonetheless consider the merits of the prisoner's federal habeas petition. *See id.* (citing *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018)); *Grant*, 886 F.3d at 891–92 (collecting procedural-default cases and discussing how federal courts assess whether to consider state prisoner's procedurally defaulted claims). In any event, if Parks is attempting to present these "causes" as bases for equitable tolling or reasons to otherwise allow his petition to proceed on the merits, his argument is without merit. The allegations and arguments that he identifies in his brief were known to him by the time of sentencing. As such, none of the "causes" explains why he waited

seventeen years to seek state post-conviction relief and twenty-one years to file a federal habeas petition. As such, none could possibly serve as an extraordinary obstacle standing in his way of diligently pursuing his rights.

Further, to the extent Parks argues that any procedural bar to his habeas claim should be excused to prevent a fundamental miscarriage of justice based on his claim of actual innocence, that argument, too, is without merit.[3] To prevail on such a claim, Parks "must support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Here, Parks' claim of actual innocence is premised on his claim that his second wife committed perjury when she testified that Parks threatened to kill her as he had killed his first wife. His argument fails to provide any evidence affirmatively demonstrating his innocence—it is conclusory, at best. His self-serving and unsubstantiated accusation is not enough. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." (citation and internal quotation marks

[3] In his response to the district court's order to show cause, Parks claimed actual innocence. Though Parks does not explicitly repeat this claim on appeal, he does state that he was "sentence[d] for a crime that he did not commit." Appellant's Combined Opening Br. & COA Application at 3.2 (emphasis and internal quotation marks omitted).

omitted)). Parks has failed to show the possibility of a fundamental miscarriage of justice excusing the timeliness bar imposed by § 2244(d).

CONCLUSION

We conclude that reasonable jurists would not debate the correctness of the district court's procedural ruling. Accordingly, we DENY Parks' application for a COA and DISMISS this matter.

Entered for the Court

Gregory A. Phillips
Circuit Judge