FILED
United States Court of Appeals
Tenth Circuit

September 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMONEO LEE,

Petitioner - Appellant,

v.

DAN SCHNURR; DEREK SCHMIDT,

Respondents - Appellees.

No. 21-3098
(D.C. No. 5:20-CV-03231-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Petitioner-Appellant Amoneo Lee, a state inmate represented by counsel, seeks a Certificate of Appealability (COA) to appeal from the district court's dismissal of his habeas petition, 28 U.S.C. § 2254, as time barred. See Lee v. Schnurr, No. 20-3247, 2021 WL 1840054, at *3 (D. Kan. May 7, 2021). Mr. Lee was sentenced to life imprisonment without the possibility of parole for 40 years, otherwise known as "a hard 40 sentence." He argues that reasonable jurists could debate whether the limitations period of 28 U.S.C. § 2244(d)(1) should be equitably tolled because he is actually innocent of the sentence, relying upon Alleyne v. United States, 570 U.S. 99 (2013). He

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

also contends that Alleyne should be applied retroactively. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

To obtain a COA, Mr. Lee must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court rejected the petition on procedural grounds, the petitioner must demonstrate not only that reasonable jurists would find the district court's resolution of the procedural issue debatable, but also whether the petition states a valid constitutional claim regarding the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Mr. Lee argues that the limitation period should be equitably tolled based on his claim that he is actually innocent of the sentence and that Alleyne should be applied retroactively.

Background

In 1997, Mr. Lee was sentenced after a jury convicted him of first-degree murder and criminal possession of a firearm, and his convictions were affirmed on direct appeal. State v. Lee, 977 P.2d 263 (Kan. 1999). The Kansas courts have rejected his claim that his sentence is unconstitutional given judge-found aggravating facts that increased his sentence, most recently in Lee v. State, 419 P.3d 81 (Kan. Ct. App. 2018) (unpublished), review denied (Kan. Feb. 28, 2019).

Discussion

Mr. Lee argues that the one-year limitation period should be equitably tolled based on his claim of actual innocence. Aplt. Br. at 5, 10. Equitable tolling or a fundamental

miscarriage of justice in the form of actual innocence may excuse a time bar. Compare Holland v. Florida, 560 U.S. 631, 649 (2010), with McQuiggin v. Perkins, 569 U.S. 383, 392–94 (2013). For equitable tolling to apply, Mr. Lee must show that an "'extraordinary circumstance stood in his way' and prevented timely filing." Holland, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Mr. Lee's only alleged extraordinary circumstance is Alleyne, which does not qualify. United States v. Hopson, 589 F. App'x 417, 418 (10th Cir. 2015) (unpublished).[1]

To qualify for a miscarriage of justice exception, he must show an actual innocence that means factual innocence, not legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998). Mr. Lee acknowledges that we have held that a person cannot be innocent of a non-capital sentence given a statutory sentence enhancement. United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993). We have concluded that such claims are not reasonably debatable. See Jones v. Martin, 622 F. App'x 738, 739–40 (10th Cir. 2015) (unpublished). This claim fares no better under more recent decisions. Brooks-Gage v. Martin, No. 21-7008, 2021 WL 3745199, at *3 (10th Cir. Aug. 25, 2021); see also, e.g., Reeves v. Fayette SCI, 897 F.3d 154, 160 (3d Cir. 2018); United States v. Jones, 758 F.3d 579, 584–86 (4th Cir. 2014).

Moreover, Alleyne's status as non-retroactive on collateral review is "a settled rule," United States v. Jackson, 995 F.3d 1308 (11th Cir. 2021) (en banc) (Pryor, C.J.,

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[1] We cite this and other unpublished dispositions only for their persuasive value. 10th Cir. R. 32.1.

respecting denial of reh'g en banc), and one observed by all 11 circuit courts to have considered it, including this one, see United States v. Salazar, 784 F. App'x 579, 584 (10th Cir. 2019) (unpublished).

We DENY the COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge