

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sherrod v. Hill

305 F. App'x 469 (9th Cir. 2008) · Decided December 30, 2008

SUMMARY

The Ninth Circuit affirmed dismissal of Kyle C. Sherrod’s 28 U.S.C. § 2254 petition as time-barred. The court held that the alleged failure of an inmate legal assistant to properly file the petition did not establish an extraordinary circumstance warranting equitable tolling, and that no evidentiary hearing was required. The court declined to consider an argument raised for the first time on appeal.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
JURISDICTION	Federal
DECIDED	December 30, 2008
DISPOSITION	affirmed
PROCEDURAL POSTURE	An Oregon state prisoner appealed the district court's dismissal of his 28 U.S.C. § 2254 petition as time-barred.
STANDARD OF REVIEW	The court reviewed the dismissal of the habeas petition as time-barred and the denial of an evidentiary hearing; the opinion does not expressly state a standard of review.
PRECEDENTIAL VALUE	Nonprecedential
PARTIES	Kyle C. Sherrod v. Hill

TOPICS

- federal habeas corpus
- statute of limitations
- appellate procedure
- preservation of error
- standard of review

PRACTICE AREAS

- Federal habeas corpus
- Post-conviction relief
- Appellate procedure

QUESTIONS PRESENTED

- Whether Sherrod was entitled to equitable tolling of the federal habeas statute of limitations because an inmate legal assistant failed to file his petition properly.
- Whether Sherrod was entitled to an evidentiary hearing on his equitable-tolling claim.

3. Whether the inmate legal assistant's actions should be imputed to the state and preclude the state from asserting that the limitations period had expired, where the argument was raised for the first time on appeal.

HOLDINGS

1. Sherrod was not entitled to equitable tolling because he did not demonstrate that the inmate legal assistant's conduct constituted an extraordinary circumstance that stood in his way and prevented timely filing.
2. An evidentiary hearing was not warranted because, even assuming Sherrod's allegations were true, he would not be entitled to equitable tolling.
3. The court declined to reach the merits of Sherrod's argument that the inmate legal assistant's actions should be imputed to the state because the argument was raised for the first time on appeal.

KEY QUOTATIONS

"We reject this contention because Sherrod has not demonstrated that this was an extraordinary circumstance that stood in his way and prevented timely filing." (470)

"We conclude that an evidentiary hearing was not warranted because, even if his allegations are true, he would not be entitled to equitable tolling." (470)

"We decline to reach the merits of this argument because it is raised for the first time on appeal." (470)

FACTUAL BACKGROUND

Sherrod, an Oregon state prisoner, entrusted his federal habeas petition to an inmate legal assistant. The assistant failed to file the petition properly, and the limitations period expired before Sherrod entrusted the petition to the assistant. Sherrod sought equitable tolling and an evidentiary hearing based on these circumstances.

PROCEDURAL HISTORY

The district court dismissed Sherrod's federal habeas petition as untimely. On appeal, Sherrod argued that equitable tolling applied because an inmate legal assistant failed to file his petition properly, that he was entitled to an evidentiary hearing, and that the legal assistant's conduct should be imputed to the state. The Ninth Circuit affirmed, declining to consider the state-imputation argument because it was raised for the first time on appeal.

DISPOSITION

affirmed

CASES CITED

- Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007)
- Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006)
- Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001)

OPINION

Sherrod v. Hill 305 F. App'x 469

PER CURIAM.

MEMORANDUM **

Oregon state prisoner Kyle C. Sherrod appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 petition as time-barred. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm. Sherrod contends that he is entitled to equitable tolling of the statute of limitations, and his petition is therefore not time-barred, because the inmate legal assistant with whom he entrusted his petition failed to file the petition properly. We reject this contention because Sherrod has not demonstrated that this was an extraordinary circumstance that stood in his way and prevented timely filing. See *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007); *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir.2006). Sherrod also contends that he should have received an evidentiary hearing. We conclude that an evidentiary hearing was not warranted because, even if his allegations are true, he would not be entitled to equitable tolling. See *Roy*, 465 F.3d at 969. Finally, Sherrod contends that the inmate legal assistant's actions should be imputed to the state and that the state should therefore be precluded from raising the fact that the limitations period expired long before Sherrod entrusted his petition to the inmate legal assistant. We decline to reach the merits of this argument because it is raised for the first time on appeal. See *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.2001). **AFFIRMED.** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.