

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.

OPINION

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.