FILED
United States Court of Appeals
Tenth Circuit

October 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FERNANDO LOPEZ,

Petitioner - Appellant,

v.

ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO; JULIAN MARQUEZ, Warden,

Respondents - Appellees.

No. 23-2108
(D.C. No. 1:22-CV-00815-KWR-GJF)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Fernando Lopez, a New Mexico inmate proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's order dismissing his 28 U.S.C. § 2254 habeas petition for being time barred. We deny his petition for a COA and dismiss the matter.

I.

A jury in New Mexico convicted Lopez of first-degree murder in 2011. The New Mexico state trial court sentenced Lopez to life imprisonment plus one year pursuant to a firearm enhancement statute. On appeal, the New Mexico Supreme Court affirmed

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Lopez's conviction but reversed the sentence enhancement, which reduced Lopez's sentence to life imprisonment. Lopez did not appeal the trial court's corrected judgment, and that judgment became final on November 7, 2013.

On October 31, 2022, nearly nine years later, Lopez filed his § 2254 petition in federal district court. The district court requested a response from Lopez to address timeliness concerns. In his response, Lopez conceded that the district court's analysis of the limitations period was in line with the finality of his criminal judgment. Lopez claimed that at the time of his trial, he was unaware of his rights; did not know how the law worked; and did not have adequate assistance of counsel. The district court found the petition untimely and dismissed it with prejudice. The court entered a judgment pursuant to Fed. R. Civ. P. 58(a), which denied Lopez a COA.

Lopez now petitions for a COA from this Court. Lopez argues three issues in his petition: (1) he was illegally extradited from Mexico; (2) his interrogation by law enforcement was unlawful; and (3) his counsel was ineffective.

II.

To obtain a COA when the district court has dismissed a petition on procedural grounds, the petitioner must show "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). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or

that the petitioner should be allowed to proceed further." *Id.* We need not address the constitutional question if we conclude that jurists of reason would not debate the lower court's procedural resolution. *Id.* at 485.

The district court below found that Lopez's claims were procedurally time barred. There is a one-year limitation on a writ of habeas corpus. 28 U.S.C. § 2244 (d)(1). This limitation will toll from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244 (d)(1)(A)–(D).

We construe Lopez's pro se arguments liberally without acting as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Lopez primarily realleges that substantive violations happened prior to or during his trial, despite the lower court's supplementary request for briefing on timeliness concerns. He does not assert that there is a newly recognized constitutional right that should be applied to him retroactively. *See* 28 U.S.C. § 2244 (d)(1)(C). Nor does he raise any new facts or claims that could not have been previously discovered with due diligence. *See id.* § 2244 (d)(1)(D).

This leaves two possibilities where the limitation period could toll from: (1) on the date which an impediment to filing an application created by State action in violation of

the Constitution or laws of the United States is removed; or (2) the final date of judgment and expiration of review. *See Sigala v. Bravo*, 656 F.3d 1125, 1127 (10th Cir. 2011). Lopez can show neither.

First, an impediment to filing an application. Lopez does not specifically allege that there was an impediment that prevented him from filing a timely habeas action. *See* 28 U.S.C. § 2244 (d)(1)(B). When construed liberally, however, Lopez alleges that his counsel's ineffectiveness should toll the statute of limitations. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, Lopez "gives no reason why he could not have learned about his final judgment if he had been pursuing his rights diligently." *Sigala*, 656 F.3d at 1128. Indeed, Lopez failed to demonstrate diligence because of the nearly nine-year gap in filings.

Second, this leaves Lopez with the final date of judgment and expiration of review. *See* 28 U.S.C. § 2244 (d)(1)(A). Lopez's limitation period for a habeas corpus petition began on November 7, 2013, and ran for one year—meaning, the window closed on November 7, 2014. *See* R. at 44. But Lopez did not file his habeas petition until nearly nine years after his final judgment. Thus, his petition is untimely. Having considered Lopez's arguments, no "jurists of reason would find it debatable [that] the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

III.

For these reasons, we DENY Lopez's petition for a COA and dismiss the matter.

Entered for the Court

Allison H. Eid
Circuit Judge