FILED
United States Court of Appeals
Tenth Circuit

September 3, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BILLY GENE GRAY,

Petitioner - Appellant,

v.

JOE M. ALLBAUGH, Director,

Respondent - Appellee.

No. 19-6076
(D.C. No. 5:19-CV-00100-HE)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Billy Gray seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 petition. We deny a COA and dismiss the appeal.

I

Gray was convicted by a jury in Oklahoma of conspiracy to distribute methamphetamine and possession of a controlled dangerous substance with intent to distribute. He was sentenced to two terms of forty years' imprisonment to be served

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

consecutively. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Gray's conviction on direct appeal on December 16, 2016.

On December 14, 2017, Gray filed an application for post-conviction relief in state district court. The trial court denied his application and the OCCA affirmed that denial on March 9, 2018. On January 29, 2019, Gray filed a § 2254 petition in federal district court. The district court denied his petition as time-barred and declined to grant a COA. Gray now seeks a COA from this court.

II

A petitioner may not appeal the denial of habeas relief under § 2254 without a COA. § 2253(c)(1). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). To make this showing, Gray must demonstrate "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." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year limitations period on habeas petitions filed by state prisoners. § 2244(d). This period generally runs from the date a conviction becomes final. See § 2244(d)(1). Gray's conviction became final on March 16, 2017, when his deadline to file a petition for writ of certiorari with the United States Supreme Court expired. However, AEDPA's limitations period is statutorily tolled while a properly filed application for state post-conviction relief is pending. § 2244(d)(2). Gray's

limitations period was tolled under this provision from December 14, 2017, through March 9, 2018. It resumed running the following day and expired on June 11, 2018. Gray filed his § 2254 petition several months later, on January 29, 2019. Absent equitable tolling, Gray's petition was therefore untimely.

Equitable tolling "is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). Gray asserts his § 2254 petition was untimely because he has an impairment resulting from strokes that he suffered and because a fellow prisoner assisting him with his filings was confused about statutory tolling. Gray raises these arguments for the first time on appeal. We generally do not consider arguments not raised below. See Laurson v. Leyba, 507 F.3d 1230, 1232 (10th Cir. 2007). Moreover, Gray has not shown his impairment is an extraordinary circumstance sufficient to toll the limitations period. See id. (dyslexia does not toll limitations period); United States v. Richardson, 215 F.3d 1338 (10th Cir. 2000) (learning disability does not toll limitations period). Further, the confusion of a fellow prisoner acting as a "jailhouse lawyer" does not toll the limitations period. Cf. United States v. Cicero, 214 F.3d 199, 204 (D.C. Cir. 2000) (placement of jailhouse lawyer in segregation does not toll limitations period).

Equitable tolling is also appropriate if "a prisoner is actually innocent." Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000). To qualify for the actual innocence exception, a petitioner must demonstrate that "it is more likely than not

that no reasonable juror would have convicted him" based upon new reliable evidence. Schlup v. Delo, 513 U.S. 298, 327 (1995). Gray admits that he told the jury he agreed to help sell methamphetamine but argues that the substance was never in his "immediate control." He has not presented any new, reliable evidence in support of this argument. Accordingly, equitable tolling is unavailable.

III

For the foregoing reasons, we **DENY** a COA and **DISMISS** the appeal. Gray's motion to proceed in forma pauperis is **GRANTED**.

Entered for the Court

Carlos F. Lucero
Circuit Judge