FILED
United States Court of Appeals
Tenth Circuit

August 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY LIN ALLEN,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 22-6141
(D.C. No. 5:22-CV-00343-D)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Petitioner Gregory Lin Allen, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 petition. He also requests leave to file a supplemental brief and moves to proceed in forma pauperis. For the reasons stated below, we deny his request for a COA, deny his motion to file a supplemental brief, grant his motion to proceed in forma pauperis, and dismiss the matter.

I.

In May 2017, Petitioner pled guilty to robbery in the first degree (Count One), possession of a stolen vehicle (Count Two), possession of a controlled drug (Count

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Three), and public intoxication (Count Four). The Tulsa County District Court sentenced Petitioner to 20-years' imprisonment on Count One, 5-years' imprisonment on Count Two, and 10-years' imprisonment on Count Three, with each sentence running concurrently. The state district court fined Petitioner for Count Four. Petitioner did not appeal his sentence or conviction.

In November 2020, more than three years after his conviction and sentence, Petitioner sought post-conviction relief in state court. Relying on McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), he argued that Oklahoma lacked jurisdiction to prosecute him because the crimes occurred in Indian country and he is an Indian. See id. at 2478 (holding Creek Reservation remains "Indian country" for purposes of Major Crimes Act, 18 U.S.C. § 1153, because Congress never disestablished it; as a result, "[o]nly the federal government, not the State, may prosecute Indians for major crimes committed" there). The state district court initially granted Petitioner's post-conviction relief application in April 2021. But in October 2021, pursuant to State ex rel. Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021) (holding McGirt does not apply retroactively), the state district court reversed its April 2021 oral decision and denied Petitioner's post-conviction relief application.[1] Petitioner appealed and the Oklahoma

[1] On this point, the magistrate judge's report and recommendation and Petitioner's brief provide different dates. The magistrate judge's report and recommendation states the state district court's denial of post-conviction relief occurred on October 15, 2021, and Petitioner's brief states the state court denied post-conviction relief on November 5, 2021. But we need not resolve this difference because, even accepting Petitioner's date as true, his claim still fails.

Court of Criminal Appeals ("OCCA") affirmed the state district court's denial on April 7, 2022. Allen v. Oklahoma, No. PC-2021-1432 (Okla. Crim. App. 2022).[2]

Petitioner filed his § 2254 petition on April 20, 2022. Respondent Scott Crow—then Oklahoma Department of Corrections Director—moved to dismiss, arguing the applicable statute of limitations barred Petitioner's claims. The United States Magistrate Judge agreed and recommended the district court grant Defendants' motion to dismiss because Petitioner filed his petition outside of the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1). Petitioner objected to the magistrate judge's report and recommendation, but the district court adopted it and dismissed Petitioner's § 2254 petition as time-barred.

II.

Petitioner now requests a COA from us to challenge the district court's order dismissing his federal habeas petition. See 28 U.S.C. § 2253(c)(1)(A). To receive a COA, Petitioner must make a "substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting 28 U.S.C. § 2253(c)(2)). This generally requires Petitioner to show 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). But because the district

[2] *Docket Sheet*, Oklahoma Court of Criminal Appeals, https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=%20PC-2021-1432 (last visited Mar. 2, 2023).

court dismissed Petitioner's habeas petition for failing to comply with the applicable limitations period, Petitioner must show that reasonable jurists could debate the district court's procedural ruling. See id. at 485. And courts generally address the procedural argument before considering merits arguments. See id.

Section 2254 petitions are subject to a one-year statute of limitations. See § 2244(d)(1). Usually, the limitations period begins to run when the state-court judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). But this start date is delayed if (1) state action created an unlawful impediment to filing the petition, (2) the petitioner asserts a constitutional right newly recognized by the Supreme Court and made retroactive to cases on collateral review, or (3) the factual predicate for the claim could not previously have been discovered through due diligence. § 2244(d)(1)(B)–(D).

Petitioner first argues that reasonable jurists could debate whether he timely filed his petition because the state court's lack of jurisdiction rendered his conviction "void ab initio" and the limitations period never began to run. See § 2244(d)(1)(A). But no language in § 2244(d)(1)(A) prevents the one-year limitations period from running when judgments are allegedly "void" for lack of subject-matter jurisdiction. See, e.g., Cole v. Pettigrew, No. 20-CV-0459, 2021 WL 1535364, at *2 n.4 (N.D. Okla. Apr. 19, 2021). Nor did McGirt create any exception to the one-year limitations period for claims alleging an absence of jurisdiction in the convicting court. See McGirt, 140 S. Ct. at 2479 (acknowledging that "[o]ther defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and

federal limitations on postconviction review in criminal proceedings."). Instead, as with other habeas claims, § 2244(d)(1)(A)'s plain procedural bar renders Petitioner's due process claim subject to dismissal for untimeliness. See Slack, 529 U.S. at 484; Morales v. Jones, 417 F. App'x 746, 749 (10th Cir. 2011) (unpublished). Thus, Petitioner's § 2254 petition remains subject to the one-year limitations period in § 2244(d)(1)(A).

Petitioner next asserts that he could not have discovered the "factual predicate" for his present claim until the Supreme Court's decision in McGirt. See § 2244(d)(1)(D). He argues that until McGirt, everyone believed that Oklahoma possessed the jurisdiction to prosecute Indians for crimes committed in Indian country. But Petitioner acknowledges that he and other state-prosecuted Indians could have challenged Oklahoma's subject matter jurisdiction "even without McGirt." Other than the McGirt decision, Petitioner alleges no new facts that he discovered after his judgment became final. Because McGirt did not change the "factual predicate" of his jurisdictional due process claim, Petitioner cannot benefit from § 2244(d)(1)(D). See Jackson v. Bowen, No. 22-6068, 2022 WL 2165789, at *2 (10th Cir. June 16, 2022) (unpublished).

Petitioner lastly argues the state of the law before McGirt was an "impediment created by State action" that prevented him from filing his § 2254 petition because he asserts that no available remedy existed until the Supreme Court decided McGirt. See § 2244(d)(1)(B). This exception usually applies when state prison officials thwart a prisoner's access to the courts, for example, by denying an inmate access to legal materials or a law library. See Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998); see also Aragon v. Williams, 819 F. App'x 610, 613 (10th Cir. 2020) (unpublished). In

contrast, perceived legal futility is not a valid state impediment under § 2244(d)(1)(B). See Head v. Wilson, 792 F.3d 102, 110 (D.C. Cir. 2015); Heuston v. Bryant, 735 F. App'x 964, 967 (10th Cir. 2018) (unpublished).

Petitioner does not claim that the State actively prevented him from filing his petition. Instead, he argues filing a petition before McGirt was futile. But even before McGirt, Petitioner could have filed his petition, advanced his jurisdictional arguments, and argued for the change in the law that McGirt ultimately delivered.[3] We therefore conclude § 2244(d)(1)(B) does not apply.

Petitioner fails to show reasonable jurists could debate the district court's procedural ruling that his petition was time-barred. Because Petitioner did not file a direct appeal, his conviction became final the next business day following the ten days after the Oklahoma trial court entered final judgment. OCCA Rules 1.5, 2.1(B). Petitioner's conviction accordingly became final on May 15, 2017, and the limitations period ran on May 15, 2018—nearly four years before Petitioner filed this April 2022 § 2254 petition. We, therefore, deny his COA request and dismiss this matter.

III.

Petitioner raises a new argument in his supplemental brief that § 2244(d)(1)(C) applies. He submits that under Reed v. Ross, 468 U.S. 1 (1984), the novelty of a constitutional claim can excuse defendants for failing to raise that claim in accordance

[3] Indeed, this Court recognized that Congress never disestablished the Creek reservation years before both the Supreme Court's McGirt decision and Petitioner's present petition. See Murphy v. Royal, 875 F.3d 896, 966 (10th Cir. 2017), aff'd, 140 S. Ct. 2412 (2020).

with applicable state procedures. But "[w]e will not address issues not raised in the appellant's opening brief, especially where the arguments are based on authority that was readily available at the time of briefing." United States v. Kimler, 335 F.3d 1132, 1138 n. 6 (10th Cir. 2003). Petitioner did not raise his § 2244(d)(1)(C) argument or the authority he relied on for this new argument in his opening brief.[4] We therefore deny Petitioner's motion to file his supplemental brief.

IV.

As for Petitioner's motion to proceed in forma pauperis under 28 U.S.C. § 1915(a), the district court found Petitioner's original motion deficient because the motion lacked the supporting documentation § 1915(a)(2) requires.[5] But § 1915(a)(2) does not govern motions to proceed in forma pauperis in the context of a § 2254 petition, which leaves Petitioner to meet only the burden of § 1915(a)(1).[6] See McIntosh v. U.S.

[4] Even if we did consider Petitioner's new § 2244(d)(1)(C) argument, we would still conclude that the district court correctly dismissed his petition on timeliness grounds. Reed applies when a defendant procedurally defaults by failing to raise an argument on direct appeal, not when a defendant fails to comply with the statutory limitations period. See, e.g., United States v. Garcia, No. 20-1381, 2021 WL 5994630, at *2 (10th Cir. Aug. 10, 2021) (unpublished). The limitations exception in § 2244(d)(1)(C) requires the Supreme Court to establish a new, retroactive constitutional right. See Pacheco v. Habti, 62 F.4th 1233, 1246 (10th Cir. 2023). And "McGirt announced no new constitutional right." Id.

[5] Section 1915(a)(2) requires that "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the . . . notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined" be attached to Petitioner's motion. 28 U.S.C. § 1915(a)(2).

[6] Petitioner did not appeal the district court's denial of his motion to proceed in forma pauperis.

Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997) (citing United States v. Simmonds, 111 F.3d 737, 744 (10th Cir. 1997)). And § 1915(a)(1) demands no such supporting documentation. So a petitioner need only "show 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." DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991) (citing § 1915(a)(1)). Petitioner represents that he has no cash or assets. And we conclude that he presented reasoned, nonfrivolous arguments which, at least for a time, generated some success in Oklahoma courts. For these reasons, we grant Petitioner's motion to proceed in forma pauperis.

Petitioner's COA request is DENIED, his motion to file a supplemental brief is DENIED, and Petitioner's motion to proceed in forma pauperis is GRANTED.

MATTER DISMISSED.

Entered for the Court

Joel M. Carson III
Circuit Judge