

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

MICHAEL WASHINGTON : CIVIL ACTION
: :
v. : :
: :
DONALD T. VAUGHN, et al. : NO. 01-1045

M E M O R A N D U M

NEWCOMER, S.J. June , 2002

Magistrate Judge Hart's Supplemental Report and Recommendation and Petitioner Washington's Objections to the Supplemental Report and Recommendation are presently before the Court.

I. FACTS AND PROCEDURAL HISTORY

On November 3, 1993, following a jury trial before the Honorable Eugene H. Clarke, Jr. of the Court of Common Pleas of Philadelphia County, Petitioner Washington was convicted of first-degree murder, possessing an instrument of crime, and violation of the Uniform Firearms Act. On December 6, 1994, after denying post-verdict motions, Judge Clark sentenced Washington to life imprisonment for the murder conviction and concurrent sentences of six to sixty months' incarceration for the weapons convictions.

On January 5, 1995, Washington filed a Petition for Notice of Appeal to the Pennsylvania Superior Court. On August 5, 1996, the court affirmed the judgement of sentence. Commonwealth v. Washington, 685 A.2d 1048 (Pa. Super. Ct. 1996). Washington filed a Petition for Reargument, which was denied on October 3, 1996. On November 4, 1996, Washington filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. Allocatur was denied on April 2, 1997. Commonwealth v. Washington, 693 A.2d 967 (Pa. 1997). Accordingly, Washington's conviction became final on July 1, 1997.

On January 20, 1998, Washington filed a timely pro se petition for post conviction relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9551, in the Court of Common Pleas of Philadelphia County. On December 15, 1998, the Honorable Steven R. Geroff denied that petition.

Then, Washington filed a Notice of Appeal to the Superior Court of Pennsylvania on January 6, 1999. On March 13, 2000, the Superior Court affirmed the denial of PCRA relief. Commonwealth v. Washington, 757 A.2d 999 (Pa. Super. Ct. 2000). Washington did not file a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

On March 2, 2001, Washington filed a Petition for Habeas Corpus Relief under 28 U.S.C. § 2254 with this Court, claiming that his trial counsel was ineffective for failing: 1) to properly cross-examine the Commonwealth's rebuttal witness with his preliminary hearing testimony; 2) to request a jury instruction regarding the significance of the prior conviction of the key Commonwealth witness; 3) to request that the trial judge instruct the jury regarding the significance of acts of prior violence by the deceased in determining self-defense; and 4) to request that the trial judge instruct the jury concerning the connection between unreasonable belief voluntary manslaughter and self-defense.

On June 14, 2001, this Court referred Washington's Petition to the Honorable Jacob P. Hart, United States Magistrate Judge. Judge Hart filed his Report and Recommendation on October 30, 2001, recommending that Washington's Petition be dismissed as untimely. Judge Hart found that while the one year limitations period for Washington to file a habeas corpus petition was tolled during his pursuit of PCRA relief, Washington filed his Petition more than five months beyond the expiration of that limitations period. On November 14, 2001, Washington filed Objections to the Report and Recommendation. In these Objections, Petitioner

argued for the first time that the habeas corpus limitations period should be equitably tolled. Specifically he claimed that: 1) he had been misled by counsel regarding an appeal to the Pennsylvania Supreme Court; and 2) computer disks holding his files had been confiscated from the Para Professional Law Clinic at S.C.I.-Graterford ("PPLC").

On December 4, 2001, this Court remanded the matter to Judge Hart for consideration of the claims raised by Washington in his Objections, as these claims were not raised before Judge Hart.

On April 15, 2002, upon consideration of Washington's claims regarding equitable tolling, Judge Hart filed a Supplemental Report and Recommendation and recommended that the Court reject Washington's claims of equitable tolling and dismiss his Petition as untimely. On April 29, 2002, Washington again filed Objections to the Supplemental Report and Recommendation. For the reasons discussed below, the Court rejects Washington's claims for equitable tolling and dismisses his Petition as untimely.

II. DISCUSSION

Washington did not file a timely Petition for Habeas Corpus Relief. Pursuant to 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), petitions for habeas corpus relief are subject to a one-year

limitations period. In most cases, the one-year period begins to run from the date on which the judgment became final in the state courts, and is tolled only by a properly filed PCRA petition. 28 U.S.C. § 2244(d)(1)(A) and (d)(2). Washington's convictions became final on July 1, 1997, ninety days after the Pennsylvania Supreme Court denied Allocatur and the last day on which Washington could have sought review by the United States Supreme Court. Thus, Washington had until July of 1998 to file his Petition here.

Because the Pennsylvania Superior Court affirmed Judge Geroff's denial of PCRA relief on March 13, 2000, and because Washington did not seek review of this decision in the Pennsylvania Supreme Court, the limitations period began to run again thirty days later on April 12, 2000.

Consequently, Washington had only until the end of September, 2001 to timely file for habeas corpus relief here. However, Washington filed his Petition here on March 2, 2001, over five months beyond the expiration of the limitations period. Accordingly, Washington's Petition is time-barred unless the limitations period is equitably tolled.

The Third Circuit has held that equitable tolling is appropriate in four narrow circumstances: (1) if the defendant

has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum; or (4) if the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that he had done everything required of him. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Further, the Third Circuit has recognized that federal courts invoke the doctrine of equitable tolling "only sparingly." United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). To qualify for equitable tolling under any of the grounds cited above, the petitioner must first establish that he "exercised reasonable diligence in investigating and bringing [the] claims." Miller v. New Jersey State Department of Corrections, 145 F.3d 616, 618-619 (3d Cir. 1998) (citing New Castle County v. Haliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997)).

Washington did not exercise reasonable diligence in investigating and bringing his claim for habeas relief. In his Supplemental Report and Recommendation, Judge Hart found that Washington had produced no evidence, except for unsupported assertions, of diligence prior to October, 2000, after the

limitations period had already run. In his Objections to the Supplemental Report and Recommendation, however, Washington introduces evidence of purported diligence not previously considered by Judge Hart. Washington's strongest support among this evidence is a letter addressed to him from his counsel, Michael Paul, on October 3, 2000. That letter refers to an earlier letter Washington wrote to Paul on September 12, 2000, but Washington's letter itself is not before the Court. Paul's letter appears to respond to Washington's and discusses the status of Washington's appeal. Paul's letter states, incorrectly, that the Supreme Court had denied Washington's appeal. In fact, no appeal had been filed in that court. Washington also submits an August 17, 2000 letter addressed to him from the Deputy Prothonotary of the Superior Court of Pennsylvania.¹ This letter indicates that the appeal is closed.

In his Supplemental Report and Recommendation, Judge Hart found that Washington did not exercise reasonable diligence in part because he had done nothing to further his PCRA appeal prior to October, 2000. The August 17 and September 12 letters show that Washington was at least somewhat active in pursuing

¹Washington includes a December 1, 2000 letter from the same Deputy Prothonotary that includes identical docket information. However, as this letter duplicates the information found in the August 17 letter, and because it is dated more than two months after the end of the limitations period in question, the Court considers here only the August 17 letter.

information about his appeal prior to the termination of the habeas limitations period. However, this level of activity does not rise to the level of reasonable diligence. The Eastern District of Pennsylvania has found a lack of reasonable diligence in similar situations. In United States v. Concepcion, 1999 WL 225865, *3 (E.D.Pa., April 19, 1999), the court found that the petitioner had offered "no evidence of reasonable diligence in investigating and filing his claims." The petitioner in Concepcion waited for more than one year after his conviction to contact the court in pursuit of his appeal. The Concepcion court found that "[a]ll of the issues raised in Petitioner's. . . motion could have been raised at any time after sentencing," and that petitioner "had a full year to file [his] motion and failed to do so." Id.

In his Objections to the Supplemental Report, Washington states that he wrote to the Superior Court "seeking to learn the status of his appeal." The only such correspondence dated before the end of September, 2000 in the record is the Superior Court letter of August 17. This single letter does not demonstrate reasonable diligence on Washington's part. Washington did not exhibit diligence throughout the period he seeks to toll, but rather sent only one letter to the Superior Court shortly before

the limitations period expired. Further, the Superior Court was not an appropriate source of information about the status of his Supreme Court appeal. Washington knew or should have known that his appeal to the Superior Court was denied on March 13, 2000, because his trial counsel's letter on May 6, 1999 indicates that counsel had filed an appeal with that court in early April, 1999. Washington could have contacted the Superior Court as early as May, 1999 to discover the status of his appeal, but did not contact the court until approximately one year later (prior to the court's August 17, 2000 letter). If Washington were pursuing information on a state Supreme Court appeal, he should have written directly to the state Supreme Court before the end of September, 2000. Washington's failure to timely pursue his appeal in the proper venue does not warrant equitable tolling because whether the Petitioner has knowledge of the law is irrelevant. See School Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 21 (3d Cir. 1981) (noting that "ignorance of the law is not enough to invoke equitable tolling"); United States v. Maldonado, 1997 WL 360932, *3 (E.D.Pa., 1997) (holding that the defendant has not provided any extraordinary reasons why the statute at issue should be tolled, and "[t]hat the defendant

is not knowledgeable in the law is no excuse for failing to abide by the limitation period. . .").

Washington's ability to retrieve docket information from the Superior Court shows that he was capable of seeking similar information from the Supreme Court. Indeed, a letter from the Prothonotary's Office of the Supreme Court of Pennsylvania on December 26, 2000, shows that Washington did seek such information from that court in a letter dated October 30, 2000. Washington had more than one month to request information concerning his appeal between receipt of the August 17 letter and the end of September. Still, Washington did not pursue information about his PCRA appeal from the Supreme Court until one month after the limitations period for habeas relief expired.

Similarly, Washington's September 12 letter to counsel does not establish that he exercised reasonable diligence. Washington had five and a half months following his PCRA appeal to file a habeas Petition, but waited until the final two weeks of that period to request appeal information from his counsel. Even if counsel were unresponsive to his inquiries, as Washington claims, there is no evidence that Washington contacted the Supreme Court directly before October 30, 2000. Such passivity on the part of the Petitioner will not satisfy the diligence required for

equitable tolling. See United States ex rel. Mendez v. Pierson, 159 F. Supp.2d 1091, 1094 (N.D. Ill. 2001)(finding that equitable tolling not appropriate when petitioner "elected to wait for written notice from counsel indicating the status of his petition for leave to appeal rather than discover the status on his own and file his § 2254 petition pro se, which the instant petition - finally filed pro se almost 2 years after the filing of the leave to appeal - demonstrates he was capable of doing").

In his Objections to the original Report and Recommendations, Washington relied on Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236 (3d Cir. 1999), to establish that he was reasonably diligent and deserves equitable tolling. The Third Circuit in Seitzinger held that plaintiff's conduct before the filing deadline for her Title VII claim weighed in favor of equitable tolling because she exhibited "consistent assiduousness" in pursuing her claim. Id. at 241. Seitzinger "contacted [counsel] before the filing deadline, which she know about in broad terms, to ensure that he had filed the complaint. In addition, she repeatedly called him, requesting a copy of the complaint and seeking information on how her case was progressing." Id. Evidence of similar assiduousness on Washington's part is missing from the record, and as discussed

above, the efforts Washington did make were inadequate.

Therefore, equitable tolling is not appropriate in this case.

Having found the Petitioner's Objections to the Supplemental Report and Recommendation are unpersuasive, the Court further finds that the Supplemental Report and Recommendation properly concluded that Washington is not otherwise entitled to equitable tolling. As Judge Hart found, the computer disks were confiscated from PPLC in November, 2000, after the habeas limitations period had already run in September. Therefore, the confiscation of these disks cannot toll a limitations period that had already run. Similarly, Washington's claims concerning his trial counsel's alleged misconduct fail to warrant equitable tolling. The earliest evidence of any misconduct by Washington's counsel is in the October 3, 2000, letter, after the limitations period had run. Both the confiscation of disks and counsel's alleged misconduct occurred after the limitations period ended, and cannot be said to have prevented Washington's timely asserting a habeas claim. The Court finds that Petitioner's habeas corpus Petition should not be equitably tolled and therefore the Petition is dismissed as untimely.

An appropriate Order follows.

Clarence C. Newcomer, S.J.

