

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-40208
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 6, 2020

Lyle W. Cayce
Clerk

BRIAN ALLEN TUCKER,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:18-CV-324

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Brian Allen Tucker, Texas prisoner # 1847045, was convicted of capital murder by terroristic threat/other felony and was sentenced to life imprisonment. In April 2018, Tucker filed a 28 U.S.C. § 2254 application in the district court. The district court dismissed the application as untimely. The court concluded that the one-year limitations period under 28 U.S.C.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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§ 2244(d)(1) began to run immediately after the time expired for Tucker to file a direct appeal, or May 11, 2013, and the limitations period lapsed one year later on or about May 11, 2014.

Citing *Hutson v. Quarterman*, 508 F.3d 236, 240 (5th Cir. 2007), and noting that Tucker had alleged that “he filed two postconviction motions for DNA testing in state court, which motions the district court did not consider in finding Tucker’s § 2254 application time barred,” Tucker was granted a certificate of appealability “on the issue whether his filing of postconviction motions for DNA testing tolled the limitations period and rendered timely his § 2254 application.” We review the district court’s determination that a § 2254 petition was untimely de novo. *See Melancon v. Kaylo*, 259 F.3d 401, 404 (5th Cir. 2001).

The record reveals that Tucker filed a motion for DNA testing on or about December 12, 2013, prior to the expiration of the one-year limitations period, and he filed a second motion for DNA testing on or around October 14, 2015. The respondent concedes that no judicial disposition of Tucker’s DNA motions could be located, that those motions remain pending in the trial court, the one-year limitations period under § 2244(d)(1) never expired, and Tucker’s § 2254 application is timely. *See* § 2244(d)(2); *Hutson*, 508 F.3d at 240; *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

Tucker has demonstrated that the district court erred in concluding that his petition was untimely. Accordingly, we VACATE the judgment and REMAND the case to the district court for a determination of the merits of his application. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998). Tucker’s motion for appointment of counsel on appeal is DENIED as moot, without prejudice to the district court’s consideration of it on remand. *See Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985).