

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.	:	MAY , 2002

MEMORANDUM

On March 28, 2002, I filed a Memorandum and Order adopting and approving United States Magistrate Judge M. Faith Angells' Report and Recommendation denying Herbert Bouie's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2544, as untimely. On April 11, 2002 Bouie filed a motion to alter or amend the judgement under Fed. R. Civ. P. 59(e), a petition for a certificate of appealability, and a motion to proceed in forma pauperis.

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 petitioned this Court for habeas relief on December 12, 1990, and again on September 30, 1992. Both times I approved and adopted Judge Angell's recommendation that the petitions be dismissed without prejudice for failure to exhaust state court remedies.¹ 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. Bouie filed the instant pro se habeas corpus petition on September 25, 2000.

DISCUSSION

“The purpose of a motion to alter or amend a judgment under Rule 59(e) is to ‘correct manifest errors of law or fact or to present newly discovered evidence.’” Ruscavage v. Zuratt, 831 F. Supp. 417, 418 (E.D. Pa. 1993) (citation omitted). “Motions under Rule 59(e) should be granted sparingly because of the interests in finality and conservation of scarce judicial resources.” Id. Under Rule 59(e), a party must rely on one of three grounds: 1) the availability of new evidence not previously available, 2) an intervening change in controlling law, or 3) the need to correct a clear error of law or to prevent manifest injustice. See Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). Petitioner asserts that his motion is based on “a need to

¹ Even though Bouie's 1992 habeas petition was filed after the Pennsylvania Supreme Court's decision denying review of his first PCRA petition, I adopted the Report and Recommendation of Judge Angell holding that Bouie had not exhausted his state remedies because he had not filed a second PCRA petition.

correct a clear error of law, so that to prevent a manifest injustice.” “[A]ny litigant considering bringing a motion to reconsider based upon [the third] ground should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.” Dodge v. Susquehanna University, 796 F. Supp. 829, 830 (M.D. Pa. 1992). Such motions “are not intended merely to relitigate old matters nor are such motions intended to allow the parties to present the case under new theories.” Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993).

In opposing Bouie’s motion defendants point out that under Local Rule 7.1(g) motions for reconsideration are to be served within ten days after the entry of the challenged judgment or order. Bouie’s certificate of service for his motion to alter or amend the judgment is not dated. I entered my prior Order on March 28, 2002. Defendants assert they did not receive a copy of Bouie’s motion until April 11, 2002, four days late. In Burns v. Morton, 134 F.3d 109, 112 (3d Cir. 1998), the Court of Appeals, citing Houston v. Lack, 487 U.S. 266 (1988), held that the relevant date for pro se habeas petitions is the date it is given to prison authorities for mailing. The Houston Court discussed the unique situation of a pro se prisoner who has no choice but to place his trust in “authorities whom he cannot control and who may have every incentive to delay.” Id. at 271. Bouie asserts that he placed his motion to alter my prior Order in the prison mail box on April 5, 2002, and points out that the other materials submitted with this motion – his motion to proceed in forma pauperis and his request for a certificate of appealability – contain certificates of service dated April 5, 2002. I will not dismiss petitioner’s motion for reconsideration on the basis that it was untimely.

In challenging my prior Order Bouie once again argues that the one-year statute of

limitations for the filing of his habeas petition began to run on October 7, 1999 leaving him until October 6, 2000 to file his petition.² Bouie contends that his latest petition is a continuation of his 1990 and 1992 petitions. Therefore, according to Bouie, the provisions of the AEDPA, passed on April 24, 1994, are not applicable to his petition.

As defendants point out, a situation similar to the present one was before the Court of Appeals in Jones v. Morton, 195 F.3d 153, 160-61 (3d. Cir. 1999). In Morton petitioner argued that the filing date of his third petition should “relate back” to the filing date of his first or second petition both of which were filed prior to AEDPA’s enactment and dismissed without prejudice for failure to exhaust state remedies. The Jones Court stated:

The District Court dismissed Jones’s first petition without prejudice for failure to exhaust state remedies, and his case was closed. On the second petition, this Court denied a certificate of appealability on exhaustion grounds. Our order did not leave Jones’s case open in federal court; rather, we dismissed the case without prejudice to Jones’s ability to refile his claims after complying with the exhaustion requirement. Because the first and second petitions were dismissed, and the cases closed, there was nothing for Jones’s third petition to relate back to. Traditionally, a statute of limitations is not tolled by the filing of a complaint that is subsequently dismissed without prejudice. As we explained in a recent habeas case, ‘[t]ypically, when a complaint (or habeas petition) is dismissed without prejudice, that complaint or petition is treated as if it never existed.’ Hull v. Kyler, 190 F.3d 88, 103-04 (3d Cir.1999) (citations omitted). Thus, courts have recognized that, if a petition is dismissed for failure to exhaust state remedies, a subsequent petition filed after exhaustion is completed cannot be considered an amendment to the prior petition, but must be considered a new action. . . . Accordingly, we reject Jones’s argument that the filing date of his third petition somehow related back to the filing date of his first or second petition.

Id. at 160-161. I will deny petitioner’s motion to alter my prior Order based on his contention

² I note however that the final sentence of Bouie’s motion to amend the judgment states: “Thus [petitioner] had (106) days from January 5, 1999 to timely file hie § 2254 application for habeas review, in which would’ve been April 21, 2000.” (Pet. Mot. to Am. at 6). As Bouie did not file the instant petition until September 25, 2000, it would appear that he concedes the fact that his petition is untimely.

that his third petition “relates back” to one or both of his prior petitions.³

Bouie again contends that equitable estoppel principles should operate to toll AEDPA’s statute of limitations on January 16, 1997, the date of his second PCRA petition, even though that petition was later ruled untimely. As explained in my prior Memorandum and Order, even if it were tolled on that date, nearly nine months of AEDPA’s statute of limitations had run leaving

³ Relying on Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) and Slack v. McDaniel, 529 U.S. 473 (2000), petitioner contends that a petition that simply restates prior claims dismissed without prejudice for failure to exhaust state remedies “is merely a continuation of the earlier . . . application for habeas corpus relief.” (Pet. Mot. to Am. at 4). Stewart and Slack examined whether the petitions at issue were to be considered “second” or “successive” petitions for the purposes of federal habeas review. “The phrase ‘second or successive petition’ is a term of art given substance in . . . prior [Supreme Court] habeas corpus cases.” Slack, 529 U.S. at 486. Even before AEDPA’s enactment petitioners filing a “second or successive” petition faced considerable obstacles in obtaining review of the merits of such later petitions. See McCleskey v. Zant, 499 U.S. 467, 487 (1991)(discussing the application of Rule 9(b) governing § 2254 cases which stated: A second or successive petition may be dismissed if the judge finds that it fails to allege new grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ). The passage of AEDPA created even greater barriers. See 28 U.S.C. 2244(b)(3)(A) (2001)(codifying AEDPA’s “gatekeeping” mechanism whereby an individual seeking to file a “second or successive” petition must first move in the appropriate court of appeals for an order directing the district court to consider the petition); § 2244(b)(1), (2)(listing a number a number of circumstances under which claims raised in a “second or successive” petition are to be automatically dismissed).

At issue in Stewart and Slack was the status of petitions that had been dismissed by the district court without prejudice as premature, Stewart, or unexhausted, Slack, and then refiled once the claim became ripe for adjudication. Both Courts held that the later petition was not “new” since the merits of the claim had never been reviewed by a federal court and therefore none of the procedural bars applicable to “second or successive” habeas petitions were implicated. The petitions at issue in Stewart and Slack were “not new” in the sense that they did not fall within the term of art “second or successive petition.” However, neither case discussed the applicability of AEDPA’s one-year statute of limitations to such “later” petitions. There is nothing in either Stewart or Slack that provides support for petitioner’s contention that the filing of an unexhausted petition prior to the passage of AEDPA renders that statute’s one-year statute of limitations inapplicable to any subsequent petitions that may be filed after AEDPA’s enactment following exhaustion of state remedies. As discussed above, this situation is squarely addressed in Jones. Petitioner makes no reference to Jones in his memorandum entitled “Petitioner’s Objection to the Respondent’s Reply to Petitioner’s Motion to Alter the Judgment.”

petitioner slightly over three months to file his petition at the conclusion of his state proceedings on October 7, 1999. As the instant petition was not filed until September 25, 2000, it is clearly untimely.⁴

Petitioner also moves for a certificate of appealability.⁵ “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” U.S. v. Cepero, 224 F.3d 256, 262 (3d Cir. 2000). In my Order of March 28, 2002, I did not find probable cause to issue a COA. Petitioner objects to the fact that this conclusion was made without explanation. In my view jurists of reason would not find that my holding that petitioner’s habeas petition is untimely debatable. With respect to his latest assertion, as discussed above, the Court of Appeals’ decision in Jones clearly controls the issue. Since his third petition does not “relate back” to either of his prior petitions, as noted in my prior Memorandum and Order, Bouie’s petition is clearly months late.

⁴ Petitioner also argues that the statute of limitations was tolled for an additional ninety days during the period when he could have petitioned the United States Supreme Court for a writ certiorari. Under Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 542 (3d Cir. 2001), “the time during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year statute of limitations under 28 U.S.C. § 2244(d)(2).” Moreover if petitioner’s reasoning were followed, the petition still was over five months late.

⁵ I note that on April 22, 2002, the Court of Appeals remanded Bouie’s petition to this Court for the sole purpose of deciding whether to issue a certificate of appealability. On April 23, 2002, that Order was vacated having been issued in error. My prior Order of March 28, 2002, found that there was no probable cause to issue a certificate of appealability.

Finally, with respect to his prior claim that the issues underlying his latest habeas petition were “newly discovered,” Bouie contends that given that he is a “layman to the law” this issue is at least debatable and therefore a certificate of appealability should issue. I disagree. In the Memorandum accompanying my prior Order I stated:

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.”⁶ 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.

(March 28, 2002. Mem. & Ord. at 4-5). Petitioner now asserts that at the time of his original appeal from conviction “he was represented by an attorney” and “his attorney raised the claim that the Commonwealth did not comply with Pa. R. Crim. P. 101.” It appears that I am to infer

⁶ 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.

from this that petitioner himself had no knowledge of the basis for this appeal. I find this contention unpersuasive. First, it still provides no explanation as to why or how this “fact” became discoverable in January 1997, and not before. Second, petitioner could not have been unaware of the length of his pre-trial incarceration and this is the “factual predicate” upon which his claim is based. The date upon which petitioner discovered the legal significance of these facts is not relevant to this inquiry. Third, the initial appeal itself and any papers attached to its subsequent rejection were documents to which he should have had access in the years that followed. In any case petitioner has made no showing that these documents were not available to him until January, 1997. For all the foregoing reasons I find that there is no probable cause to issue a certificate of appealability.

Petitioner has also filed a motion to proceed in forma pauperis. Under Federal Rule of Appellate Procedure 24 a party wishing to appeal from a district court action in forma pauperis must file a motion with the district court. There must be an affidavit attached to this motion that:

- A. Shows in the detail prescribed by Form 4 of the Appendix of Forms, the party’s inability to pay or give security for fees and costs;
- B. Claims an entitlement to redress; and
- C. States the issues that the party intends to present on Appeal.

Fed. R. App. P. 24. Petitioner’s motion for leave to proceed in forma pauperis filed on April 29, 2002, satisfies these requirements. Accordingly his motion will be granted.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT ALEXANDER BOUIE

v.

BEN VARNER, et al.

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CIVIL ACTION

NO. 00-4846

ORDER

AND NOW, this day of May, 2002, in consideration of petitioner Herbert Bouie's motions to alter or amend the judgment, for a certificate of appealability, and leave to proceed in forma pauperis, it is ORDERED:

1. Petitioner's motion to alter or amend my Order of March 28, 2002 is DENIED.
2. Petitioner's motion for a certificate of appealability is DENIED. There is no probable cause to issue a certificate of appealability.
3. Petitioner's motion to proceed in forma pauperis is GRANTED.

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