

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

LUCIUS SHAIRD, : CIVIL ACTION
Petitioner, :
 :
v. :
 :
WILLIAM J. WOLF, :
Respondent. : No. 03-18

MEMORANDUM AND ORDER

J. M. KELLY, J.

FEBRUARY , 2004

Presently before the Court are the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport and objections thereto filed by pro se Petitioner Lucius Shaird ("Petitioner"), who is currently incarcerated at the State Correctional Institute at Albion, Pennsylvania. Petitioner was convicted of murder in the first degree, possession of an instrument of crime ("PIC"), aggravated assault, and simple assault and recklessly endangering another person. Petitioner was then sentenced to an aggregate term of life imprisonment for these convictions.

On December 20, 2002, Petitioner filed a Petition for a Writ of Habeas Corpus with this Court, pursuant to 28 U.S.C. § 2254.¹ In accordance with 28 U.S.C. § 636 and Local Rule of Civil

¹ Petitioner signed and hand-delivered this Petition to prison officials on December 20, 2002. While it was postmarked December 31, 2002 and docketed by the Clerk of Court on January 3, 2002, this Court will, in accordance with the prison mailbox rule, consider it filed as of December 20, 2002. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998).

Procedure 72.1, the Court referred Petitioner's habeas corpus petition for a Report and Recommendation to Magistrate Judge Rapoport, who, on July 23, 2003, recommended that this Court dismiss Petitioner's petition as untimely. On August 1, 2003, Petitioner filed his objections to the Report and Recommendation.

For the following reasons, Petitioner's objections are **OVERRULED**, Magistrate Judge Rapoport's Report and Recommendation is **APPROVED** and **ADOPTED**, and Petitioner's habeas corpus petition is **DISMISSED** as untimely.

I. PROCEDURAL HISTORY

A. State Court Proceedings

On January 14, 1997, Petitioner was convicted of the aforementioned offenses after waiving his right to a jury trial, and being tried before the Honorable C. Darnell Jones, II, in the Court of Common Pleas of Philadelphia. On April 4, 1997, after denying post-verdict motions, Judge Jones sentenced Petitioner to life imprisonment for first degree murder with concurrent five to ten year terms of imprisonment for his aggravated assault and PIC convictions.²

Petitioner promptly filed a direct appeal on April 8, 1997 with the Pennsylvania Superior Court (the "Superior Court"). On

² Judge Jones suspended Petitioner's sentence as to his conviction for simple assault and recklessly endangering another person.

February 10, 1999, the Superior Court affirmed Petitioner's conviction in Commonwealth v. Shaird, 737 A.2d 812 (Pa. Super. Ct. 1999). On August 17, 1999, the Supreme Court of Pennsylvania denied allocatur in Commonwealth v. Shaird, 742 A.2d 674 (Pa. 1999).

Pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-9551, Petitioner mailed his first pro se petition for post-conviction relief on January, 24, 2000 ("PCRA I").³ Petitioner was then assigned legal counsel, who subsequently filed a no-merit letter in accordance with Commonwealth v. Finley, 550 A.2d 213, 215 (Pa. Super. Ct. 1988).⁴ On September 20, 2000, after an independent review of the merits, the PCRA court agreed with counsel's Finley letter that the

³ While the petition was marked as received and filed by the PCRA court on January 27, 2000, because Petitioner submitted the petition by mail on January 24, 2000, this Court will construe the submission date as the filing date, pursuant to the prison mailbox rule. Burns, 134 F.3d at 113.

⁴ A no-merit letter, also known as a Finley letter, is an appointed counsel's request to withdraw that must:

- 1) Detail the nature and extent of the counsel's review of the petitioner's record;
- 2) List each issue the petitioner wished to have reviewed by the PCRA court; and
- 3) Contain counsel's explanation of why the petitioner's issues were meritless.

Finley, 550 A.2d at 215. The PCRA court will then conduct an independent review of the record and, if it agrees with counsel that the petition is meritless, will allow counsel to withdraw. Id. The petitioner is then free to proceed pro se or with private counsel to review the court's ruling. Id.

petition was meritless and dismissed Petitioner's first petition. Petitioner, with new counsel, appealed this dismissal to the Superior Court.

On March 6, 2001, while PCRA I was under review in the Superior Court, Petitioner filed a second pro se PCRA petition ("PCRA II"). On March 27, 2001, Judge Jones, acting as the PCRA court, dismissed PCRA II for lack of jurisdiction because the appeal of PCRA I was still pending in the Superior Court. Petitioner did not appeal Judge Jones' disposition of PCRA II.

On July 30, 2001, the Superior Court affirmed the dismissal of PCRA I in Commonwealth v. Shaird, 785 A.2d 1034 (Pa. Super. Ct. 2001). On February 6, 2002, the Supreme Court of Pennsylvania denied allocatur for PCRA I.

Petitioner filed his final pro se PCRA petition ("PCRA III") with the PCRA court on March 16, 2002,⁵ which was dismissed on May 30, 2002, as untimely filed. On June 25, 2002, Petitioner appealed PCRA III to the Superior Court. On April 3, 2003, the Superior Court affirmed the dismissal of PCRA III as untimely in Commonwealth v. Shaird, 828 A.2d 403 (Pa. Super. Ct. 2003).

⁵ While the petition was docketed by the PCRA court on March 26, 2002, this Court, in conformity with the prison mailbox rule, deems March 16, 2002 the filing date as Petitioner hand-delivered the petition to prison officials on that date. Burns, 134 F.3d at 113.

B. Proceedings in This Court

On December 20, 2002, Petitioner filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

Petitioner asserts two instances where he was denied due process under the Fourteenth Amendment in his criminal case: (1) by his conviction of first degree murder in the absence of evidence proving specific intent and (2) when the trial court, during a bench trial presided over by Judge Jones, took additional testimony after Judge Jones initiated deliberations. (Pet. at 9-10.) The District Attorney of Philadelphia ("Respondent") responded that Petitioner's claims are time-barred by the one-year statute of limitations set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1).

Magistrate Judge Rapoport, on July 22, 2003, agreed with Respondent and issued a Report and Recommendation that recommended the petition be dismissed as time-barred. On August 1, 2003, Petitioner filed objections to Magistrate Judge Rapoport's Report and Recommendation claiming that the report failed to address the PCRA court's dismissal of PCRA II. Petitioner made two objections contending that: (1) PCRA III was untimely filed because of the PCRA court's erroneous dismissal of PCRA II, and (2) his subsequent filing of PCRA III was an attempt at reasonable diligence by exhausting his ineffective assistance of counsel claims. Petitioner claims that these objections

warrant an equitable tolling of the precisely twenty-one days he is beyond AEDPA's one-year statute of limitations.

II. DISCUSSION

A pivotal issue is whether Petitioner, after being sentenced, properly and timely exhausted his state and federal appeals for post-conviction relief. See 28 U.S.C. § 2254 (b). First, this Court will address PCRA III's dismissal for untimeliness at the state court level to show that the state court's dismissal was proper, and, that, since PCRA III was filed untimely at the state level, there is no justifiable reason for this Court to toll the AEDPA's statute of limitations requiring habeas corpus petitions be filed in a federal district court within one year of final judgement. See 28 U.S.C. § 2244(d). Second, we will discuss how the state court's proper dismissal of PCRA II forecloses Petitioner's argument for equitable tolling of AEDPA.

A. AEDPA Statute of Limitations

The statute of limitations under AEDPA provides, in pertinent part, that:

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

28 U.S.C. § 2244(d).

The Pennsylvania Supreme Court denied allocatur for Petitioner's criminal case on August 17, 1999, which is considered the date that Petitioner's judgment became final, and the date from which Petitioner had ninety days to file for certiorari in the United States Supreme Court. That ninety-day period, expired on November 15, 1999, and, therefore, November 15, 1999 is the date from which Petitioner had one year under the AEDPA statute of limitations to apply to a federal district court for a writ of habeas corpus. Sup. Ct. R. 13(1); Morris v. Horn, 187 F.3d 333, 337 & n.1 (3d Cir. 1999)(noting that finality of direct review occurs after ninety-day period allowed for seeking certiorari expires). Thus, for purposes of our review, Petitioner's state court judgment became final on November 15, 1999, when his time for seeking direct review in all courts expired. Barring any exceptions, Petitioner had one year, or until November 15, 2000, to file a timely petition for writ of habeas corpus in this Court.

B. Statutory Tolling of AEDPA

AEDPA allows its one-year statute of limitations for federal post-conviction relief to be tolled during the pendency of a "properly filed" petition for state post-conviction relief. 28

U.S.C. § 2244(d)(2). It follows that if the filing of the post-conviction petition in state court is untimely, then that petition does not qualify as "properly filed" under the AEDPA and, therefore, will not toll the habeas statutory time limit in federal court. Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001). When determining whether or not a state PCRA petition is timely filed, "'we must look to state law governing when a petition for collateral relief is properly filed' and 'defer to a state's highest court when it rules on an issue.'" Merritt v. Blaine, 326 F.3d 157, 165 (3d Cir. 2003)(quoting Fahy, 240 F.3d at 243-4).

On January 24, 2000, Petitioner timely filed PCRA I with the PCRA court, thereby tolling the AEDPA statutory time period from the date of PCRA I's filing until its final disposition in the Pennsylvania Supreme Court on February 6, 2002. Despite the tolling of this period, however, time lapsed between final judgment of Petitioner's criminal case and Petitioner's filing of PCRA I, and that time counts toward Petitioner's one-year time limit. Specifically, 70 days expired between November 15, 1999, the date of final judgment, and January 24, 2000, the date PCRA I was filed. Therefore, Petitioner had 295 days remaining from February 6, 2002, the date the Pennsylvania Supreme Court denied allocatur for PCRA I, or until November 29, 2002, to file a timely habeas petition in this Court. Petitioner, however, did

not file his habeas petition until December 20, 2002 -- twenty-one days beyond AEDPA's statute of limitations.

1. PCRA's Statute of Limitations

The PCRA is Pennsylvania's statute providing for collateral attack of state criminal convictions, and sets forth its own statute of limitations for petitions filed thereunder. The PCRA provides that "[a]ny petition . . . including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa. Cons. Stat. § 9545(b)(1). According to the PCRA, "a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." § 9545(b)(3). Petitioner's final judgment date under the PCRA is November 15, 1999, when his time for seeking direct review in all courts expired. Petitioner had one year from that date, or until November 15, 2000, to file any and all PCRA petitions.

The Superior Court determined that PCRA III, filed in the PCRA court on March 16, 2002, was untimely filed.⁶ Commonwealth v. Shaird, 828 A.2d 403 (Pa. Super. Ct. 2003). We agree that

⁶ As previously explained, PCRA II will be addressed in our discussion of equitable tolling.

PCRA III was untimely filed because it was filed one year and four months after the PCRA one-year statute of limitations expired on November 15, 2000. Thus, this Court cannot deem the AEDPA time limit as statutorily tolled for the period that PCRA III was pending because PCRA III was never "properly filed" in state court.

Petitioner timely filed PCRA I on January 24, 2000. However, both PCRA II and PCRA III were untimely as they were filed after the PCRA's one-year statute of limitations that expired on November 15, 2000. PCRA II was filed on March 6, 2001 and PCRA III was filed on March 16, 2002.

2. Exceptions to PCRA's Statute of Limitations

PCRA's statutory time limit has certain exceptions for late filing. 42 Pa. Cons. Stat. § 9545(b)(1);⁷ Commonwealth v.

⁷ The PCRA statute of limitations provides the following exceptions for late filing:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been

Beasley, 741 A.2d 1258, 1261 (Pa. 1999). Petitioner asserts two reasons why PCRA III should have been considered timely filed: (1) PCRA II claimed ineffective assistance of PCRA I counsel, and (2) the PCRA court's dismissal of PCRA II amounted to a governmental interference under § 9545(b)(1)(i) that caused him to file PCRA III in an untimely fashion. These claims are without merit.

First, under Pennsylvania law, an ineffective assistance of counsel claim will not excuse an untimely PCRA petition. Commonwealth v. Pursell, 749 A.2d 911, 916 (Pa. 2000) (stating a claim of ineffective assistance of counsel in a capital case does not trigger an exception to the one-year time limitation). "[T]he timeliness requirements of 42 Pa. Cons. Stat. § 9545(b) [are] jurisdictional in nature." Id. at 913. Pennsylvania courts are without jurisdiction to grant relief on an untimely PCRA petition unless it meets one of the enumerated exceptions in § 9545(b)(1)(i)-(iii). Id. at 914. As a claim for ineffective assistance of counsel is not one of the enumerated exceptions, Petitioner's attempt to couch an ineffective assistance of

ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

§ 9545(b)(1)(i)-(iii).

counsel claim in the language of the exceptions does not save his PCRA petitions from being found untimely. See Id. at 916-7. Furthermore, Petitioner's claims of ineffective assistance of PCRA I counsel were specifically addressed and dismissed on the merits in Shaird, 785 A.2d 1034, where the Superior Court determined that PCRA I counsel was not ineffective for filing a Finley letter.

Second, Petitioner contends that PCRA III should have been found timely because the PCRA court's dismissal of PCRA II caused him to file his untimely PCRA III, a contention that bears resemblance to the governmental interference exception under § 9545(b)(1)(i). Yet, as discussed above, the PCRA court did not interfere with Petitioner having his ineffective assistance of counsel claim heard, nor did the PCRA court require or cause Petitioner to file PCRA III. If Petitioner believed the dismissal of PCRA II was erroneous, then he could have appealed the PCRA court's decision to the Superior Court, as he has done with his other adverse decisions. Further, the exception for governmental interference under § 9545(b)(1)(i) does not apply to this case as Petitioner has offered no evidence that the government prevented him from asserting any of his rights. We agree with the Superior Court's dismissal of PCRA III because it was untimely and Petitioner did not present a valid exception to the PCRA's jurisdictional time bar.

Petitioner does not assert a basis by which AEDPA's statute of limitations may be statutorily tolled.

C. Equitable Tolling of the AEDPA

As discussed above, Petitioner had until November 29, 2002 to timely file his petition for writ of habeas corpus in this Court. This deadline was 295 days from February 6, 2002, when PCRA I, a properly filed petition in state court, was fully adjudicated. Petitioner did not file in this Court until December 20, 2002, twenty-one days past the statutory deadline. Petitioner seeks equitable tolling of the statute of limitations for the twenty-one days he is beyond the time limit.

Equitable tolling of AEDPA's statute of limitation should be sparingly applied, "only when the principles of equity would make [the] rigid application [of a limitation period] unfair." Brown v. Shannon, 322 F.3d 768, 773 (3d Cir. 2003)(Citation omitted). "Generally, this will occur when the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." Id. (Citation omitted). "Moreover, . . . [t]he petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient." Id. (Citation omitted). "Mere mistake or negligence on the part of an attorney generally does not 'rise to the extraordinary circumstances required for

equitable tolling.'" Fahy, 240 F.3d at 244.

The United States Court of Appeals for the Third Circuit has recognized that equitable tolling may be appropriate under three circumstances: "(1) the defendant has actively misled the plaintiff; (2) if 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) (citation omitted). "In the final analysis, however, 'a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.'" Id. (Citations omitted). Moreover, "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fahy, 240 F.3d at 244.

1. PCRA Court's Dismissal of PCRA II

Petitioner claims that the PCRA court's allegedly erroneous dismissal of PCRA II caused him to file PCRA III in an untimely manner. The PCRA court's actions, according to Petitioner, "actively misled" and caused him to file his untimely PCRA III. (Obj. at 2.) This Court does not agree with Petitioner and finds the PCRA court's dismissal of PCRA II appropriate.

Petitioner filed PCRA II on March 6, 2001, after the PCRA's one-year statute of limitations expired, and it was dismissed by the PCRA court on March 27, 2001, for lack of jurisdiction. The PCRA court does not have jurisdiction to review a second petition when a first petition is currently being reviewed in a higher court. Commonwealth v. Lark, 746 A.2d 585, 588 (Pa. 2000). According to the Pennsylvania Supreme Court in Lark, "when an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review." Id. Because Petitioner's PCRA I appeal was pending in the Pennsylvania Superior Court at the time he filed PCRA II, the PCRA court, according to Lark, did not have jurisdiction to review it. Accordingly, we must conclude that the PCRA court's dismissal of PCRA II was not erroneous, but rather demanded under Pennsylvania law.

2. Reasonable Diligence in Exhausting Ineffective Assistance Claims

Petitioner also claims that in filing PCRA II and PCRA III, he was merely "attempting to exercise 'reasonable diligence' [by] exhausting his ineffective assistance of counsel claims." (Obj. at 3.) However, as previously discussed, his claim for

ineffective assistance was reviewed on the merits in his PCRA I appeal in Commonwealth v. Shaird, 785 A.2d 1034 (Pa. Super. Ct. 2001). Whatever diligence Petitioner was trying to exercise by filing PCRA II before the Superior Court ruled on PCRA I appears to be a redundancy of PCRA I at best. Moreover, ineffective assistance of counsel claims are not considered "extraordinary" enough to equitably toll the habeas limitations. Fahy, 240 F.3d at 244.

Petitioner had 295 days from the final decision of PCRA I to file a petition for writ of habeas corpus in this Court, but instead chose to file another PCRA petition. Even after PCRA III was dismissed as untimely on May 30, 2002 by the PCRA court, Petitioner had 182 days left to file a timely habeas petition in this Court by November 29, 2002, but again chose to pursue PCRA relief in state court. Petitioner's claim that he was unaware that the AEDPA statute of limitations did not toll during this time is disingenuous, as he filed a habeas petition in this Court before the Pennsylvania Superior Court ruled on his appeal in PCRA III on April 3, 2003.

This Court is not persuaded by Petitioner's objections to Magistrate Judge Rapoport's Report and Recommendation, and does not accept Petitioner's argument that he was attempting to exercise reasonable diligence in pursuing post-conviction relief. Accordingly, AEDPA's statute of limitations will not be equitably tolled in this matter.

III. CONCLUSION

As equitable and statutory tolling of AEDPA's statute of limitations is not warranted by the facts of this non-capital case, this Court need not reach the merits of Petitioner's claims for collateral relief. Accordingly, Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED** as untimely filed.

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

LUCIUS SHAIRD, : CIVIL ACTION
Petitioner, :
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v. :
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WILLIAM J. WOLF, :
Respondent. : No. 03-18

O R D E R

AND NOW, this day of February, 2004, upon
careful and independent consideration of Magistrate Judge
Rapoport's Report and Recommendation and Petitioner's objections
to the Magistrate Judge's Report and Recommendation, it is
ORDERED that:

1. Petitioner's Objections to the Magistrate Judge's
Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation of Magistrate Judge
Rapoport is **APPROVED** and **ADOPTED** as supplemented by
memorandum;
3. The Petition for Writ of Habeas Corpus is **DENIED AS
UNTIMELY**; and
4. Because Petitioner has failed to make a substantial
showing of the denial of a constitutional right, there
is no basis for the issuance of a certificate of
appealability.

BY THE COURT:

JAMES MCGIRR KELLY, J.