

14 Fed.Appx. 791

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.

Dyke Edward NELSON, Petitioner-Appellant,

v.

John M. RATELLE, Warden; Attorney General of the State of California, Respondents-Appellees.

No. 99-55299. D.C. No. CV-96-07525-TJH-AN. Argued
and Submitted Dec. 8, 2000. Decided June 28, 2001.

State prisoner filed petition for habeas corpus. The United States District Court for the Central District of California, [Terry J. Hatter, Jr.](#), J., dismissed petition as time barred. Prisoner appealed. The Court of Appeals held that prisoner's filing a writ of habeas corpus with the California Supreme Court tolled statute of limitations until date on which the California Supreme Court dismissed petition on procedural grounds.

Reversed.

***791** Appeal from the United States District Court for the Central District of California [Terry J. Hatter, Jr.](#), District Judge, Presiding.

Before [BROWNING](#), [PREGERSON](#), and [BEEZER](#), Circuit Judges.

Opinion

MEMORANDUM¹

Dyke Edward Nelson appeals the dismissal of his [28 U.S.C. § 2254](#) petition for habeas corpus as time barred. We have jurisdiction pursuant to [28 U.S.C. § 2253](#).

Nelson contends that his writ of habeas corpus filed with the California Supreme Court on April 23, 1997 tolled the statute of limitations so that his Amended Petition originally filed on March 28, 1997, and still pending before the district court on August 27, 1997, was timely.

¹ We review the dismissal of a petition for a writ of habeas corpus de novo. [Miles v. Prunty](#), 187 F.3d 1104, 1105 (9th Cir.1999).

² ³ The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations on habeas petitions by state prisoners. [28 U.S.C. § 2244\(d\)](#). Since Nelson's conviction became final before the enactment of AEDPA, the statute of limitations was due to expire ***792** on April 24, 1997, one year after the act's implementation. [Calderon v. United States District Court \(Beeler\)](#), 128 F.3d 1283, 1287 (9th Cir.1997), *overruled in part on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir.1998). The statute of limitations is tolled, however, while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." [28 U.S.C. § 2244\(d\)\(2\)](#). Nelson filed a writ of habeas corpus with the California Supreme Court on April 23, 1997, which tolled the statute of limitations until August 27, 1997, the date on which the California Supreme Court dismissed Nelson's petition on procedural grounds. A state habeas petition is still "properly filed" with the state court sufficient to toll the statute of limitations even though a petitioner's claims may be deemed procedurally barred by the state court. [Artuz v. Bennett](#), 531 U.S. 4, 121 S.Ct. 361,

364, 148 L.Ed.2d 213 (2000); *Dictado v. Ducharme*, 244 F.3d 724, 726 (9th Cir.2001). Nelson's habeas petition was therefore exhausted and before the district court on August 27, 1997, one day before the statute of limitations would have run. The district court should proceed with that petition, although it may allow Nelson leave to amend his petition to cure the defects described in the district court's November 7, 1997 order. Such an amendment would relate back to the petition timely before the district court on August 27, 1997. Fed.R.Civ.P. 15(c)(2); *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir.2000).

REVERSED.

Parallel Citations

2001 WL 727323 (C.A.9 (Cal.))

Footnotes

- 1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by [Ninth Circuit Rule 36-3](#).

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