United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 6, 2023
Lyle W. Cayce
Clerk

No. 19-30750

CHARLES F. FICHER, JR.,

Petitioner—Appellant,

versus

EDWARD BICKHAM, *Warden, Dixon Correctional Institute*,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:14-CV-2281

Before ELROD, HO, and WILSON, *Circuit Judges*.

JAMES C. HO, *Circuit Judge*:

When defending against a federal habeas petition, the state may determine that it has a debatable timeliness argument, but a devastating merits argument. When that happens, the state may rationally elect to pursue the merits argument, and forgo the timeliness argument. It may choose that path to give closure to the litigant, deter additional litigation, or further some other objective. And if a state decides to make that call, the Supreme Court has told us that we must respect it. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012). After all, timeliness isn't jurisdictional, so it's subject to waiver or forfeiture by the state. *See Day v. McDonough*, 547 U.S. 198, 205 (2006).

That's what happened here: The State abandoned its timeliness defense on appeal. It argued timeliness before the district court, and prevailed on that ground. But now on appeal, it concedes that Petitioner's equitable tolling argument may have merit, so it urges us instead to decide the ineffective assistance of counsel claim—an issue the district court didn't address.

We must honor the State's considered decision to proceed on the merits. But we will not decide the merits when the district court has not yet done so. Instead we vacate and remand so that the district court can rule on the ineffective assistance of counsel claim in the first instance.

I.

A Louisiana jury convicted Charles F. Ficher, Jr. of second-degree murder. (In the underlying state records, Petitioner's name sometimes appears as "Fisher" or "Fischer." *See*, *e.g.*, *State v. Fisher*, 648 So. 2d 52 (La. App. 1995). But in this case, he is referred to as "Ficher," so that is the spelling we adopt in this opinion.)

In this habeas proceeding, Ficher contends that his trial counsel erred by failing to contact an eyewitness who would've supported his defense. He has twice been denied state postconviction relief. He now seeks federal habeas relief for a second time.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a state prisoner has one year to file a federal petition for habeas corpus relief. 28 U.S.C. § 2244(d)(1). The limitations period is tolled during the time the petitioner's properly filed application for state postconviction relief is pending. 28 U.S.C. § 2244(d)(2).

When Ficher filed his first federal habeas petition, the district court found it timely because his application for state postconviction relief had

tolled the limitations period. *Ficher v. Cain*, 2008 WL 4974431, at *1 (E.D. La. Nov. 19, 2008). But the district court ultimately dismissed the petition without prejudice, because it included some unexhausted claims for state relief—rejecting Ficher's request to delete the unexhausted claims because they would have been procedurally barred in state court in any event. *Id. Cf. Rhines v. Weber*, 544 U.S. 269, 278 (2005) (holding that the district court should allow a petitioner to "delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief"). The AEDPA limitations period ran while his first federal habeas petition was pending.

Years later, Ficher filed a second application for state postconviction relief, relying on an intervening Supreme Court case. But the state courts denied relief. *See State ex rel. Fischer v. State*, 141 So. 3d 279 (La. 2014). Ficher then filed his second federal habeas petition, again relying on the intervening Supreme Court decision. The district court held the petition untimely and dismissed it with prejudice. *See Ficher v. Goodwin*, 2019 WL 3522243, at *6 (E.D. La. Aug. 2, 2019).

II.

The AEDPA statute of limitations is an affirmative defense that may be forfeited or waived. *See Day*, 547 U.S. at 205, 208.

Nevertheless, the Supreme Court has held that courts have the discretion to address an unargued timeliness defense *sua sponte*—at least where the state's waiver or forfeiture is based on a mistake. *See*, *e.g.*, *id.* at 202 (where "a concession of timeliness by the state" is "patently erroneous," "the federal court had discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation") (alteration omitted); *id.* at 210 ("if a judge does detect a

clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge"); *id.* at 211 ("From all that appears in the record, there was merely an inadvertent error, a miscalculation," and therefore "no abuse of discretion" for a court to raise the timeliness defense *sua sponte*).

But what if it's not a mistake? What if, instead, the state makes a deliberate and considered decision to abandon a potentially viable timeliness defense?

In its brief on appeal, the State acknowledged that Ficher's argument for equitable tolling was "at the very least not implausible." As the State observed, "equitable tolling may be warranted where a federal petition is dismissed without prejudice in order to allow a pro se petitioner to exhaust state court remedies, and the petitioner's AEDPA clock runs during the pendency of the federal habeas proceeding."

The State doubled down on its decision during oral argument. We asked counsel whether he "recognize[d] that [the State's] appellate brief is essentially steering [the court] toward affirming on the merits." He agreed, stating that the State had an interest in obtaining a favorable ruling dismissing Ficher's petition on the merits, rather than on timeliness grounds.

So this is not a case of a mistaken belief in timeliness, but rather, a deliberate decision by the State to forgo a debatable defense. As a result, this case is governed, not by *Day*, but by *Wood*.

In *Wood*, the state "express[ed] its clear and accurate understanding of the timeliness issue," and then "deliberately steered the [court] away from the question and towards the merits of Wood's petition." 566 U.S. at 474. The state advised the district court that it "would not challenge . . . the timeliness of Wood's habeas petition." *Id.* at 465 (cleaned up).

The district court denied the habeas claims on the merits, as the state requested. But the court of appeals raised the timeliness issue *sua sponte* and held the petition untimely. *Id.* at 467–68.

The Supreme Court held that the court of appeals abused its discretion by overriding the state's judgment and entertaining the abandoned timeliness defense. *Id.* at 474. "The State's . . . decision not to contest the timeliness of Wood's petition did not stem from an 'inadvertent error,' as . . . in *Day*." *Id.* Rather, "the State knew it had an 'arguable' statute of limitations defense, yet it chose, in no uncertain terms, to refrain from interposing a timeliness 'challenge' to Wood's petition." *Id.* "For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved." *Id.* at 473.

In sum, courts of appeals may reach an abandoned timeliness defense when the waiver or forfeiture results from a mistake—but not when the state's decision to focus exclusively on the merits of the habeas claim is based on a deliberate judgment call. And that is especially so where timeliness is complex but the merits are straightforward. *Cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) ("Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.").

So we will heed the State's direction not to decide the timeliness issue. But rather than decide the merits of Petitioner's claim in the first instance, we conclude that remanding the case back to the district court is appropriate. *See*, *e.g.*, *Wallace v. Mississippi*, 43 F.4th 482, 501 (5th Cir. 2022) (vacating and remanding after holding that the district court erred in its time bar determination); *Hardy v. Quarterman*, 577 F.3d 596, 600 (5th Cir. 2009)

(remanding to the district court upon reversal of a denial of equitable tolling). The district court has not yet had opportunity to reach the merits of Petitioner's claim. As we have repeatedly observed, we are a court of review, not first view.

* * *

We vacate and remand this case for proceedings on the merits.