

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 29, 2023

Christopher M. Wolpert
Clerk of Court

WILLIAM SHIRLEY, IV,
Petitioner - Appellant,

v.

STEVEN HARPE,
Respondent - Appellee.

No. 23-6044
(D.C. No. 5:22-CV-01049-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.

Petitioner-Appellant William Shirley, IV, a state inmate appearing pro se, seeks to appeal the district court’s denial of his habeas corpus petition, 28 U.S.C. § 2254, as time barred. 28 U.S.C. § 2244(d)(1)(A). The district court concluded that there was no basis for statutory or equitable tolling of the Antiterrorism and Effective Death Penalty Act’s (AEDPA) one-year limitation period and dismissed the petition as untimely. As no reasonable jurist could conclude otherwise, we deny a COA 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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Background

Mr. Shirley pled guilty in Oklahoma state court to first-degree manslaughter in 2018 and was sentenced to 25 years' imprisonment. After unsuccessful attempts at obtaining state post-conviction relief, Mr. Shirley filed his federal petition. He alleged his conviction was devoid of due process because he is Indian, the offense was committed on Indian land, and based on the Supreme Court's ruling in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), Oklahoma lacked jurisdiction to prosecute him under the Major Crimes Act, 18 U.S.C. § 1153(a). R. 5, 7.

The magistrate judge recommended the petition be dismissed as untimely under the one-year limitation period as he had not shown a basis for statutory or equitable tolling. Upon consideration of Mr. Shirley's objections and applying de novo review, the district court adopted the recommendation and dismissed the petition. Shirley v. Harpe, No. CIV-22-1049, 2023 WL 2496720 (W.D. Okla. Mar. 14, 2023).

Discussion

Mr. Shirley asks this court to consider his "[j]urisdictional [c]laim" de novo. *Aplt. Br.* at 5. But a COA is a prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). To obtain a COA, where, as here, a district court has dismissed a filing on procedural grounds, Mr. Shirley must show 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). No

reasonable jurist could conclude that the district court's dismissal of Mr. Shirley's petition was procedurally incorrect.

A state inmate seeking habeas relief must file in federal court within one year “from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review” or “the date on which the constitutional right asserted . . . has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2244(d)(1)(A), (C). The one-year limitations period may be tolled pending the disposition of “a properly filed application for State post-conviction or other collateral review.” *Id.* § 2244(d)(2).

Following entry of his guilty plea, Mr. Shirley was sentenced on September 25, 2018. *Shirley*, 2023 WL 2496720, at *1. Mr. Shirley did not move to withdraw his plea or pursue a direct appeal. Thus, his conviction became final when the time to pursue a direct appeal expired on December 24, 2018. Okla. Stat. tit. 22, § 1051(A). Given Mr. Shirley did not file his federal habeas petition until December 2022, four years after his conviction became final, his petition was untimely. R. 3; 28 U.S.C. § 2244(d)(1)(A). Although Mr. Shirley pursued state post-conviction relief, it was two years after his state conviction became final, so statutory tolling did not apply. 28 U.S.C. § 2244(d)(2); *Shirley*, 2023 WL 2496720, at *1; Okla. Stat. tit. 22, § 1080.1 (“A one-year period of limitation shall apply to the filing of any application for post-conviction relief . . .”).

Mr. Shirley asserts the limitations period should proceed from the date the Supreme Court decided *McGirt v. Oklahoma*. Aplt. Br. at 6; *see* 28 U.S.C. § 2244(d)(1)(C). In his view, the Supreme Court implicitly indicated *McGirt*'s

jurisdictional ruling had retroactive effect, because “otherwise *McGirt* (sic) would not have received relief.” *Aplt. Br.* at 6. “But there is at least one fatal flaw to this argument: *McGirt* announced no new constitutional right.” *Pacheco v. El Habti*, 62 F.4th 1233, 1246 (10th Cir. 2023). Thus, § 2244(d)(1)(C) does not apply.

As the district court unassailably found, Mr. Shirley’s petition was time-barred and lacked basis for statutory tolling or application of § 2244(d)(1)(C). Although Mr. Shirley argued that equitable tolling applied in his objections to the magistrate judge’s report and recommendation, he does not raise it on appeal. Thus, the argument is waived. *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003).

We DENY a COA and DISMISS this appeal. Seeing no “reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal[,]” *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991), we deny Mr. Shirley’s motion for leave to proceed without the prepayment of costs or fees.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge