FILED
United States Court of Appeals
Tenth Circuit

May 26, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOEL SHANE PETHEL,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-5050
(D.C. No. 4:20-CV-00379-JED-CDL)
(N.D. Okla.)

ORDER AND JUDGMENT*

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

Joel Shane Pethel, a pro se Oklahoma state prisoner, appeals from a district court order that dismissed his 28 U.S.C. § 2254 habeas petition as untimely. The district court has issued a certificate of appealability (COA) solely on the applicability of equitable tolling. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

In 2001, Harry and Teresa Hye were shot to death inside their home in Oklahoma as it was set on fire. "Their adopted daughter, Cenessa Tackett, was also shot but survived and managed to escape the burning house." *Browning v. Trammell*, 717 F.3d 1092, 1095 (10th Cir. 2013). Tackett identified Pethel and her former boyfriend, Michael Browning, as the perpetrators. Browning and Pethel were arrested and charged with multiple crimes, including first-degree murder. The State sought the death penalty against both men.

During pretrial proceedings, "Tackett's attorney (for unknown reasons) faxed two psychiatric reports to the prosecution," revealing that Tackett "displayed magical thinking and a blurring of reality and fantasy, . . . typically projected blame onto others," and possibly possessed "[a]n assaultive, combative, or even homicidal potential." *Id.* (emphasis and internal quotation marks omitted). The State revealed the existence of the reports to the defendants, but did not disclose their contents. Browning and Pethel moved to compel production of the reports. The trial court examined the reports in camera and concluded they contained no material exculpatory or impeaching information. The court then denied the motions to compel and sealed the reports.

Browning went to trial first. Tackett was the State's prime witness. She testified that she had become pregnant with Browning's child, and Browning was angry at the prospect of paying child support. On February 18, 2001, he showed up at the Hyes' home with Pethel, who had a gun. They bound the Hyes and Tackett, placed the family's valuables in Pethel's truck, and then carried the family members into a closet. "At

Pethel's suggestion, Browning . . . doused the hanging clothes with lighter fluid and lit them" on fire. *Id.* at 1097. "Pethel said, 'It is time,' and shot Harry Hye in the head. Teresa Hye began to scream and Pethel shot her as well. Finally, he shot Tackett." *Id.*

To counter Tackett's testimony, the defense proposed that she had a financial motive to kill the Hyes, and that she and Pethel "conspired to rob and murder the Hyes and frame Browning." *Id.* at 1098.

The jury was not convinced by the defense theory. It found Browning guilty of first-degree murder (two counts), shooting with intent to kill, first-degree arson, and robbery with a firearm, and it recommended the death penalty for the Hyes' murders. The trial court accepted the jury's recommendation and imposed two death sentences, as well as two life sentences for the shooting and robbery, and a 35-year sentence for the arson.

Afterward, on February 11, 2003, Pethel pled guilty to the same crimes in exchange for avoiding the death penalty. In doing so, he claimed that Browning was the shooter, but he "otherwise corroborated most of Tackett's story." *Id.* at 1100. The trial court imposed the same sentence it gave to Browning, except it imposed two life-without-parole sentences for the murders.

As time passed, Browning challenged his convictions and sentences, ultimately obtaining conditional habeas relief due to the State's failure to produce Tackett's psychiatric records. *See Browning v. Workman*, No. 07-CV-16-TCK-PJC, 2011 WL 2604744, at *6, *9 (N.D. Okla. June 30, 2011) (concluding it was unreasonable to determine that Tackett's psychiatric reports contained nothing favorable to Browning or

material to his guilt or punishment). On May 6, 2013, this court affirmed the district court's decision. *See Browning*, 717 F.3d at 1094 ("agree[ing] with the district court that [Tackett's] psychiatric information was favorable to Browning and material to his defense," "[g]iven the central role [she] played at trial and the severity of her mental health diagnosis").

Browning's new trial began roughly five years later. Pethel was designated as a prosecution witness and transported to the county jail on April 26, 2018. It is unclear if he testified. But he does identify either that date, or April 27, as when he learned of Browning's success in obtaining Tackett's psychiatric records.[1] The State returned Pethel to prison on May 14, 2018, after Browning's retrial ended in a hung jury.[2]

Four months later, on September 13, 2018, Pethel filed a postconviction application in the trial court to withdraw his guilty plea, file an out-of-time appeal, and obtain an evidentiary hearing. He argued that his plea was invalid because the State had denied him access to Tackett's psychiatric reports in violation of the right to due process, as construed in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("hold[ing] that the suppression by the prosecution of evidence favorable to an accused upon request violates

[1] In the district court, Pethel indicated that on April 26, when he was transported to the jail, he learned of Browning's success in obtaining Tackett's psychiatric records. On appeal, Pethel states that he learned the information the next day, during a meeting with his attorney and prosecutors.

[2] Browning ultimately pled no contest to second-degree murder (two counts) and shooting with intent to kill. The trial court imposed 25-year concurrent sentences, with credit for time served.

due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

The trial court denied Pethel's application, ruling that (1) he failed to show he was denied an appeal through no fault of his own, rather than due to his decision to plead guilty; and (2) the State was not required to disclose impeachment evidence prior to his guilty plea.[3] After an evidentiary hearing, the Oklahoma Court of Criminal Appeals affirmed the trial court's decision on October 4, 2019.

On July 15, 2020, Pethel filed the instant habeas petition in federal district court, attacking the non-disclosure of the contents of Tackett's records. For relief, he asked to be "[r]e-sentenced [the] same as . . . Browning, or at least allowed to withdraw [his] plea." R. at 18. The State moved to dismiss the petition as untimely. Pethel filed a response.

The district court granted the State's motion, concluding that Pethel's petition was untimely filed more than one year beyond any applicable statutory triggering event. *See* 28 U.S.C. § 2244(d)(1). The district court considered the timeliness of Pethel's habeas

[3] The Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002). But the Supreme Court has not explicitly addressed whether withholding exculpatory evidence, as opposed to impeachment evidence, during the pretrial plea bargaining process violates a defendant's constitutional rights, and the circuits are split on the issue. *See Alvarez v. City of Brownsville*, 904 F.3d 382, 392-93 (5th Cir. 2018) (collecting cases and noting that the Tenth Circuit has, in an unpublished decision, *United States v. Ohiri*, 133 F. App'x 555, 556 (10th Cir. 2005), viewed the knowing nondisclosure of exculpatory evidence prior to a guilty plea as a due process violation).

petition from (1) when the judgment in his criminal case became final, and (2) when he learned of Browning's success in obtaining Tackett's psychiatric records. Specifically, the district court determined that Pethel's state court judgment became final in late February 2003 when he did not seek to withdraw his plea, and he did not file his habeas petition or any tolling document within a year of that date. *See id.* § 2244(d)(1)(A) (running the one-year limitations period from the date the defendant's judgment became "final by the conclusion of direct review or the expiration of the time for seeking such review"); *id.* § 2244(d)(2) (tolling the limitations clock during "State post-conviction [proceedings] or other collateral review"). Next, the district court determined that Pethel filed his habeas petition over a year after he learned that Browning had obtained Tackett's records. *See id.* § 2244(d)(1)(B) (running the one-year limitations period from the date an unlawful State filing impediment is lifted); *id.* § 2244(d)(1)(D) (running the one-year limitations period from the date the habeas claim's factual predicate could have been discovered). The district court further determined—for both § 2244(d)(1)(B) and (D)—that although part of the period between Pethel's discovery date (April 26 or 27, 2018) and his habeas filing date (July 15, 2020) was statutorily tolled while he sought state postconviction relief, his habeas petition was still 58 days late.[4]

[4] On appeal, Pethel asserts that the district court started the § 2244(d)(1)(B) limitations period three or four days too early. But the district court did not grant Pethel a COA on any issue other than equitable tolling, and he does not seek to expand the COA, so we do not consider his assertion. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (noting that a COA is a jurisdictional prerequisite to appellate review).

The district court declined to equitably toll the limitations period, because Pethel did not diligently file his habeas petition after learning of Browning's success in obtaining Tackett's reports, and it rejected Pethel's assertion that he justifiably relied on an attorney's advice that there was "plenty of time" to seek § 2254 relief. R. at 291 (internal quotation marks omitted).[5]

DISCUSSION

I. Standards of Review

"We review for abuse of discretion a district court's decision to grant or deny equitable tolling." *Al-Yousif v. Trani*, 779 F.3d 1173, 1177 (10th Cir. 2015). "A district court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable, or where the court exceeded the bounds of permissible choice, given the facts and the applicable law in the case at hand." *Carter v. Bigelow*, 787 F.3d 1269, 1278 (10th Cir. 2015) (citation and internal quotation marks omitted).

We construe Pethel's pro se filings liberally, but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

II. Equitable Tolling

"Equitable tolling may . . . extend the [§ 2244(d)(1)] limitations period if an applicant shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Al-Yousif*, 779

[5] The attorney incorrectly explained that the "time limit[ ] on federal habeas . . . is 1 year after the [state] district court denies relief . . . ." R. at 291 (internal quotation marks omitted).

F.3d at 1177 (brackets and internal quotation marks omitted). "Equitable tolling is a rare remedy to be applied in unusual circumstances." *Id.* at 1179 (ellipsis and internal quotation marks omitted).

A. Due Diligence

Pethel argues that he diligently pursued his *Brady* claim once he learned, in late April 2018, that such a claim existed. But he fails to indicate whether he acted with any diligence prior to that date. Indeed, Pethel knew of Tackett's psychiatric records before he pled guilty in 2003. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (rejecting prisoner's equitable-tolling argument that his untimely filing was the result of no access to legal materials at private prison, because he failed to explain his failure to pursue his federal claims during the fifteen months prior to his transfer there); *accord Smith v. Davis*, 953 F.3d 582, 595 (9th Cir.) (en banc) (observing that due diligence requires consideration of the prisoner's efforts "before, during, and after" encountering an obstacle to timely filing), *cert. denied*, 141 S. Ct. 878 (2020). And although Pethel did not know what information was in those records when they were sealed, neither did Browning. Yet, Browning pursued a *Brady* claim, and Pethel did not—until September 2018. Nothing required Pethel to delay pursuit of a *Brady* claim until Browning did so first. In other words, Pethel's *Brady* claim was not dependent on any action Browning took on his own *Brady* claim.

Nevertheless, Browning's success in federal court with respect to Tackett's records was discoverable by Pethel far in advance of April 2018, when Pethel was transported to the county jail for Browning's retrial and met with prosecutors and his

attorney. Indeed, this court's decision affirming the conditional grant of habeas relief to Browning was published and presumably available to Pethel in the prison's law library as early as May 2013. Pethel does not contend otherwise, and he identifies no steps he took in pursuit of a *Brady* claim from May 2013 to April 2018. *See Moore v. Gibson*, 250 F.3d 1295, 1299 (10th Cir. 2001) (holding that prisoner's forty-month delay in pursuing state postconviction proceedings demonstrated lack of diligence).

And once Pethel actually learned of Browning's successful habeas case, it took him over four months to apply for state postconviction relief and then over nine months to seek federal habeas relief after the OCCA affirmed the denial of postconviction relief. Although he indicates that he worked or attempted to work on his state postconviction application after learning in April 2018 of Browning's successful case, he does not identify what steps he took after the OCCA's decision, except to state that he contacted an attorney about how to proceed and then received the attorney's response on October 30, 2019. Yet, he did not file his habeas petition until July 15, 2020. "[T]his Circuit has generally declined to apply equitable tolling when it is facially clear from the timing of the state and federal petitions that the petitioner did not diligently pursue his federal claims." *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003).

B. Extraordinary Circumstances

Pethel contends that he relied on his attorney's erroneous advice in October 2019 and believed he had sufficient time to seek habeas relief. But that reliance could have had no effect on Pethel's lack of diligence throughout the preceding years. Moreover, while "sufficiently egregious misconduct on the part of a habeas petitioner's counsel may

justify equitable tolling," mere "negligence" in interpreting the statute of limitations "is not generally a basis for equitable tolling." *Fleming v. Evans*, 481 F.3d 1249, 1255, 1256 (10th Cir. 2007).

Pethel next contends that his ability to timely file his habeas petition was impacted by a four-week prison lockdown in June 2018, limited law library access in July 2018, and Covid-19 restrictions and an infection in 2020. But he did not mention any of these matters in the district court, and he makes no attempt to argue them here in the context of plain error. Therefore, they are waived. *See Harris v. Sharp*, 941 F.3d 962, 975 n.5 (10th Cir. 2019) (observing in the § 2254 context that an issue forfeited in the district court will not be considered on appeal in the absence of plain-error argument); *see, e.g.*, *Coppage v. McKune*, 534 F.3d 1279, 1282 (10th Cir. 2008) (declining to consider prisoner's "additional arguments in favor of equitable tolling . . . because they were not presented to the district court in response to the government's motion to dismiss").

But even if we were to consider these impediments, they had no applicability in the years preceding 2018. Additionally, Pethel provides few details as to when Covid-19 issues surfaced in 2020, or how those issues played a role in the time it took him to file his habeas petition. "[S]pecific facts" are necessary to support a claim of extraordinary circumstances. *Al-Yousif*, 779 F.3d at 1179 (internal quotation marks omitted).

Pethel has not shown that an extraordinary circumstance stood in his way and prevented timely filing of his habeas petition.

CONCLUSION

Because the district court did not abuse its discretion in denying equitable tolling, we affirm the district court's judgment.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge