

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

HERBERT ALEXANDER BOUIE	:	CIVIL ACTION
	:	
v.	:	
	:	
BEN VARNER, et al.	:	NO. 00-4846
	:	
O'NEILL, J.	:	MARCH , 2002

MEMORANDUM

On January 22, 2002 United States Magistrate Judge M. Faith Angell filed a Report and Recommendation denying Herbert Bouie's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2544. I will approve and adopt Judge Angell's Report and Recommendation.

BACKGROUND

On February 3, 1986, Bouie was convicted of robbery, aggravated assault and possession of a prohibited offensive weapon. On May 1, 1986, he was sentenced to ten to twenty years imprisonment for robbery and a consecutive term of two-and-one-half to five years on the weapons charge. Bouie's conviction was upheld by the Superior Court of Pennsylvania and his petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on January 5, 1988. On August 2, 1988 Bouie filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541, et seq. He was denied relief. This decision was upheld by the Superior Court and Bouie's subsequent petition for allocatur to the Supreme Court of Pennsylvania was denied on July 21, 1992. While this decision was pending, Bouie twice petitioned this Court for

habeas relief and both times I approved and adopted Judge Angell's recommendation that the petitions should be dismissed without prejudice for failure to exhaust state court remedies. On January 16, 1997, Bouie filed a second PCRA petition which was denied on April 23, 1997. The Superior Court affirmed this dismissal on November 30, 1998 and Bouie's petition for allowance of appeal to the Pennsylvania Supreme Court was denied on October 7, 1999. The instant pro se habeas corpus petition was filed on September 25, 2000.

Judge Angell concluded that Bouie's latest petition is time barred. The Antiterrorism and Effective Death Penalty Act of 1996, signed into law April 24, 1996, significantly altered the rules governing habeas corpus petitions. Under AEDPA, 28 U.S.C. § 2244(d)(1), state prisoners have one year to apply for federal habeas relief. 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.

Id. § 2244(2) states: "The 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 the subsection." According to Judge Angell, Bouie's statute of limitations began to run April 5, 1988, ninety days after his petition was rejected by the Pennsylvania Supreme Court and therefore the last day on which he could

have filed a timely direct appeal to the United States Supreme Court.¹ See Rep. & Rec. at 7. However, as noted by Judge Angell, for a petitioner whose conviction became final before the effective date of AEDPA, the one-year statute of limitations begins to run on the date of AEDPA's enactment - April 24, 1996. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir.1998). The Court of Appeals has explained that the effect of its ruling in Burns is to "make ... all other convictions in this circuit otherwise final before the effective date of the AEDPA, April 24, 1996, final on that day for purposes of calculating the limitations period." United States v. Duffus, 174 F.3d 333, 334 (3d Cir. 1999).

Applying AEDPA's provisions to Bouie's petition, Judge Angell held that the statute of limitations began to run on April 24, 1996. Id. at 8. Bouie then filed a PCRA petition on January 16, 1997. The PCRA court denied relief and the Pennsylvania Superior Court affirmed finding that Bouie's petition was not timely filed. The Pennsylvania Supreme court declined to review Bouie's subsequent appeal on October 7, 1999. The government maintains that this time-barred state petition did not act to toll AEDPA's statute of limitations but, as Judge Angell points out, even if it did Bouie's petition would still be time barred. Id. When Bouie filed his second PCRA petition 267 days of AEDPA's one-year time requirement had passed. Petitioner alleges that the statute of limitations was tolled on that day under § 2244(d)(2) as a properly filed application for state post-conviction review. This process was completed on October 7, 1999, when the Pennsylvania Supreme Court declined to review his petition. According to Judge Angell, this left Bouie 98 days from that date to file the instant petition. Id. Under this scenario

¹ Rule 13 of the Supreme Court of the United State provides that such petitions are timely when filed within ninety days after entry of judgment.

the deadline for filing the present petition would have been January 13, 2000. As the petition was filed on September 25, 2000, according to Judge Angell Bouie was 256 days too late. Id. I find Judge Angell's analysis persuasive.

Bouie contends that Judge Angell erred in stating that he filed his second PCRA petition on January 16, 1997, and maintains that it was in fact filed on January 9, 1997. I note that Bouie stated in his initial objections to Judge Angell's Report and Recommendation that he filed the PCRA petition on January 16. (Pet. Obj. to R&R at 7). In any case, even were I to accept January 9 as the date Bouie's PCRA petition was filed, the instant petition would still be 249 days late.

Bouie also contends that "since all of his prior Counsels were diligent in 'not' discovering violations of his speedy trial rights . . . his claims therefore should be considered as newly discovered, and that under this scenario, the provisions under 28 U.S.C. § 2244(d)(1)(D) were triggered to reset the grace period's one-year statute of limitation to the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence." (Pet.'s 2nd Obj. to R&R at 9). The claims raised in Bouie's petition are: (1) ineffective assistance of counsel for failing to litigate violations of petitioner's speedy trial rights; (2) denial of due process by the trial court for failing to grant petitioner an evidentiary hearing regarding the delay in bringing him to trial; and (3) denial of equal protection of the law by the trial court for failing to grant the evidentiary hearing. (Pet.'s Hab. Pet. at 9-10). What remains unclear is how these claims were "newly discovered" for purposes of the instant petition. I note that in his original appeal to the Pennsylvania Superior Court following his conviction in 1986, one of the two issues presented was "whether the trial court erred in refusing to hold an

evidentiary hearing pertaining to the failure to bring petitioner to trial pursuant to Rule 1100.”² Commonwealth v. Bouie, No. 015512 Philadelphia 1986, slip. op. at 1 (Pa. Super. Ct., May 6, 1987). Bouie argues that the AEDPA statute of limitations “began to run anew” upon the completion of his PCRA proceedings on October 7, 1999. (Pet.’s 2nd Obj. to R&R at 9). However, he provides no explanation as to why this represents the first date on which the factual predicates of his claims could have been discovered through due diligence. In other words there is nothing before me explaining why during the period from the passage of AEDPA on April 24, 1996 to the filing of his PCRA petition, sometime in January, 1997, these facts were not discoverable. Indeed the record indicates these facts were well known to him since he had raised identical claims over a decade earlier.

Finally, petitioner also argues that he is entitled to equitable tolling. Bouie states: “Tardy filing resulting from due diligence by the filing party, attempting to comply with a non-prejudice Order to refiling [sic] after exhaustion, where state law is unclear regarding the operation of a procedural filing requirement, is sufficient to triggering [sic] the equitable tolling standard.” Id. at 10. However, petitioner has made no allegation that his delay in filing was caused by a misunderstanding of a state filing requirement that was in some way “unclear.” I agree with Judge Angell that nothing in the record reveals that Bouie’s petition falls into the rare category of cases requiring equitable tolling. See Rep. & Rec. at 9.

An appropriate Order follows.

² Pennsylvania Rule of Criminal Procedure 1100, currently codified as Rule 600, states that no defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days.

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CIVIL ACTION

NO. 00-4846

ORDER

AND NOW, this day of March, 2002, in consideration of Herbert Bouie's petition for habeas corpus and after review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell and petitioner's objections thereto, it is ORDERED:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED.
3. There is no probable cause to issue a certificate of appealability.

THOMAS N. O'NEILL, JR., J.