

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

ELIEZER PEREZ, : CIVIL ACTION
Petitioner, :
 :
v. :
 :
RAYMOND J. SOBINA, et al., :
Respondents. : No. 02-CV-559

MEMORANDUM AND ORDER

J. M. KELLY, J.

JULY , 2003

Presently before the Court is the Report and Recommendation issued by Magistrate Judge Carol Sandra Moore Wells ("Judge Wells"), and objections thereto filed by pro se habeas corpus Petitioner Eliezer Perez ("Perez"), who is currently incarcerated at the State Correctional Institution at Somerset, Pennsylvania. On February 5, 1996, Perez was tried before a jury in the Berks County Court of Common Pleas ("Court of Common Pleas") and convicted of: (1) first degree murder; (2) two counts of aggravated assault; (3) possessing a criminal instrument; and (4) carrying a firearm without a license.¹ After filing several unsuccessful appeals in the Pennsylvania state courts, on November 16, 2001, Perez filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Section 2254") alleging ineffective assistance of both trial and appellate

¹ Perez was sentenced to life imprisonment for first degree murder and given consecutive terms of six to 23 months for possessing an instrument of crime, and nine to 23 months for carrying a firearm without a license.

counsel. Judge Wells' Report and Recommendation concludes that Perez's habeas corpus petition is untimely pursuant to the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Although Perez, in his objections, concedes that his petition is time-barred, he contends that the doctrine of equitable tolling applies, and that his claims should be allowed to proceed in this Court. For the following reasons, we **OVERRULE** Perez's objections, **APPROVE** and **ADOPT** Judge Wells' Report and Recommendation and **ORDER** that Perez's Petition for Habeas Corpus is **DENIED**.

I. BACKGROUND

On February 5, 1996, following a jury trial before the Honorable Jeffrey K. Sprecher in the Court of Common Pleas, Perez was convicted of several criminal offenses. On March 29, 1996, Perez filed a timely appeal in the Pennsylvania Superior Court, which affirmed the judgment of sentence on August 1, 1997. In a letter dated August 21, 1997, Perez's appointed counsel, assigned from the Office of the Public Defender, advised Perez that he intended to prepare a petition to the Pennsylvania Supreme Court requesting allowance of appeal, which was filed on September 8, 1997. After receiving Perez's petition, the Deputy Prothonotary of the Pennsylvania Supreme Court notified Perez's counsel that the appeal was rejected as untimely because it was filed over 30

days from the issuance of the Superior Court's decision, and advised his counsel that in order to seek relief with the Pennsylvania Supreme Court, Perez must instead file a petition for allowance of appeal nunc pro tunc.

On September 10, 1998, Perez wrote to his counsel and requested information relating to his Supreme Court appeal. On September 11, 1998, the Chief Public Defender responded that the Supreme Court had denied as untimely Perez's appeal and enclosed a copy of the September 8, 1997 letter from the Supreme Court evidencing the same. On October 5, 1998, Perez filed a Petition for Permission to file a Petition for Allowance of Appeal Nunc Pro Tunc, which was denied by the Supreme Court on January 12, 1999. Commonwealth v. Perez, No. 287 (Pa. Jan. 12, 1999).

On April 23, 1999, Perez filed a pro se petition for collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, et seq., alleging that his trial counsel was ineffective. On February 24, 2000, the PCRA court ruled that it lacked jurisdiction to hear the petition because Perez had not filed his PCRA claim within one year of the date judgment became final. Commonwealth v. Perez, No. 1538 (Ct. Com. Pl. Berks County Feb. 24, 2000). On March 20, 2000, Perez appealed this PCRA determination to the Pennsylvania Superior Court. On December 5, 2000, the Superior Court affirmed dismissal of the PCRA petition, holding that it lacked sufficient

allegations to qualify for an exception to the PCRA's one-year filing requirement. Commonwealth v. Perez, No. 739 (Pa. Super. Ct. Dec. 5, 2000). Perez then filed a petition for Allowance of Appeal to the Supreme Court, which was denied on April 17, 2001. Commonwealth v. Perez, No. 43 (Pa. Apr. 17, 2001). On November 16, 2001, Perez filed the instant petition for writ of habeas corpus pursuant to Section 2254 in this Court.

II. DISCUSSION

A. **AEDPA Statute of Limitations**

Apart from a few exceptions, AEDPA, 28 U.S.C. § 2244,² mandates that a petition for writ of habeas corpus in federal court must be filed within one year from the date that the state court judgment becomes final. 28 U.S.C. § 2244(d).³ Since the

² Since Perez filed his petition seeking habeas relief in this Court after AEDPA was signed into law, its statute of limitations is controlling.

³ Section 2244(d) provides:

(d) (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 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

Pennsylvania Superior Court affirmed the conviction imposed by the Court of Common Pleas on August 1, 1997, to which Perez did not seek a timely appeal to the Supreme Court of Pennsylvania within 30 days,⁴ the judgment became final on or about September 2, 1997.⁵ See 28 U.S.C. § 2244(d)(1). Thus, Perez had one year from September 2, 1997 to file a federal habeas corpus petition unless a tolling provision applied. See id. On September 8, 1997, Perez sought allocatur in the Pennsylvania Supreme Court, but his petition was rejected as untimely. Perez then filed a PCRA petition, which was dismissed as untimely by the PCRA Court and affirmed by the Pennsylvania Superior Court and the Supreme Court of Pennsylvania. Since these untimely appeals did not operate to toll the one-year statute of limitations under AEDPA as they were not "properly filed" pursuant to 28 U.S.C.

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).

⁴ Pursuant to Pennsylvania Rule of Appellate Procedure 1113(a), an appeal must be filed within 30 days from a judgment entered by the Superior Court or the Commonwealth Court sought to be reviewed. Pa. R. App. P. 1113(a).

⁵ Since August 31, 1997 falls on a Sunday and September 1, 1997 was a holiday, the judgment became final on or about September 2, 1997.

2244(d)(2),⁶ we agree that Perez's November 16, 2001 petition for federal habeas relief was also filed beyond the limitations period.

B. Equitable Tolling

To overcome the AEDPA statute of limitations bar, Perez contends that the doctrine of equitable tolling applies. Equitable tolling is available only if: "(1) the defendant has actively misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Perez argues that since the Pennsylvania Supreme Court Prothonotary failed to notify him immediately that his direct appeal had been dismissed, as Perez alleges to be required by Pennsylvania Rule of Appellate Procedure 1123, "extraordinary circumstances" exist to support his equitable tolling claim. We find that equitable tolling does not apply in Perez's case since Perez presents no evidence demonstrating that the Prothonotary

⁶ Section 2244(d)(2) provides that "[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).

failed to comply with Rule 1123 and, therefore, must conclude that his claims are time-barred.

Rule 1123 provides that: "If the petition for allowance of appeal is denied the Prothonotary of the Supreme Court shall immediately give written notice in person or by first class mail of the entry of the order denying the appeal to each party who has appeared in the Supreme Court." Pa. R. App. Pro. 1123(a). Although Perez alleges he was not notified by the Supreme Court that his appeal was denied as untimely until September 11, 1998, roughly one year after it rendered its decision, Perez presents no evidence, nor does the record suggest, that this delay is attributable to the Prothonotary. Rather, the Prothonotary, in full compliance of Rule 1123, notified Perez's counsel on the same day it had rejected Perez's petition for appeal as untimely. Rule 1123 does not contemplate that the Prothonotary must also notify the aggrieved party directly if they are represented by counsel, which is what occurred in the instant case. After reviewing the record, it instead appears to this Court that Perez's counsel failed to notify him immediately of the Supreme Court's decision or that Perez failed to maintain contact with his attorney in pursuing his claims, both of which are reasons we find insufficient to qualify as an "extraordinary circumstance" warranting equitable relief. See Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002) (explaining that attorney error is not

sufficient to trigger equitable tolling); Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001) ("in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required"); Cooper v. Price, No. Civ. A. 98-3009, 2002 U.S. Dist. LEXIS 18991, at *12-13 (E.D. Pa. Oct. 2, 2002) (finding equitable tolling is not warranted when petitioner did not use reasonable diligence in pursuing his claim when he was informed by his attorney of the court's denial of his appeal roughly one year after it was rendered). Moreover, we find that Perez's contentions that he did not complete high school and is not well versed in the law, are inadequate grounds for applying equitable tolling principles to his case. Accordingly, we **OVERRULE** Perez's objections, **APPROVE** and **ADOPT** Judge Wells' Report and Recommendation and find that Perez's petition for writ of habeas corpus is **DENIED**.

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O R D E R

AND NOW, this 7th day of July 2003, in consideration of the Report and Recommendation filed by Magistrate Judge Carol Sandra Moore Wells ("Judge Wells") (Doc. No. 12), and the objections thereto filed by pro se Petitioner Eliezer Perez ("Perez") (Doc. No. 13), it is **ORDERED** that Perez's objections are **OVERRULED**, Judge Wells' Report and Recommendation is **APPROVED** and **ADOPTED** and the Petition for Habeas Corpus filed by Perez is **DENIED**. It is **FURTHER ORDERED** that a certificate of appealability **SHALL ISSUE** pursuant to 28 U.S.C. 2253(c).

BY THE COURT:

JAMES MCGIRR KELLY, J.