FILED
United States Court of Appeals
Tenth Circuit

April 23, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT L. BROWN, JR.,

Petitioner - Appellant,

v.

(FNU) SCHNURR,

Respondent - Appellee.

No. 20-3107
(D.C. No. 5:19-CV-03216-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Robert L. Brown, Jr., a Kansas state prisoner, seeks a certificate of appealability (COA) in order to challenge the district court's denial of his petition for relief under 28 U.S.C. § 2254. Because Brown has failed to demonstrate his entitlement to a COA, we deny his request and dismiss the matter.

I

Brown was convicted of one count of attempted murder in a Kansas state court in October 2013. In December 2013, Brown was sentenced to a term of imprisonment of 247 months. Brown filed a direct appeal of his conviction, and the Kansas Court of Appeals affirmed Brown's conviction and sentence in April 2015. In January 2016, the

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Kansas Supreme Court denied review of Brown's conviction. On April 24, 2016, the time in which Brown could have filed for a writ of certiorari in the United States Supreme Court expired and Brown's conviction became final.

On January 6, 2017 Brown filed a motion for post-conviction relief under Kansas's habeas statute, K.S.A. 60–1507, in Kansas state court. The district court denied that motion on July 10, 2017 and Brown appealed. On December 21, 2018, the Kansas Court of Appeals affirmed the district court's denial of Brown's 60–1507 motion. The Kansas Supreme Court denied review of Brown's motion on June 25, 2019; the Kansas Supreme Court did not issue its mandate until July 9, 2019.

On October 25, 2019, Brown filed the § 2254 petition at issue in this case. The respondent filed a motion to dismiss the habeas motion as untimely. The district court concluded that the motion was untimely because it was not filed within the one-year filing period proscribed by 28 U.S.C.§ 2244(d)(1). ROA, 114–19. The court explained that Brown's state court 60-1507 filing "stopped the clock" of the one-year filing period. The question for the district court was whether the clock began to run again on June 25, 2019 (when the Kansas Supreme Court denied review of Brown's state habeas petition) or on July 9, 2019 (when the Kansas Supreme Court issued its mandate). Brown's petition would be timely if the clock was stopped until July 9 but would be untimely if the clock began to run again on June 25. Citing Tenth Circuit caselaw, the district court concluded that "as soon as the [Kansas Supreme Court] denied review on June 25, 2019, Mr. Brown's 60–1507 motion achieved final resolution and was no longer pending." ROA, 117. The district court cited *Serrano v. Williams*, 383 F.3d 1181–1185 (10th Cir.

2004), in which this court ruled a state supreme court's decision was "final" for purposes of calculation of the federal habeas statute of limitations. In *Serrano,* we rejected the very argument raised here, i.e., that the statute of limitations is tolled under 28 U.S.C. § 2244(d)(1)(A) until the mandate issues. We reasoned that after the denial of review there was no action to be taken and thus no extension of the tolling was warranted. *Serrano,* 383 F.3d at 1184. Although Brown had not "specifically argue[d] for equitable tolling," the district court nonetheless considered that basis and ruled that Brown was not entitled to equitable tolling. The district court granted the respondent's motion to dismiss. Brown later applied to the district court for a COA, and the district court denied that application.

II

In order to appeal the district court's order denying his § 2254 petition, Brown must first obtain a COA. 28 U.S.C. § 2253(c)(1)(A). Because the district court dismissed Brown's filing on procedural grounds, Brown 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). Because Brown is proceeding pro se, we construe his filings liberally, "but our role is not to act as his advocate." *Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009).

After reviewing Brown's application for a COA and the district court proceedings, we conclude that Brown has failed to establish his entitlement to a COA. In his application for a COA, Brown does not argue that the district court erred in using June

25, 2019 as the relevant date in assessing whether his motion was timely. Instead, Brown argues that he is entitled to equitable tolling of the period of limitations on account of his actual innocence. Application for COA, 20 ("This foundation of 'actually innocent' of the robbery conviction, supports granting equitable tolling."). But Brown did not argue for equitable tolling before the district court. The district court only considered equitable tolling because Brown "mention[ed] he consulted an attorney who mistakenly used the [Kansas Supreme Court] mandate date to calculate the restarting of the limitations clock." ROA, 118. Brown did not argue for equitable tolling on the basis of actual innocence, and accordingly Brown has waived appellate review of that issue. *See United States v. Viera*, 675 F.3d 1214, 1220 (10th Cir. 2012) (adhering "to our general rule against considering issues for the first time on appeal" and denying a COA application when issue was not presented to the district court in the § 2254 petition). Brown has therefore failed to demonstrate his entitlement to a COA.

As a final matter, we deny Brown's motion to proceed *in forma pauperis*. "To qualify for in forma pauperis status, a petitioner must show a financial inability to pay the required fees and a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Scott v. Milyard*, 350 Fed. Appx. 213, 216 (10th Cir. 2009) (unpublished). Although Brown has demonstrated his inability to pay, he has not provided a nonfrivolous argument in support of his COA application. *See Quintana v. Trani*, 820 Fed. Appx. 727, 732 (10th Cir. 2020) (unpublished) (finding petitioner's arguments frivolous where he "waived any challenge to the merits of the district court's denial of his § 2254 motion").

III

Brown's request for a COA is DENIED, his request to proceed *in forma pauperis* is DENIED, and the matter is dismissed.

Entered for the Court

Mary Beck Briscoe
Circuit Judge