

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 8, 2021

Christopher M. Wolpert
Clerk of Court

KENNETH J. COX,

Petitioner - Appellant,

v.

ED CALEY, Warden of the Colorado
Territorial Correctional Facility; THE
ATTORNEY GENERAL OF THE STATE
OF COLORADO,

Respondents - Appellees.

No. 21-1201
(D.C. No. 1:20-CV-03272-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

Kenneth J. Cox, a Colorado state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his 28 U.S.C. § 2254 application for a writ of habeas corpus. He also seeks leave to proceed *in forma pauperis* (“*ifp*”). Exercising jurisdiction under 28 U.S.C. § 1291, we deny both requests and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Mr. Cox is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

A jury convicted Mr. Cox in Colorado state court of 14 counts related to the sexual abuse of his stepdaughters. The court sentenced him to 24 years to life in prison on each of two of the fourteen counts, to run consecutively. His sentences on the remaining counts were to run concurrently. The Colorado Court of Appeals affirmed his conviction on direct appeal, and the Colorado Supreme Court denied certiorari.

After the mandate of the Colorado Court of Appeals issued, Mr. Cox filed a postconviction motion for reconsideration of his sentence under Colorado Rule of Criminal Procedure 35(b). The sentencing court granted his motion and reduced each of his consecutive sentences to 15 years to life.

Mr. Cox filed a 28 U.S.C. § 2254 application for habeas corpus in federal court on November 2, 2020. The state moved to dismiss the application as untimely under 28 U.S.C. § 2244(d)(1)(A), which provides that “[a] 1-year period of limitation . . . shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.”

The magistrate judge found that Mr. Cox’s conviction became final on January 11, 2016. He found the limitation period was tolled under 28 U.S.C. § 2244(d)(2) from February 16, 2016 to December 7, 2016, while Mr. Cox’s Rule 35(b) motion was pending. The limitation period thus expired on November 3, 2017—three years before Mr. Cox filed his § 2254 application. The magistrate judge also concluded that equitable tolling was not available to Mr. Cox because he had not shown that he pursued his rights

diligently or that some extraordinary circumstance prevented timely filing. He recommended that the district court dismiss the application as untimely.

The district court adopted the magistrate judge's recommendation, dismissed Mr. Cox's application, and denied a COA. Mr. Cox appealed and filed an opening brief, which we construe as a combined brief and application for a COA. *See* 10th Cir. R. 22.1(A).

II. DISCUSSION

A. *COA Standard*

Before we may exercise jurisdiction over Mr. Cox's appeal, he must obtain COAs for the issues he wishes to raise. *See* 28 U.S.C. § 2253(c)(1)(A), (c)(3). Where, as here, the district court dismissed the § 2254 application on procedural grounds, we will grant a COA only if the applicant can demonstrate both "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).

B. *Analysis*

Mr. Cox has not made the showing required for a COA. The district court correctly dismissed his § 2254 application because it was filed outside the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1)(A). And Mr. Cox failed in his brief to address this ground for dismissal.

Subject to exceptions not applicable here, state prisoners must file their § 2254 applications within one year of the day "the judgment [of the state court] 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). This period is tolled while a state post-conviction petition is pending. *Id.* § 2244(d)(2).

The Colorado Supreme Court denied certiorari on Mr. Cox’s direct appeal on October 13, 2015. Mr. Cox did not seek certiorari from the United States Supreme Court, so his conviction became “final” for purposes of § 2244(d)(1)(A) when his time to do so expired on January 11, 2016. *See Al-Yousif v. Trani*, 779 F.3d 1173, 1178 (10th Cir. 2015); Sup Ct. R. 13.1 (petition for certiorari must be filed within 90 days of entry of order denying discretionary review in state court of last resort).

The one-year limitation period was tolled, with 330 days remaining, when Mr. Cox filed a state post-conviction motion for sentence reconsideration on February 16, 2016. 28 U.S.C. § 2244(d)(2). The limitation period began to run again when the time for appealing the state court’s order granting his motion for sentence reduction expired on December 7, 2016. The limitation period expired 330 days later, on November 3, 2017.² Mr. Cox’s § 2254 petition, filed in November 2020, was therefore untimely.

In his brief on appeal, Mr. Cox does not address the timeliness of his application. He has not challenged the district court’s finding that his application was untimely or attempted to demonstrate that any exceptions to the one-year time bar apply. Instead, he makes various arguments concerning the merits of his § 2254 application for relief. He

² Mr. Cox also filed a second state post-conviction motion on February 5, 2018, which was denied. But that did not toll the limitations period under § 2244(d)(2) because the period had already expired.

has therefore waived any challenge to the district court’s conclusion that his application should be dismissed as untimely. *See Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) (The rule that “[a]rguments not clearly made in a party’s opening brief are deemed waived” applies “even to prisoners who proceed pro se and therefore are entitled to liberal construction of their filings.”).

Mr. Cox has not shown that reasonable jurists would debate the correctness of the district court’s decision. He therefore is not entitled to a COA.

III. CONCLUSION

We dismiss this matter. We also deny Mr. Cox’s request to proceed *ifp*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge