United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 5, 2022
Lyle W. Cayce
Clerk

No. 19-10079

SAM JONES,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1028

Before JONES, HIGGINSON, and DUNCAN, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*.

The question presented is whether Sam Jones's federal habeas application is time-barred. It is undisputed that Jones filed the instant application after the one-year limitations period in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and that he is not entitled to any statutory tolling. Thus, the timeliness inquiry turns on whether Jones is entitled to equitable tolling. The district court held that Jones is not entitled to equitable tolling and dismissed the application. This court granted

a certificate of appealability on the equitable-tolling question and we now AFFIRM.

Background

In 2012, a Texas jury convicted Sam Jones of aggravated assault with a deadly weapon against a witness and sentenced him to life imprisonment. The Texas Court of Appeals affirmed his conviction and sentence on direct appeal, and the Texas Court of Criminal Appeals denied his petition for review on November 27, 2013. Because Jones did not seek a writ of certiorari from the Supreme Court, his conviction became final 90 days later on February 25, 2014.

On April 28, 2014, Jones filed a *pro se* application for state habeas relief. Jones attached a 112-page memorandum in support of his state habeas application, outlining a litany of alleged instances of ineffective assistance of counsel and abuses of discretion by the trial court. Knowing that Texas Rule of Appellate Procedure 73.1(d) limited such memoranda to 50 pages, Jones simultaneously sought leave to exceed the page limit. The State responded that the Texas Court of Criminal Appeals would likely reject Jones's state habeas application as non-compliant with Rule 73.1(d). The trial court agreed and recommend that Jones's application be dismissed. On July 9, 2014, the Texas Court of Criminal Appeals dismissed Jones's state habeas application for not complying with Rule 73.1(d).

Rather than simply refile a compliant state habeas application, Jones filed a § 2254 application in federal court on July 21, 2014. The State answered on November 20, 2014, emphasizing that Jones failed to exhaust his state remedies and arguing that, as a result, the district court should dismiss his § 2254 application. The magistrate judge agreed and recommended that the district court dismiss Jones's application. In response, on March 30, 2015, Jones moved to stay the § 2254 proceedings so

he could present his unexhausted claims in a new state habeas application. Even though dismissing Jones's § 2254 application at that time would make any future applications untimely, the magistrate judge recommended that the district court deny the stay motion. The district court adopted the magistrate judge's recommendation and dismissed the § 2254 application without prejudice and denied Jones a certificate of appealability.

Jones sought a certificate of appealability from this court, primarily challenging the district court's decision to deny his stay request. This court denied Jones's motion for a certificate of appealability on June 24, 2016.

During that appeal, Jones returned to state court and filed a second state habeas application. Once again, the Texas Court of Criminal Appeals dismissed the state habeas application for not complying with Rule 73.1(d)'s 50-page limit. Jones then filed a *third* state habeas application—one that complied with the 50-page limit—on December 4, 2015. The Texas Court of Criminal Appeals denied that state habeas application on March 29, 2017.

Finally, on April 5, 2017, having exhausted his claims in state habeas proceedings, Jones filed the instant § 2254 application. The State argued that Jones's § 2254 application is time-barred because he failed to file it within the limitations period and that he is not entitled to any tolling. Jones rejoined that he is entitled to equitable tolling because he exercised diligence in pursuing his rights and because the state procedural rules misled him about the possibility of refiling a state habeas application after the Texas Court of Criminal Appeals dismissed his first one. The magistrate judge recommended that the district court dismiss Jones's § 2254 application as untimely, concluding that Jones failed to show that he is entitled to equitable tolling. The district court agreed, accepted the magistrate judge's recommendation, and dismissed Jones's application.

Jones filed a timely notice of appeal from the judgment denying his § 2254 application as time-barred. This court granted a certificate of appealability on a single issue: Whether the district court abused its discretion in denying equitable tolling. Jones subsequently moved for the court to appoint counsel.

Standard of Review

"A district court's refusal to invoke equitable tolling is reviewed for abuse of discretion." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted).

Discussion

AEDPA requires state prisoners to file for federal habeas relief within a year of their conviction becoming final. 28 U.S.C. § 2244(d)(1)(A). That limitations period is statutorily tolled during the pendency of a "properly filed application for State post-conviction or other collateral review." *Id.* § 2244(d)(2). Moreover, in limited circumstances, a court may equitably toll the limitations period. *See Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010). Jones filed his federal habeas petition outside the limitations period, and we conclude that he is not entitled to statutory or equitable tolling. Accordingly, we AFFIRM the district court.

The Texas Court of Criminal Appeals denied Jones's petition for discretionary review on November 27, 2013. Thus, Jones's conviction and sentence became final under AEDPA 90 days later, on February 25, 2014, after the time for filing a petition for a writ of certiorari expired. *See* Sup. Ct. R. 13.1, 13.3; *Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008) (citation omitted). Absent any statutory or equitable tolling, then, Jones had until February 25, 2015, to file his federal habeas application. He did not file the instant § 2254 application until April 5, 2017.

Here, there is no dispute that Jones is not entitled to statutory tolling because he never "properly filed" a state habeas application during the limitations period.[1] Jones filed his first state habeas application on April 28, 2014, but the Texas Court of Criminal Appeals dismissed it for noncompliance with Texas Rule of Appellate Procedure 73.1(d). A state application dismissed on those grounds is not properly filed. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000) ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.").[2] Jones did not succeed in "properly filing" a state habeas application until much later, on December 4, 2015. By that time, however, the § 2244 limitations period had expired. Thus, whether Jones's current § 2254 application is timely hinges on whether he is entitled to equitable tolling.

Equitable tolling is "a discretionary doctrine that turns on the facts and circumstances of a particular case." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). Because of the limitations placed on second and successive federal habeas applications,[3] courts are "cautious not to apply the statute of limitations too harshly." *Id.* Nevertheless, equitable tolling is warranted in only "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). It is appropriate where the petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*,

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[1] It is well settled that the time during which a *federal* habeas application is pending does not serve to statutorily toll the limitations period under 28 U.S.C. § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181, 121 S. Ct. 2120, 2129 (2001).

[2] *See also Wickware v. Thaler*, 404 F. App'x 856, 858-59 (5th Cir. 2010) (noting that a state habeas action dismissed for failure to comply with Texas Rules of Appellate Procedure 73.1 and 73.2 was not "properly filed" under AEDPA).

[3] *See* 28 U.S.C. § 2244(b).

560 U.S. at 649, 130 S. Ct. at 2562 (internal quotation marks and citation omitted). And equitable tolling applies principally where the defendant actively misleads the plaintiff about the cause of action or prevents the plaintiff from asserting his rights in some extraordinary way. *United States v. Wheaten*, 826 F.3d 843, 851 (5th Cir. 2016) (citing *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir., 1999), *abrogated on other grounds by Causey v. Cain*, 450 F.3d 601, 605 (5th Cir. 2006)). Jones is not entitled to equitable tolling because he has not shown that extraordinary circumstances prevented timely filing.

Concerning the extraordinary circumstances necessary for equitable tolling, this court has explained that a "petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (per curiam) (citation omitted). Such circumstances include, among others, when a petitioner receives delayed notice of a court order denying the petitioner's state habeas application or when a district court order misleads the petitioner. *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (eighteen-month delay in receiving order denying state habeas application despite repeated inquiries into status of that application); *Prieto v. Quarterman*, 456 F.3d 511, 515-16 (5th Cir. 2006) (district court order granting extension of time to file federal habeas petition on date after limitations period expired). Critically, however, a petitioner's failure to comply with state procedural law or general ignorance of the law do not qualify as extraordinary circumstances for purposes of equitable tolling. *See Larry v. Dretke*, 361 F.3d 890, 897-98 (5th Cir. 2004) (untimeliness resulting from failure to comply with procedural requirement that a state habeas application be filed after conviction becomes final did not warrant equitable tolling); *Fisher*, 174 F.3d at 714 (noting that "ignorance of the law, even for

an incarcerated *pro se* petitioner, generally does not excuse prompt filing" (citations omitted)).

Jones argues that the circumstances here are extraordinary and therefore warrant equitable tolling. He points out that he filed his original § 2254 application 219 days before the AEDPA limitations period lapsed. That application lingered in the district court for 403 days. During that time, prompted by the magistrate judge's recommendation to dismiss the application for failure to exhaust, Jones also requested a stay to allow him to exhaust his state remedies. Ultimately, however, the district court denied the stay and dismissed his federal habeas application for failure to exhaust. In short, Jones attributes his untimeliness to the district court's failure to promptly resolve his original federal habeas application and to its decision to deny his motion for a stay.

In arguing that these circumstances warrant equitable tolling, Jones relies on Justice Stevens's concurrence in *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120 (2001), and two out-of-circuit cases, *Griffin v. Rogers*, 399 F.3d 626 (6th Cir. 2005), and *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002). Justice Stevens's concurrence in *Duncan* is hardly dispositive; it only suggests that "a federal court might very well conclude" that equitable tolling is warranted during the pendency of a timely federal habeas petition later dismissed for failure to exhaust after the limitations period has lapsed. 533 U.S. at 183, 121 S. Ct. at 2130.

Moreover, the out-of-circuit cases are neither binding nor persuasive. In *Griffin*, the Sixth Circuit concluded that equitable tolling was appropriate in similar circumstances. 399 F.3d at 636-39. But, in doing so, it relied on an

equitable tolling test that it later disavowed in light of *Holland*.[4] Thus, *Griffin* is not persuasive. *Rodriguez* is no more persuasive because it, at most, merely intimates that equitable tolling might be appropriate where a petitioner's timely, but unexhausted, § 2254 application is dismissed without prejudice after AEDPA's limitations period has lapsed. *Rodriguez*, 303 F.3d at 439 (remanding for district court to consider "whether, and to what extent, Rodriguez should benefit from equitable tolling"). In sum, Jones offers little to no support for his argument that the circumstances in his case are so extraordinary to necessitate equitable tolling.

More importantly, Jones's plight is entirely self-inflicted and stems from his failure to comply with basic state procedural rules—about which he had notice. Texas Rule of Appellate Procedure 73.1(d) provides that a memorandum attached to a state habeas application "shall not exceed . . . 50 pages" and that if the memorandum exceeds 50 pages then the court may dismiss the application unless it grants leave to exceed "for good cause." TEX. R. APP. P. 73.1(d). Jones knew about the 50-page limitation; indeed, he filed a motion seeking leave to exceed the limitation. The Texas Court of Criminal Appeals quickly dismissed his state habeas application for not complying with Rule 73.1(d), leaving him 231 days to refile in state court. If Jones had simply refiled a state habeas application compliant with Rule 73.1, he would be entitled to statutory tolling. 28 U.S.C. § 2244(d)(2). Instead, he went directly to federal court, thinking that the order dismissing his state habeas application precluded him from refiling. But, as explained above, a petitioner's unfamiliarity with the law is not an extraordinary circumstance

[4] *See Griffin*, 399 F.3d at 635 (citing five-factor test articulated in *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001)); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749-50 (6th Cir. 2011) (recognizing that the equitable tolling test articulated in *Holland* is "analytically distinct from *Dunlap*'s five-factor inquiry" and that *Holland*'s two-part test "has become the law" of the circuit).

that supports equitable tolling. *Fisher*, 174 F.3d at 714. Accordingly, Jones is unable to show that he is entitled to equitable tolling.

Furthermore, in responding to Jones's initial, unexhausted § 2254 application, the State pointed out that Jones had failed to exhaust his state remedies and that he needed to refile in state court before proceeding to federal court. At that point, Jones still had 97 days before AEDPA's limitations period lapsed. Then, the magistrate judge recommended that the district court dismiss Jones's initial § 2254 application for failure to exhaust eight days before AEDPA's limitations period lapsed. Either of those warnings were enough to notify Jones of his procedural misstep. Nevertheless, he continued to litigate in federal court and did not refile his habeas application in state court until long after AEDPA's limitations period had expired.[5]

In short, Jones cannot show the extraordinary circumstances necessary for equitable tolling because his failure to timely file the instant petition is the result of his own procedural mistakes. As a result, the district court did not err, much less abuse its discretion, in declining to equitably toll AEDPA's limitations period in this case.

CONCLUSION

For the forgoing reasons, this court AFFIRMS. Jones's motion to appoint counsel is therefore DENIED AS MOOT.

[5] To his credit, Jones moved to stay the federal habeas proceedings after the magistrate judge recommended that the district court dismiss the action for failure to exhaust. Even so, because Jones's own procedural mistakes necessitated that motion, it does not help him get equitable tolling in this proceeding.