

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TYRONE DAVIS : CIVIL ACTION
 :
 v. :
 :
 BEN VARNER, :
 AND : NO. 00-4349
 THE DISTRICT ATTORNEY OF :
 THE COUNTY OF PHILADELPHIA, :
 AND :
 THE ATTORNEY GENERAL OF :
 THE STATE OF PENNSYLVANIA :

MEMORANDUM

Padova, J.

November , 2001

Before the Court is Tyrone Davis' pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner is a state prisoner currently incarcerated at the State Correctional Institution at Dallas, Pennsylvania. For the reasons that follow, the Court denies the Petition.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The procedural history of Petitioner's case following conviction is complex. The details relevant to the instant Petition are as follows:

Petitioner received a jury trial presided over by the Honorable Francis A. Biunno of the Philadelphia Court of Common Pleas, and on May 14, 1985, was convicted of first-degree murder and possessing an instrument of crime. On September 10, 1986, Judge

Biunno denied post-verdict motions and sentenced Petitioner to a term of life imprisonment on the murder conviction, together with a concurrent sentence of ten months to five years for possessing an instrument of crime.

On September 16, 1986, Petitioner appealed to the Pennsylvania Superior Court asserting the following grounds: (1) the trial court committed reversible error in refusing to permit a juror to question a Commonwealth witness by writing the question for submission; (2) the selection of Petitioner's jury violated the Pennsylvania Constitution; and (3) the verdict was against the weight of the evidence. On April 28, 1987, in a per curium decision, the Superior Court affirmed the judgment of sentence. On May 21, 1987, Petitioner filed an Allowance of Appeal with the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied allocatur on September 25, 1987.

On March 10, 1988, Petitioner filed a pro se motion ("First PCRA Motion") pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, in the Court of Common Pleas for Philadelphia County. In his First PCRA Motion, Petitioner presented two new arguments which were not part of his appeal: (1) that the cross-examination by the prosecutor of a defense witness as to the witness' knowledge of an individual known as George Randolph was irrelevant and prejudicial; and (2) that the prosecutor made improper, prejudicial and inflammatory remarks in

his closing statement. The court appointed counsel to file an amended petition on behalf of Petitioner, but counsel submitted a letter, pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988) ("Finley letter"), seeking to withdraw on the grounds that no meritorious issues existed. On October 10, 1991, the PCRA court, allowed counsel to withdraw and dismissed the First PCRA Motion as meritless. On November 22, 1991, Petitioner filed a pro se appeal to the Pennsylvania Superior Court, which was dismissed as untimely. Petitioner did not pursue any further action on that Motion in the Pennsylvania Supreme Court.

On December 2, 1996, approximately five years later, Petitioner filed a new PCRA Motion ("Second PCRA Motion") raising three new issues: (1) trial counsel was ineffective for not interviewing the defense witness, Mr. Arthur Gaskins, and for failing to recall Mr. Gaskins as a surrebuttal witness; (2) trial counsel was ineffective for failing to object and argue that prior inconsistent statements may be considered only for purposes of impeachment and not as substantive evidence; and (3) appellate and post-conviction counsel were ineffective for not litigating or preserving the above issues. On August 20, 1997, the court held that the Second PCRA Motion was untimely, that some of the issues raised were waived or previously litigated, and that all of the issues were meritless. On November 16, 1999, the Superior Court affirmed, concluding that the Motion was untimely. Petitioner filed

a petition for re-argument or en banc hearing which was denied on January 11, 2000. The Pennsylvania Supreme Court denied allocatur on May 23, 2000.

On August 18, 2000, Petitioner pro se filed the instant Petition.¹ In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, the Court referred the Petition to United States Magistrate Judge Charles B. Smith for a report and recommendation. On May 8, 2001, Judge Smith filed a report and recommendation ("Report") recommending that the Petition be denied. Petitioner filed timely objections. In accordance with 28 U.S.C. § 636(b), the Court will conduct a de novo determination of the Report.²

II. DISCUSSION

The instant Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A.

¹ Although the actual filing of the Petition was August 25, 2000, Petitioner signed the Petition and presumably delivered it to prison officials on August 18, 2000.

² Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

§ 2254(a)(West Supp. 2001).

The Petition asserts nine claims for relief. First, Petitioner claims the 1995 amendments to the Post Conviction Relief Act, which place a one-year limitation period on the filing of petitions under the Act, are unconstitutional. Second, Petitioner argues that the decision of the Pennsylvania Superior Court on the issues raised in the PCRA appeal were inconsistent with the applicable practices of the courts in Pennsylvania. Third, Petitioner argues that the trial court abused its discretion and committed reversible error in dismissing Petitioner's Second PCRA Motion as untimely without first according him procedural due process under standards announced by the Pennsylvania Supreme Court in Commonwealth v. Lawson, 549 A.2d 107 (Pa. 1988), where Petitioner made a prima facie showing of a manifest miscarriage of justice. Fourth, Petitioner contends that First PCRA counsel rendered ineffective assistance under Pennsylvania Rule of Criminal Procedure 1504 by failing to raise claims of constitutional violations rendering Petitioner's trial unfair. Fifth, Petitioner claims that the Commonwealth prejudiced him of his right to a fair and impartial trial by first charging conspiracy, joining his trial with his co-defendant and then withdrawing the conspiracy count, while still conducting the trial under the conspiracy and accomplice theory. Sixth, Petitioner claims ineffective assistance of trial counsel for failing to make a timely objection to the improper jury

instruction and ineffective assistance of appellate and PCRA counsel for failing to argue trial counsel's ineffectiveness on this issue. Seventh, Petitioner claims ineffective assistance of trial counsel for not interviewing defense witness Arthur Gaskins and not thereafter recalling him as a surrebuttal witness to explain that he could not identify the shooter, but was certain that the shooter was not Petitioner or his co-defendant. Eighth, Petitioner claims ineffective assistance of trial counsel for failing to object and argue that prior inconsistent statements may be considered only for the purpose of impeachment and not as substantive evidence. Ninth, Petitioner asserts that he was denied his right to effective assistance of counsel where all prior counsel failed to raise and argue the issues raised above. See Petition at 6.

Magistrate Judge Smith determined that Petitioner's claims are procedurally barred as untimely under the applicable statute of limitations. He further concluded that equitable tolling was not available.

Petitioner objects to the magistrate's conclusion that the Petition is untimely. First, Petitioner contends that the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) was equitably tolled because Petitioner did not know that his Second PCRA Motion, which was dismissed as untimely, would not toll the statute of limitations. Second, Petitioner contends that the

statute of limitations should be excused because he has established the existence of a miscarriage of justice because he is actually innocent of the crimes of which he was convicted. The Court disagrees and overrules both objections.

A. AEDPA's One-Year Statute of Limitations

The instant Petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997) (applying AEDPA to petitions filed after April 24, 1996, the effective date of AEDPA). Under the Act:

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.

28 U.S.C. § 2244(d)(1). In this instance, provision (A), the final judgment date applies. Petitioner has not alleged any facts

indicating that any of these other provisions apply, therefore, the Court will not consider them.

Using the final date of judgment, Petitioner's Petition is untimely. Petitioner's judgment became final on December 25, 1987, ninety days after the Pennsylvania Supreme Court denied allocatur on September 25, 1987. See Morris v. Horn, 187 F.3d 333, 337, n.1 (3d Cir. 1999) (holding that judgment becomes final at the conclusion of direct review or the expiration of time for filing such review, including the time for filing a petition for writ of certiorari in the United States Supreme Court). Because the judgment became final prior to the effective date of the AEDPA, Petitioner receives a "grace-period" of one year starting on April 24, 1996, the effective date of the AEDPA. See Brown v. Angleone, 150 F.3d 370, 372-73 (4th Cir. 1998). Thus, Petitioner had from April 24, 1996, until April 23, 1997, to file this habeas Petition. See Nara v. Frank, 264 F.3d 310, 315 (3d Cir. 2001). Petitioner failed to file by April 23, 1997, and his Petition is therefore time barred.

Furthermore, Petitioner's Second PCRA Motion did not toll the statute of limitations. The AEDPA only allows tolling for properly filed applications: "[T]he time during which a properly filed application for State post-conviction 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)(2). A "'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). If a Petitioner files an application that the state court dismisses as either time-barred or waived, then it is not deemed a "properly-filed application." Morris v. Horn, 187 F.3d 333, 338 (3d Cir. 1999). In the instant case, the state court determined that Petitioner's Second PCRA Motion was untimely.³ Therefore, it did not toll the limitations period because it was not "properly filed." See Morris, 187 F.3d at 338.

³ 42 Pa. C.S.A. § 9545 provides:

Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claims in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in the section and has been held by that court to apply retroactively.

42 Pa. C.S.A. § 9545 (West 2001).

B. Petitioner's Objections

Petitioner first objects that the one-year statute of limitations should be deemed equitably tolled because Petitioner did not know that his Second PCRA Motion, which was held to be untimely, would not toll the statute since he filed it during the PCRA "grace period." Petitioner, however, fails to meet the requirements for equitable tolling.

The statute of limitations in the AEDPA is subject to equitable tolling. See Miller v. New Jersey State Dep't. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). "[E]quitable tolling is proper only when 'the principles of equity would make [the] rigid application [of a limitation period] unfair.'" Id. at 618 (citation omitted). The petitioner "must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient." Id. at 618-19 (citations and internal citations omitted). Equitable tolling may be permitted when: (1) the respondent has actively misled the petitioner; (2) the petitioner has in some extraordinary way been prevented from asserting his rights; or (3) the petitioner has timely asserted his rights but in the wrong forum. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). "[I]n the final analysis, however, 'a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.'" Jones, 195 F.3d

at 159 (citing United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)). In the present case, none of the factors for tolling have been met. Petitioner has not presented any evidence that Respondent misled Petitioner regarding the filing date of this Petition. Petitioner has not in some extraordinary way been prevented from asserting his rights. This is also not an instance where Petitioner has timely filed but in the wrong forum. Rather, Petitioner did not file his Petition until well after the expiration of the limitations period. Petitioner presents no reason as to why he waited until August 2000 to file the present Petition. When such unreasonable delay occurs, no equitable tolling is available. See, e.g., New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997)(finding no equitable tolling where petitioner waited months to file habeas petitioner after end of alleged tolling event). See also Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999) (same).

Petitioner argues that between the time counsel was appointed for his First PCRA Motion and the time that same counsel filed her Finley letter regarding the non-meritorious case, a riot occurred at Petitioner's correctional facility which caused the destruction of his personal property, including his court records. Petitioner was then transferred to the Restrictive Housing Unit at the State Correctional Institution in Pittsburgh, Pennsylvania. During the hearing after the Finley letter was filed, Petitioner indicated to

the First PCRA court that he wanted to appeal, but was unable to do so because of the destruction of his documents. The First PCRA court allowed Petitioner to obtain replacements of his trial notes of testimony, but Petitioner never received a replacement copy of his post-conviction petition. Petitioner remained at the Restrictive Housing Unit without access to a law library or legal assistant from 1989 until 1992. Petitioner thus claims that he was unable to file his appeal in a timely fashion, which led to the dismissal of the appeal of his First PCRA Motion, the untimeliness of his Second PCRA Motion, and the present untimeliness of this habeas Petition.

Even if the Court accepts all of Petitioner's explanations as true, however, Petitioner's allegations fail to explain why he waited until December 1996, four years after release from the Restrictive Housing Unit to file a Second PCRA Motion. Petitioner also fails to provide any reason for waiting until August 2000 to file this current habeas Petition. Accordingly, Petitioner fails to provide sufficient reasons that warrant equitable tolling of the statute of limitations.

Petitioner next objects to the Report on the basis that he has established a miscarriage of justice because he is innocent of the crimes of which he was convicted. To avoid a procedural bar to a habeas claim based on a claim of actual innocence, a habeas petitioner must show that "a constitutional violation has probably

resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477 U.S. 478, 495 (1986)). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. Id.

Petitioner has failed to make the requisite showing to excuse procedural default. Petitioner offers no new reasons why a reasonable jury would not have convicted him. Petitioner has not provided any new evidence available after trial demonstrating his actual innocence. Accordingly, Petitioner has not met the threshold to establish actual innocence, and therefore the Court is barred from considering Petitioner's claims for habeas relief.

IV. CONCLUSION

For the foregoing reasons, the Court overrules Petitioner's Objections. Having approved and adopted Magistrate Judge Smith's Report and Recommendation after independent consideration, the Court denies the Petition.

An appropriate Order follows.

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TYRONE DAVIS	:	CIVIL ACTION
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v.	:	
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BEN VARNER,	:	
AND	:	NO. 00-4349
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF PHILADELPHIA,	:	
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THE STATE OF PENNSYLVANIA	:	

ORDER

AND NOW, this Day of November, 2001, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1) and all attendant and responsive briefing, and after review of the Report and Recommendation of the United States Magistrate Judge Charles B. Smith, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, any responses and replies thereto, and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED**;

4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability under 28 U.S.C. § 2253 (c)(2); and
5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

John R. Padova, J.