JIMENEZ v. COCKRELL

2003 | Cited 0 times | N.D. Texas | May 19, 2003

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636 (b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a state prisoner pursuant to 28 U.S.C. § 2254.

B. PARTIES

Petitioner Frank Joe Jimenez III, TDCJ-ID #1013080, is in custody of the Texas Department of Criminal Justice, Institutional Division, in Huntsville, Texas.

Respondent Janie Cockrell is the Director of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID).

C. FACTUAL AND PROCEDURAL HISTORY

In March 1990, Jimenez was charged by indictment in state court with the murder of Carlos Castoreno. (2State Habeas R. 65.)[1] On January 28, 1991, pursuant to a plea bargain agreement, Jimenez pled nolo contendere to the charged offense and was placed on ten years' deferred adjudication community supervision. (Id. at 67-76.) Jimenez did not file a motion for new trial or directly appeal the deferred adjudication judgment; thus the judgment became final under state law thirty days later on February 27, 1991. See Manuel v. Texas, 994 S.W.2d 658, 661-62 (Tex.Crim. App. 1999) (holding defendant placed on deferred adjudication may raise issues relating to original plea proceeding only in appeal taken when deferred adjudication is first imposed); TEX. R. APP. P. 26.2(a)(1) (formerly TEX. R. APP. P. 41(b)(1)) (allowing thirty days from the date sentence is imposed or suspended in open court to file notice of appeal in the absence of timely filed motion for new trial).

Subsequently, the state filed a petition to proceed to adjudication, alleging various violations of Jimenez's deferred adjudication community supervision. (Id. at 78-80.) On September 28, 2000, the trial court adjudicated Jimenez's guilt for the offense and, on October 27, 2000, sentenced Jimenez to seventeen years' imprisonment. (Id. at 81.) Jimenez filed a motion for new trial, but did not directly appeal the judgment adjudicating his guilt. (Pet. at 3.) Thus, the trial court's judgment adjudicating guilt became final under state law ninety days later on January 25, 2001. See TEX. R. App. P. 26.2(a)(2) (allowing ninety days after the date sentence is imposed or suspended in open court to file notice of appeal if timely motion for new trial is filed).[2]

Jimenez has filed two postconviction applications for writ of habeas corpus in the state courts. The first was denied without written order on the findings of the trial court. Ex parte Jimenez, No. 50, 175-02 (Tex. Cm. App. Jan. 9, 2002) (not designated for publication). The second was dismissed as successive. Ex parte Jimenez, No. 50, 175-03 (Tex.Crim. App. Apr. 10, 2002) (not designated for publication). Jimenez filed his federal petition for writ of habeas corpus on December 3, 2002, in the United States District Court for the Southern District of Texas, Houston Division, and the petition was thereafter transferred to the Northern District of Texas, Fort Worth Division, by order dated January 31, 2003.[3]

D. ISSUES

In grounds one and two of the instant petition, Jimenez incorporates by reference the claims raised in his two state writ applications, some of which relate to the original plea proceeding and some of which relate to the proceeding to adjudicate his guilt. (Pet. at 7; State Habeas Rs.) In his third ground, he claims he has been denied access to the courts during the "time spent `in transit' at state jail and/or transfer facilities that lack sufficient resources to thoroughly and comprehensively investigate and raise [his] constitutional claims." (Pet. at 7-8.)

E. RULE 5 STATEMENT

Cockrell believes that the claims raised in Jimenez's state writ application No. 50, 175-02 and presented in this federal petition are sufficiently exhausted for purposes of § 2254(b) and (c). 28 U.S.C. § 2254 (b)-(c). She asserts, however, that the claims raised in Jimenez's state writ application No. 50, 175-03 and presented herein have not been exhausted in the state court system and are procedurally barred. (Resp't Answer at 3-5.) Nevertheless, she does not move for dismissal on exhaustion grounds and, instead, moves for dismissal on limitations grounds.

F. STATUTE OF LIMITATIONS

Cockrell argues that Jimenez's claims are barred by the one-year statute of limitations. (Resp't Resp. at 6-9.) The Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), effective April 24, 1996, imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. 28

U.S.C. § 2244 (d). Section 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244 (d)(1)-(2).

Petitioners attacking judgments which became final before the AEDPA's effective date have one year from the effective date of the Act to file a federal habeas corpus action. Flanagan v. Johnson, 154 F.3d 196, 199-201 (5th Cir. 1998).

As to Jimenez's claims relating to his original plea and the judgment placing him on deferred adjudication community supervision, Cockrell argues that the one-year limitations period ran from the date on which the deferred adjudication order became final by the conclusion of direct review or the expiration of the time for seeking such review. (Resp't Answer at 5-7.) 28 U.S.C. § 2244 (d)(1)(A). Cockrell contends that the judgment placing Jimenez on deferred adjudication community supervision became a final appealable order on January 28, 1991, the date deferred adjudication community supervision was imposed, and that the time for seeking direct review expired on February 27, 1991, 30 days after the judgment was entered. Because that date precedes the effective date of the AEDPA, she argues a federal petition challenging Jimenez's plea or the plea proceedings was due no later than April 24, 1997, absent any tolling. (Id.) Similarly, Cockrell contends Jimenez's claims relating to the adjudication of guilt are untimely. (Id. at 8-9.)

On the other hand, Jimenez contends that, although he was aware of a statute of limitations, he is entitled to equitable tolling on the grounds that the state impeded his access to the courts by not furnishing him with the information to gain a "legal transfer" and by failing to provide him with practice and procedure guides and an adequate law library necessary for the investigation and advancement of his claims while he was "in transit." (Pet'r Mem. at 4; Pet'r Supp. Br. at 3-18.) He further contends equitable tolling is appropriate because his trial counsel failed to properly advise him regarding his right to appeal. (Id.) Jimenez proposes that the limitations period did not begin to run until he was transferred to a unit of TDCJ-ID with an adequate law library that allowed him "ready and meaningful access to the courts." (Id. at 13.)

Historically, the undersigned and the district judges in this division have found that the statute of limitations in the deferred adjudication context does not begin to run until deferred adjudication community supervision is revoked and guilt is adjudicated. See, e.g., Standridge v. Cockrell, No. 4:02-462-Y, 2002 WL 31045977, at *3 (N.D. Tex. Sept. 10, 2002); Anderson v. Cockrell, No. 4:02-CV-157-A, 2002 WL 1782222, at *3-4 (N.D. Tex. July 30, 2002); Crenshaw v. Cockrell, No. 4:01-CV-405-Y, 2002 WL 356513, at *5 (N.D. Tex. Mar. 5, 2002). But see Wilkinson v. Cockrell, 240 F. Supp.2d 617, 621 (N.D. Tex. 2002).[4] Likewise, other judges in the district have historically adopted that position. See, e.g., Jamme v. Cockrell, No. 3:01-CV-1370-L, 2002 WL 1878403, at *23 (N.D. Tex. Aug. 12, 2002); Cutrer v. Cockrell, No. 3:01-CV-0841-D, 2002 WL 1398558, at *25 (N.D. Tex. June 26, 2002); Smith v. Cockrell, No. 3:02-CV-0503-M, 2002 WL 1268016, at * 2 (N.D. Tex. June 3, 2002); Davis v. Cockrell, No. 3:01-CV-1946-D, 2002 WL 226367, at *2 (N.D. Tex. Feb. 12, 2002); Jordan v. Cockrell, No. 3:01-CV-1162-G, 2001 WL 1388015, at *2 (N.D. Tex. Nov. 6, 2001). Because of certain indications from the Fifth Circuit Court of Appeals, this historical position on the issue has been called into question, and it is now appropriate to reexamine the position.

Although the Fifth Circuit has not yet addressed the issue of "finality" of a deferred adjudication order for purposes of § 2244(d)(1)(A), on a closely analogous matter the Court has addressed the issue of "finality" of a deferred adjudication order for purposes of sentence enhancement under 21 U.S.C. § 841(b)(1)(A). See United States v. Vasquez, 298 F.3d 354, 358 (5th Cir.), cert denied, 123 S.Ct. 546 (2002). For purposes of sentence enhancement under § 841(b)(1), a prior conviction for a felony drug offense must be final. 21 U.S.C. § 841 (b)(1)(A). Such a conviction becomes final when the time for seeking direct appellate review has elapsed. See United States v. Morales, 854 F.2d 65, 68-69 (5th Cir. 1988).

In Vasquez, the government sought to enhance Vasquez's federal drug sentence under § 841(b)(1)(A) on the basis of a prior Texas state court deferred adjudication for an unrelated felony drug offense. Id. at 358-59. Vasquez argued that the deferred adjudication was not "final" within the meaning of the enhancement statute since he retained the right to appeal revocation of his deferred adjudication community supervision and any sentence imposed thereon. Id. at 358. Turning to Texas law, the Court noted that a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in an appeal taken when deferred adjudication is first imposed and that a defendant whose deferred adjudication is revoked may appeal only from the

revocation. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 23 (Vernon Supp. 2003); Manuel, 994 S.W.2d at 658. It stated that "the proper analysis of whether Vasquez's prior state conviction had become `final' focuses not on whether his deferred adjudication had been revoked and a formal adjudication of guilt entered, but instead on whether the time for appealing the entry of deferred adjudication had passed." Id. at 359. The Court concluded that because Vasquez had not appealed the imposition of deferred adjudication community supervision in his Texas case, his "conviction" for the state offense became "final" for purposes of the § 841(b)(1)(A) enhancement when the time for seeking appellate review had expired thirty days after deferred adjudication was imposed. Id. at 359; see also Tex. R. App. P. 26.2(a)(1).[5]

Vasquez, coupled with the court order referred to in footnote 5, is more than persuasive on the present issue. In keeping with this authority, the statute of limitations begins for purposes of § 2244(d)(1)(A) when a Texas state court deferred adjudication order becomes final by the conclusion of direct review or the expiration of the time for seeking such review, notwithstanding the fact that there has been no determination of guilt. Accordingly, Jimenez's opportunity to appeal the validity of his original plea and the plea proceedings expired in February 1991. See id. at 358-59; Manuel, 994 S.W.2d at 661-62. Allowing for the one-year grace period, a federal petition raising any claims regarding his original plea and the plea proceedings must have been filed by April 24, 1997. See Flanagan v. Johnson, 154 F.3d 196, 199-201 & n. 2 (5th Cir. 1998). Jimenez's state writ applications filed after limitations had expired did not operate to toll the limitations period. See Scott v. Johnson, 227 F.3d 260, 263 (5th Cir. 2000), cert denied, 532 U.S. 963 (2001). Thus, Jimenez's claims challenging the original plea and the plea proceedings raised in the instant petition, filed on December 3, 2002, are untimely.

As to Jimenez's claims challenging the adjudication proceedings and his seventeen-year sentence, the time for seeking direct review of the judgment adjudicating guilt began on October 27, 2000, the day his sentence was imposed in open court. See TEX. R. APP. P. 26.2(a)(2). As previously noted, Jimenez filed a motion for new trial but did not directly appeal the judgment. (Pet. at 3.) Thus, the judgment adjudicating guilt became final on January 25, 2001, and Jimenez had one year thereafter, or until January 25, 2002, to timely file a federal petition raising his claims absent any applicable tolling. See TEX. R. APP. P. 26.2(a)(2). Applying the tolling provision under § 2244(d)(2) during the pendency of his state writ applications, the limitations period was tolled for an additional 281 days. See 28 U.C. § 2244(d)(2). His federal petition raising claims regarding the adjudication proceedings and his seventeen-year sentence was therefore due no later than November 2, 2002. Accordingly, Jimenez's petition filed on December 3, 2002 is untimely.

Jimenez's arguments in support of equitable tolling are not persuasive. Application of the doctrine of equitable tolling is available only in rare and exceptional circumstances when a person is prevented in some extraordinary way from asserting his rights in a timely manner. See Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998). An inadequate law library does not constitute a "rare and exceptional" circumstance warranting equitable tolling. See

Scott, 227 F.3d at 263 n. 3. Nor does Jimenez's pro se status, his unfamiliarity with TDCJ-ID's policies and procedures for obtaining a "legal transfer," or his ignorance of the law or legal process entitle him to equitable tolling. See Felder v. Johnson, 204 F.3d 168, 171-72 (5th Cir. 2000); Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999). Finally, whether Jimenez had effective assistance of counsel on direct appeal in state court is not relevant to the question of tolling the AEDPA's statute of limitations. See Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. 2000); see also United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002) (holding mere attorney error or neglect does not trigger statute of limitations); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Apr. 3, 2003) (No. 02-9984) (same). Jimenez alleges he was denied his right to appeal through ineffective assistance of trial counsel and that due to counsel's age, counsel "was often forgetful and extremely slow at getting things done." A criminal defendant has a right to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 395 (1985). An alleged violation of that right, however, does not toll the federal statute of limitations. Molo, 207 F.3d at 775.

RECOMMENDATION

Jimenez's petition for writ of habeas corpus should be DISMISSED with prejudice as time-barred.

NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636 (b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until June 9, 2003. The United States District Judge need only make a de novo determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. See 28 U.S.C. § 636 (B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc op. on reh'g); Carter v. Collins, 918 F.2d 1198, 1203 (5th Cir. 1990).

IV. ORDER

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until June 9, 2003, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

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It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

1. "2State Habeas R." refers to the state habeas record in Ex parte Jimenez, No. 50, 175-02.

2. Apparently, Jimenez's motion for new trial was overruled by operation of law.

3. A pro se habeas petition is deemed filed when the petition and any attachments are delivered to prison authorities for mailing. See Spotville v. Cain, 149 F.3d 374 377 (5th Cir. 1998).

4. In Wilkinson, District Judge John H. McBryde earlier concluded that Cockrell's position on the subject is correct and reversed his previous position on the issue.

5. Further indication that the Fifth Circuit would adopt this view in determining the finality of a deferred adjudication order or judgment for purposes of § 2244(d)(1)(A) is found in a January 6, 2003 order out of that Court denying a certificate of appealability in an unrelated case from this division, Caldwell v. Cockrell, No. 02-11010, USCC No. 4:02-CV-326-A. In that case, Caldwell was placed on deferred adjudication community supervision by the state trial court for burglary of a habitation in November 1992. He did not appeal the deferred adjudication order. In August 2000, the state trial court adjudicated Caldwell's guilt for the offense. Thereafter, Caldwell attempted to appeal his conviction, but because his notice of appeal was deficient and because he had failed to timely appeal the deferred adjudication judgment, the state appellate court dismissed the appeal for want of jurisdiction. Thereafter, Caldwell sought state habeas relief, which was denied, and, in March 2002, he filed a federal petition for writ of habeas corpus in this court pursuant to § 2254. His claims relating to his original plea and the plea proceeding were dismissed by this court as untimely. Fifth Circuit Judge B. Grady Jolly, when ruling on Caldwell's request for certificate of appealability on the issue, expressly stated in his order that Caldwell's petition was time-barred with regard to his claims relating to the original plea hearing because his opportunity to appeal the validity of his plea and the plea proceeding expired in December 1992 under Manuel v. State. 994 S.W.2d at 661-62.