

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cohee v. Yates

No. 18-6071, United States Court of Appeals for the Tenth Circuit (July 27, 2018)

SUMMARY

The Tenth Circuit denied a certificate of appealability (COA) and dismissed an appeal from the denial of a 28 U.S.C. § 2254 habeas petition as untimely. The court held that the AEDPA one-year limitations period began when the state conviction became final ten days after the guilty plea, and the petition filed over two years later was untimely absent equitable tolling. The petitioner’s claim of ineffective assistance of counsel for failing to communicate during the appeal period did not warrant equitable tolling because he failed to show diligent pursuit of his rights or that extraordinary circumstances beyond his control caused the delay. The court also rejected pro se arguments regarding trial court abuse of discretion and state appellate errors, as the petition was time-barred.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	Carlos F. Lucero; Harris L. Hartz; Carolyn B. McHugh
JURISDICTION	Federal
DECIDED	July 27, 2018
DOCKET	18-6071
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from denial of habeas petition and denial of certificate of appealability
STANDARD OF REVIEW	Substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2)
PRECEDENTIAL VALUE	unpublished
PARTIES	Darrius Dajuan Cohee v. James Yates

TOPICS

- habeas corpus
- criminal procedure
- statute of limitations
- standard of review
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Cohee made a substantial showing of the denial of a constitutional right to warrant a COA.
2. Whether Cohee's § 2254 petition was untimely under AEDPA's one-year limitations period.
3. Whether Cohee was entitled to equitable tolling based on ineffective assistance of counsel, trial court abuse of discretion, or OCCA errors.

HOLDINGS

1. Cohee failed to make a substantial showing of the denial of a constitutional right, and his petition is untimely under AEDPA; equitable tolling is not warranted.

KEY QUOTATIONS

"We may issue a COA 'only if the applicant has made a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2). To satisfy this standard, Cohee must show 'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.' Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotation omitted)." (2)

"But as the magistrate judge properly held, Cohee failed to show that he 'diligently pursue[d]' this claim below and has not 'demonstrate[d] that the failure to timely file was caused by extraordinary circumstances beyond his control.' Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000)." (3)

FACTUAL BACKGROUND

In February 2014, Cohee pled guilty in Oklahoma state court to conspiracy to traffic a controlled dangerous substance and aggravated trafficking in illegal drugs. He was sentenced to eighteen years' imprisonment. He did not file a direct appeal, and his attempts to obtain relief through collateral state proceedings were unsuccessful. He then filed a § 2254 habeas petition in federal district court on December 29, 2017.

PROCEDURAL HISTORY

Cohee filed a 28 U.S.C. § 2254 habeas petition in the Western District of Oklahoma. A magistrate judge recommended dismissal as untimely. The district court adopted the recommendation and dismissed the petition. Cohee appealed and sought a COA.

DISPOSITION

dismissed

CASES CITED

- Slack v. McDaniel, 529 U.S. 473 (2000)
- Preston v. Gibson, 234 F.3d 1118 (10th Cir. 2000)

- Clark v. Oklahoma, 468 F.3d 711 (10th Cir. 2006)
- Marsh v. Soares, 223 F.3d 1217 (10th Cir. 2000)
- Fisher v. Gibson, 262 F.3d 1135 (10th Cir. 2001)
- Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347 (10th Cir. 2017)

OPINION

PER CURIAM.

FILED United States Court of Appeals UNITED STATES COURT OF APPEALS Tenth Circuit
FOR THE TENTH CIRCUIT July 27, 2018 _____ Elisabeth A.
Shumaker Clerk of Court DARRIUS DAJUAN COHEE, Petitioner - Appellant, v. No. 18-6071
(D.C. No. 5:17-CV-01384-R) JAMES YATES, (W.D. Okla.) Respondent - Appellee.
_____ ORDER DENYING CERTIFICATE OF
APPEALABILITY * _____ Before LUCERO, HARTZ, and
McHUGH, Circuit Judges. _____ Darrius Cohee seeks a
certificate of appealability (“COA”) to appeal the district court’s denial of his 28 U.S.C. § 2254
petition.

We deny a COA and dismiss the appeal. I In February 2014, Cohee pled guilty in Oklahoma state court to conspiracy to traffic a controlled dangerous substance and aggravated trafficking in illegal drugs. He was sentenced to eighteen years’ imprisonment. Cohee did not file a direct * 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. appeal, and his attempts to obtain relief through collateral state proceedings were unsuccessful. He then filed a § 2254 habeas petition in district court. A magistrate judge recommended that the application be dismissed as untimely.

After Cohee filed objections, the district court adopted the recommendation and dismissed Cohee’s petition. This timely appeal followed. II A petitioner may not appeal the denial of habeas relief under § 2254 without a COA. 28 U.S.C. § 2253(c)(1).

We may issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). To satisfy this standard, Cohee must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotation omitted).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a one-year limitations period. 28 U.S.C. § 2244(d)(1). In this case, the limitations period began to run on the date on

which Cohee’s judgment became final. § 2244(d)(1)(A); *Preston v. Gibson*, 234 F.3d 1118, 1120 (10th Cir. 2000).

Because Cohee did not appeal, his conviction became final ten days after the entry of judgment, on March 6, 2014. See *Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006). Cohee filed his habeas petition on December 29, 2017—over two years after the limitations period expired.

Under § 2244(d)(1), this action is therefore untimely absent equitable tolling. 1 Cohee argues that he is entitled to equitable tolling based on ineffective assistance of counsel, abuse of discretion by the trial court, and errors by the Oklahoma Court of Criminal Appeals (“OCCA”). According to Cohee, during the ten-day period following his guilty plea, his trial attorney ignored his calls.

Cohee contends that his attorney’s conduct constituted an improper denial of his Sixth Amendment right to counsel during appellate proceedings, which should render his petition timely. But as the magistrate judge properly held, Cohee failed to show that he “diligently pursue[d]” this claim below and has not “demonstrate[d] that the failure to timely file was caused by extraordinary circumstances beyond his control.” *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir.

2000). Cohee’s remaining arguments fare no better. He argues that the trial court committed abuse of discretion, but provides little detail. See *Carney v. Okla. Dep’t of Pub. Safety*, 875 F.3d 1347, 1351 (10th Cir. 2017) (“Although we construe [a pro se litigant’s] papers liberally, we cannot make arguments for him.” (citation omitted)). Cohee also argues that the OCCA erred by failing to engage in plain error review of inadmissible evidence, refusing to reach his application on appeal, and refusing to rule on his request for an evidentiary hearing.

Because his claims are time-barred, we do not address the merits of the OCCA’s decision. 1 Cohee is not entitled to statutory tolling because his application for post-conviction relief was filed after the AEDPA limitations period had ended. See *Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001). 3 III For the foregoing reasons, we DENY a COA and DISMISS the appeal.

Cohee’s motion to proceed in forma pauperis is GRANTED. Entered for the Court Carlos F. Lucero Circuit Judge 4