FILED
United States Court of Appeals
Tenth Circuit

October 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETER ALLEN SARRACINO,

Petitioner - Appellant,

v.

J. BALTAZAR, Warden; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 21-2004
(D.C. No. 1:18-CV-00875-MV-LF)
(D. New Mexico)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

Peter Allen Sarracino is a New Mexico state prisoner who was convicted of first-degree murder and other felonies in 1996. In 2018, Mr. Sarracino filed a petition for a writ of habeas corpus in district court under 28 U.S.C. § 2254. The district court denied relief and denied a certificate of appealability ("COA"), holding that Mr. Sarracino did not timely file his petition within the one-year limitation period provided by 28 U.S.C. § 2244(d). Mr. Sarracino, proceeding *pro se*, asks this court to grant him a COA, and

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

moves for leave to proceed *in forma pauperis*.[1] Concluding that reasonable jurists could not debate the propositions that Mr. Sarracino did not timely file his § 2254 petition and that he has not demonstrated a basis for overcoming the timeliness bar to review, we deny a COA. And because Mr. Sarracino fails to advance a nonfrivolous argument for overcoming the timeliness bar to his § 2254 proceeding, we also deny his motion for leave to proceed *in forma pauperis*.

I. BACKGROUND

In 1996, a New Mexico jury convicted Mr. Sarracino of first-degree murder, conspiracy to commit murder, attempted murder, tampering with evidence, false imprisonment, and unlawful taking of a motor vehicle. Mr. Sarracino appealed his convictions. The New Mexico Supreme Court affirmed his convictions in July 1998. Following the denial of reconsideration, the mandate issued on August 7, 1998.

A little *over* a year after the mandate issued, Mr. Sarracino, on August 19, 1999, pursued state post-conviction relief. Mr. Sarracino asserts his state post-conviction proceeding pended for eighteen-and-a-half years, with the state trial court denying relief in July 2017.[2] Mr. Sarracino petitioned for a writ of certiorari from the denial of state

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[1] Because Mr. Sarracino proceeds *pro se*, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

[2] While the pendency of a single habeas proceeding for eighteen-and-a-half years strikes us as unusually long, we need not investigate the accuracy of Mr. Sarracino's assertion because, as discussed in Section II, his § 2254 proceeding is clearly untimely even under the timeframe he alleges.

habeas relief; but, on August 30, 2017, the Supreme Court of the State of New Mexico denied his petition.[3]

On September 17, 2018, a little *over* a year after the Supreme Court of the State of New Mexico denied a writ of certiorari in the post-conviction proceeding, Mr. Sarracino commenced his § 2254 proceeding in the United States District Court for the District of New Mexico. The district court issued a show cause order, directing Mr. Sarracino to explain why his § 2254 petition should not be dismissed as untimely.[4] Mr. Sarracino responded to the show cause order, presenting a single argument—that his § 2254 petition was timely because he filed it within one year of the extended deadline for him to file his petition for a writ of certiorari in the Supreme Court of the State of New Mexico.

The district court rejected Mr. Sarracino's timeliness argument, observing that 28 U.S.C. § 2244(d) creates a one-year limitation period and that more than one year elapsed between Mr. Sarracino's convictions becoming final and commencement of his state post-conviction proceeding, as well as between the conclusion of his state post-conviction proceeding and his § 2254 petition. The district court, therefore, dismissed

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[3] Prior to filing his petition for a writ of certiorari, Mr. Sarracino moved to extend the deadline to file said petition. The Supreme Court of the State of New Mexico granted Mr. Sarracino's motion, extending the deadline until September 18, 2017. Based on the date of the order denying Mr. Sarracino's petition for a writ of certiorari, it is apparent Mr. Sarracino did not utilize the full extension period granted and filed his petition before September 18, 2017.

[4] Although the untimeliness of a § 2254 petition is an affirmative defense that typically must be raised by the state, a district court may raise the issue *sua sponte* where it "is clear from the face of the petition" that it is untimely. *Kilgore v. Attorney Gen. of Colo.*, 519 F.3d 1084, 1085 (10th Cir. 2008).

Mr. Sarracino's § 2254 petition with prejudice and denied a COA. Thereafter, the district court denied Mr. Sarracino's motion for reconsideration.

Mr. Sarracino petitions this court for a COA. It is not apparent from his petition if Mr. Sarracino persists with his argument that he timely commenced his § 2254 proceeding by instituting the action within a year of the deadline to file his writ of certiorari in the Supreme Court of the State of New Mexico. Rather, Mr. Sarracino now contends he can overcome the timeliness bar because he is actually innocent of his convictions. Although Mr. Sarracino's argument is far from clear, he appears to argue that he recently received investigation reports, not disclosed by the prosecutor as required by *Brady v. Maryland*, 373 U.S. 83 (1963). He alleges that these reports suggest that, rather than murdering the victims, he attempted to protect one or more of them from harm. Mr. Sarracino also moves for leave to proceed *in forma pauperis*.

II. DISCUSSION

A. Standard for a COA

Without a COA, we do not possess jurisdiction to review the denial of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court denies relief and denies a COA, we will issue a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 28 U.S.C. § 2253(c)(2)). "This standard requires 'a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to

proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Further, where a district court denies relief on procedural grounds, the petitioner must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478.

B. Standard for Leave to Proceed In Forma Pauperis

Section 1915 of Title 28 of the United States Code permits a prisoner to seek leave to proceed *in forma pauperis* and avoid prepayment of fees associated with docketing an appeal. For a petitioner seeking a COA to obtain leave to proceed *in forma pauperis*, he must "demonstrate a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted); *see also Felvey v. Long*, 800 F. App'x 642, 646 (10th Cir. 2020) (unpublished). When an appellate court dismisses a proceeding and also denies leave to proceed *in forma pauperis*, the litigant seeking appellate review remains responsible for paying the filing fee. *Kinnell v. Graves*, 265 F.3d 1125, 1129 (10th Cir. 2001); *see also Knox v. Morgan*, 457 F. App'x 777, 780 (10th Cir. 2012) (unpublished) (reminding § 2254 litigant of responsibility to pay filing fee after denying a COA and denying leave to proceed *in forma pauperis*).

C. Analysis

Section 2244 of Title 28 of the United States Code establishes the applicable limitation period for commencing a § 2254 proceeding, stating that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Relevant to Mr. Sarracino's case, the limitation period commenced on "the date on which the judgment 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). Furthermore, when calculating the limitation period, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation. . . ." 28 U.S.C. § 2244(d)(2).

It is readily apparent from Mr. Sarracino's § 2254 petition that reasonable jurists could not debate the proposition that Mr. Sarracino did not timely commence his § 2254 proceeding. The limitation period ran 283 days between when his conviction became final and when Mr. Sarracino commenced his state post-conviction proceeding.[5] And

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[5] The district court concluded the limitation period ran for 374 days—from when the Supreme Court of the State of New Mexico entered its mandate following affirmation of Mr. Sarracino's convictions on direct appeal and when Mr. Sarracino commenced his state post-conviction proceeding on August 19, 1999. On this point, the district court erred. When calculating the starting point for the limitation period under § 2244(d)(1)(A):

> a petitioner's conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until—following a decision by the state court of last resort—after the United States Supreme Court has denied review, *or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed*.

Locke v. Saffle, 237 F.3d 1269, 1273 (10th Cir. 2001) (emphasis added) (internal quotation marks omitted). Although Mr. Sarracino does not contend that he sought review of his conviction before the United States Supreme Court, pursuant to the emphasized language, the § 2244(d)(1) limitation period did not start to run until ninety days after the Supreme Court of the State of New Mexico entered its judgment. *See* Sup. Ct. R. 13(1) ("Unless otherwise provided by law, a petition for a writ of certiorari to

while § 2244(d)(2) tolls the time *during* the pendency of a properly filed state post-conviction proceeding, it does not "restart" the clock or negate aggregation of the time between the finality of the convictions and the commencement of the state post-conviction proceeding. *See Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001) ("The limitations period generally runs from the date on which the state judgment became final after direct appeal, *see* 28 U.S.C. § 2244(d)(1)(A), but is tolled during the time state post-conviction review is pending, *see* 28 U.S.C. § 2244(d)(2).").

When Mr. Sarracino filed his state post-conviction proceeding, he had eighty-two days remaining in the limitation period. The state courts resolved his state post-conviction proceeding on August 30, 2017, recommencing the running of the limitation period.[6] Thus, Mr. Sarracino needed to file his § 2254 petition in the district court by November 20, 2017. Mr. Sarracino, however, did not file his § 2254 petition until September 17, 2018. Accounting for the period that elapses between August 30, 2017,

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review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."). Thus, accounting for the ninetieth day from issuance being a Sunday, *see* Sup. Ct. R. 30(1), the § 2244(d)(1) limitation period began to run on November 9, 1998. With Mr. Sarracino filing his state post-conviction proceeding on August 19, 1999, only 283 days, not 374 days, elapsed for purposes of the limitation period. This error by the district court, however, does not provide a basis for granting a COA because the total time during which the limitation period ran before Mr. Sarracino commenced his § 2254 proceeding still exceeds one year.

[6] As opposed to within the context of a direct appeal in state court, the limitations period does not toll during the period of time in which a petition for a writ of certiorari from the denial of state post-conviction relief could be filed in the United States Supreme Court. *Lawrence v. Florida*, 549 U.S. 327, 332–36 (2007).

and September 17, 2018, Mr. Sarracino allowed an additional 383 days to run against the limitation period.[7] Consequently, reasonable jurists could not debate the proposition that Mr. Sarracino failed to timely commence his § 2254 proceeding.

In an effort to escape this conclusion, Mr. Sarracino, in his petition before us for a COA, argues that he is actually innocent. This argument cannot merit a COA for two reasons. First, Mr. Sarracino did not present an actual innocence argument in response to the district court's show cause order regarding the timeliness of his § 2254 petition. And a § 2254 litigant waives this court's consideration of an argument to overcome a procedural impediment, such as untimeliness, where he fails to raise the argument in the district court. *Childers v. Crow*, 1 F.4th 792, 797–98 (10th Cir. 2021). This principle of forfeiture holds true even where the argument to overcome untimeliness is a claim of actual innocence. *Id.* at 798. Second, to overcome a procedural impediment based on a claim of actual innocence, a petitioner "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Fontenot v. Crow*, 4 F.4th 982, 1030 (10th Cir. 2021) (quoting *House v. Bell*, 547 U.S. 518, 537–38 (2006)). Mr. Sarracino comes nowhere close to meeting this standard. To the extent his actual innocence argument is comprehensible, it amounts to little more than his own rendition of the facts and is unsupported by meaningful

[7] Notably, even if Mr. Sarracino were correct that the limitation period did not restart until September 18, 2017—the last date on which he could have timely filed in the Supreme Court of the State of New Mexico—he still would not have timely commenced his § 2254 proceeding when considering the 283 days that elapsed prior to commencement of the state post-conviction proceeding.

evidence. Indeed, the investigation reports underlying his actual innocence claim further incriminate Mr. Sarracino, rather than exculpate him. For instance, one individual, Natalie Yawea, informed authorities that she heard Mr. Sarracino state (1) "We got rid of the bodies and we ended up getting stuck"; (2) "We tried to soak this guy in the water," an apparent reference to trying to drown one of the victims; and (3) "Let's get rid of this car," in reference to a vehicle driven by one of the victims and the subject of Mr. Sarracino's conviction for unlawful taking of a motor vehicle. ROA at 38.

Accordingly, where it is not debatable that Mr. Sarracino did not timely file his § 2254 petition and that his claim of actual innocence is both forfeited and unsupported, we decline to grant a COA. Furthermore, because Mr. Sarracino fails to advance a nonfrivolous argument in support of his petition for a COA, we deny his motion for leave to proceed *in forma pauperis*. Therefore, Mr. Sarracino will be responsible for paying the filing fee.

III. CONCLUSION

We **DENY** Mr. Sarracino's petition for a COA, we **DENY** Mr. Sarracino's motion for leave to proceed *in forma pauperis*, and we **DISMISS** this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge