

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

THOMAS TOMONEY : CIVIL ACTION
 :
 v. :
 :
 WARDEN, S.C.I. GRATERFORD, et al. : NO. 01-0912

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 17, 2002

Thomas Tomoney, a state prisoner convicted of first-degree murder, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. This court referred Tomoney's petition to Magistrate Judge Jacob P. Hart who issued a Report and Recommendation ("R & R") to which petitioner filed timely objections. After de novo consideration of the record and briefs, including petitioner's objections to the R & R, the R & R will be approved and adopted, and the petition will be denied as untimely.

BACKGROUND¹

On October 4, 1977, Tomoney entered a plea of not guilty to first-degree murder before the Honorable Joseph T. Murphy of the Court of Common Pleas of Philadelphia County. After a jury trial, Tomoney was convicted of first-degree murder, and the jury

¹ Taken from the Facts and Procedural History of Magistrate Judge Jacob P. Hart's Report and Recommendation.

sentenced him to life imprisonment. (Information No. 1776, April Term, 1977). On April 13, 1978, post-verdict motions were heard and denied, and Judge Murphy affirmed the jury's sentence of life imprisonment.

On April 24, 1978, Tomoney filed a Notice of Appeal with the Pennsylvania Supreme Court. The court affirmed Tomoney's sentence on March 20, 1980. Commonwealth v. Tomoney, 412 A.2d 531 (Pa. 1980).²

In 1981, Tomoney filed a petition for habeas corpus in this court. On November 13, 1981, this court dismissed the petition for failure to exhaust state court remedies.

On March 11, 1985, Tomoney filed a motion for state collateral relief under the Post Conviction Hearing Act ("PCHA"), 42 Pa. Con. Stat. Ann. § 9541 (West 2002) et seq. On June 16, 1988, the Honorable Joseph O'Keefe denied relief.

Tomoney appealed that decision to the Pennsylvania Superior Court on July 15, 1988. On September 27, 1988, Tomoney's appeal was dismissed for failure to file a brief. Following this dismissal, the Honorable James D. McCrudden granted Tomoney permission to appeal nunc pro tunc. On January 9, 1992, the Superior Court affirmed the denial of PCHA relief. Commonwealth v. Tomoney, 607 A.2d 1127 (Pa. Super. Ct. 1992). Tomoney

² Under 17 P.S. § 211.202(1) (Supp 1975), which predated 42 Pa. Con. Stat. Ann. § 5571 (West 2002), all felonious murder convictions were appealed directly to the Supreme Court of Pennsylvania.

appealed this decision to the Pennsylvania Supreme Court. On September 16, 1992, allocatur was denied. Commonwealth v. Tomoney, 614 A.2d 1143 (Pa. 1992).

On January 14, 1997, Tomoney filed a second pro se petition under the PCRA. On July 23, 1997, the Honorable Eugene H. Clarke, Jr., denied the petition for failure to meet the requirements of a successive PCRA petition. Tomoney did not appeal this decision to the Pennsylvania Superior or Supreme Court.

On February 23, 2001,³ Tomoney, filing this petition for habeas corpus, claimed that counsel was ineffective for failing to object to the trial court's instructions on reasonable doubt. The petition was referred to Magistrate Judge Jacob P. Hart. On November 21, 2001, Magistrate Judge Hart filed a R & R that Tomoney's petition was time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). Tomoney, filing timely objections to the R & R, asserts his petition is not untimely under the AEDPA.

DISCUSSION

A. Motion to Strike the State's Response

In his Traverse and again in his Exceptions to the R & R,

³ The Facts and Procedural History Section of the R & R mistakenly stated the date of filing was January 24, 2001. Elsewhere in the Report the filing date is correctly stated.

Tomoney claims that the State's Response should be stricken because: 1) it is the functional equivalent of a Rule 12(b)(1) and 12(b)(6) motion to dismiss; and 2) it does not comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules").

1. Applicability of the Federal Rules of Civil Procedure

Tomoney, claiming that the State's response is equivalent to a Rule 12(b)(1) and 12(b)(6) motion to dismiss and therefore inappropriate, cites Browder v. Director, Dep't of Corr. Of Illinois, 434 U.S. 257, 269, n.14 (1978). In dictum, the Supreme Court in Browder stated that a motion to dismiss a habeas proceeding was "inappropriate" and that "the procedure for responding to the application for a writ of habeas corpus, unlike the procedure for seeking a correction of a judgment, is set forth in the habeas corpus statutes and, under Rule 81(a)(2), takes precedence over the Federal Rules." Id. The petition in Browder had been filed prior to the enactment of the § 2254 Rules, effective February 1, 1977. Tomoney's petition was filed in 2001; therefore, the current § 2254 Rules take precedence over the Browder dictum.

2. The Rules Governing Section 2254 Cases in the United States District Courts

Tomoney further claims that the State's Response should be stricken because it does not comply with Rule 5 of the § 2254 Rules. Rule 5 requires the respondent to answer the allegations in the petition, state whether the claims have exhausted, and identify what transcripts are available. However, on April 24, 1996, the federal habeas statute was amended by the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d), imposing a one-year limitations period on petitions for habeas corpus. Rule 5 does not directly address how the respondent should assert the AEDPA's one-year limitation period in a response; the § 2254 Rules became effective in 1977, but the AEDPA was passed in 1996.

Rule 5 states requirements for the answer to a habeas petition, but it is not the only § 2254 Rule on point. Rule 4 provides that the judge shall order the respondent to file an answer (the normal process under Rule 5), or "take such other action as the judge deems appropriate." The meaning of this provision is explained in the Advisory Committee Notes to Rule 4:

This [provision] is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss.... In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the merits of the

petition.

Magistrate Judge Hart is correct that allowing respondent to address the limitations period in the answer eliminates piecemeal litigation by avoiding multiple filings, multiple reports, and multiple opinions. The order directing the District Attorney of Philadelphia to address specifically the AEDPA limitation period, 28 U.S.C. § 2244(d), in her response to Tomoney's petition was not in error. Tomoney v. Warden, S.C.I. Graterford, No. 01-0912 (Order of Hart, J., 3/38/01). See Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (stating that "[t]he Habeas Corpus Rules themselves provide district courts with ample discretionary authority to tailor the proceedings" in habeas cases); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (motion to dismiss habeas petition on procedural grounds is authorized by § 2254 Rules); Purdy v. Bennett, 2002 WL 123508 (S.D.N.Y. 2002) (same).

B. Timeliness of Federal Habeas Corpus Petition

The AEDPA became effective on April 24, 1996. Section 2244(d) of AEDPA reads, in pertinent part:

- (1) 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 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.

(2) The time during which a properly filed application for State post conviction relief 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).

See 28 U.S.C. § 2244(d).

Mr. Tomoney's sentence became final on June 18, 1980, ninety days after the Pennsylvania Supreme Court affirmed the judgment of the trial court, because he did not seek direct review in the U.S. Supreme Court. See Kapral v. United States, 166 F.3d 565, 570-571 (3d Cir. 1999) (stating judgment becomes final when the U.S. Supreme Court has completed review, or the time to seek such review has expired).

Where the prisoner's conviction became final before April 24, 1996, as here, it would be impermissibly retroactive to bar the filing of his habeas petition before April 24, 1997, one year after AEDPA's effective date. See Burns v. Morton, 134 F.3d 109,

111 (3d Cir. 1998).⁴ AEDPA's one-year deadline for Tomoney's habeas claim expired on April 24, 1997, except for statutory or equitable tolling.

1. Statutory Tolling

The AEDPA provides that a "properly filed" petition for state collateral relief will toll the one-year limitations period. 28 U.S.C. § 2244(d)(2). As of the date of his petition, Tomoney had filed two state collateral petitions under the Post Conviction Relief Act ("PCRA"), Pa. Cons. Stat. Ann. § 9545 (West 2002); only his second PCRA petition is relevant here. Tomoney filed his second PCRA petition on January 14, 1997, and it was denied on July 23, 1997. Because Tomoney's conviction became final prior to the enactment of the AEDPA on April 24, 1996, he was given a one-year grace period, ending April 24, 1997, to file a writ of habeas corpus on the federal level. See supra note 4 and accompanying text. As of January 14, 1997, approximately three months and ten days of Tomoney's one-year grace period

⁴ The circuit has granted a one-year grace period, which ends on April 24, 1997, for prisoners whose state convictions became final prior to the enactment of the AEDPA on April 24, 1996. See, e.g., Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999); Ross v. Artuz, 150 F.3d 97, 100-103 (2d Cir. 1998); Brown v. Angelone, 150 F.3d 370, 374-376 (4th Cir. 1998); United States v. Flores, 135 F.3d 1000, 1002, n. 7, 1006 (5th Cir. 1998); Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir. 1999); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Ford v. Bowersox, 178 F.3d 522, 523 (8th Cir. 1999); Calderon v. District Court, 128 F.3d 1283, 1286-1287 (9th Cir. 1997), overruled on other grounds, 163 F.3d 530, 539-540 (9th Cir. 1998); Hoggro v. Boone, 150 F.3d 1223, 1225-1226 (10th Cir. 1998); Wilcox v. Florida Dept. of Corrections, 158 F.3d 1209, 1211 (11th Cir. 1998).

remained. A "properly filed" state collateral petition, for the purpose of § 2244(d)(2), would toll the one-year grace period for the time from January 14, 1997 until the petition was decided on July 23, 1997. Accordingly, Tomoney still had approximately three months and ten days after July 23, 1997 to file a federal petition. Tomoney did not file a federal habeas petition until February 23, 2001 - over three years later.

2. Equitable Tolling

In his Exceptions to the R & R, Tomoney claims the AEDPA limitations period should not apply to his petition because: 1) it disrupts settled expectations and has an impermissible retroactive effect; and 2) the state correctional institution's library is not in compliance with constitutional requirements.

The Court of Appeals for the Third Circuit has stated that the one-year filing deadline for a § 2254 habeas petition is subject to "equitable" tolling in four specific 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 rights to file suit, a motion for appointment of counsel is pending, or 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).

a. Settled Expectations and Retroactive Effect

Tomoney contends that the one-year deadline should not apply because it disrupts settled expectations and has an impermissible retroactive effect. He claims that in dismissing his first habeas petition for failure to exhaust state court remedies, this court neglected to state specifically that his file was closed, so there was a reasonable expectation that he could file a § 2254 habeas upon complete exhaustion.

In his Report, Magistrate Judge Hart cited the Third Circuit's clear statement 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." Jones v. Morton, 195 F.3d 153, 160-161 (3d Cir. 1999). Tomoney's circumstances are indistinguishable from those presented in Jones.

In addition, equitable tolling should be used sparingly. The Court of Appeals for the Third Circuit has stated "[t]he petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient." Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998) (internal

citations, quotations, and punctuation omitted).

The effect of this court's dismissal of Tomoney's first habeas petition for failure to exhaust state court remedies was to close his file and subject it to the AEDPA limitations period. The second habeas petition is a new action, not an amendment to the first. As illustrated by Jones, the law since the enactment of the AEDPA is clear and could have been discerned through the exercise of reasonable diligence if proper legal resources were available to Tomoney (see below). Principles of equity do not warrant tolling the AEDPA limitations period on the account of disappointing Tomoney's expectations.

b. Inadequacy of State Institutional Library

Finally, Tomoney claims that he is entitled to equitable tolling because the Graterford library facilities are not in compliance with Bounds v. Smith, 430 U.S. 817 (1977). He also cites Raynor v. Dufrain, 28 F. Supp. 2d 896, 900 (S.D.N.Y 1998), that equitable tolling is warranted when petitioner is prohibited from filing a habeas petition by denial of access to the necessary filing materials.

Tomoney cites a case in which the court deemed the denial of access to habeas filing materials a valid reason to toll equitably the AEDPA's limitations period. Tomoney never claims he was denied access to the necessary filing materials, or if so,

when and for how long. He has failed to set forth factual allegations regarding how, if in any way, he was actively or passively prevented from filing his habeas petition in a timely manner.

Tomoney's equitable tolling claim must therefore rest solely on his general assertion that the library facilities at Graterford are "not in compliance with Bounds v. Smith, 430 U.S. 817 (1977)." (Obj. at 7). Tomoney misunderstands the holding in that case. The Court in Bounds reaffirmed the longstanding right of access to the courts; it did not create a freestanding right to a law library or obligate the prison system to provide one. Lewis v. Casey, 518 U.S. 343, 350 (1996). Even if Graterford had neither a prison library nor a legal assistance program, Tomoney would not have a basis for relief if it were otherwise possible for him to file a timely habeas petition. Accordingly, in order to show that his rights have been violated, Tomoney cannot simply allege that Graterford's law library facilities are not in compliance with Bounds; he must go on to "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 351. Tomoney did not alleged an actual injury; his exception based on Bounds is rejected.

CONCLUSION

Magistrate Judge Hart's order to the District Attorney of Philadelphia that she specifically address 28 U.S.C. § 2244(d), the AEDPA limitation period, in her response to Tomoney's petition was not in error. In addition, Tomoney's statutory and equitable tolling arguments are without merit. Accordingly, Tomoney's objections to the R & R will be overruled; his petition for habeas corpus will be denied as untimely.

An appropriate order follows.