

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

MELVIN WHITE, : CIVIL ACTION
Petitioner :
 :
 :
v. :
 :
COMMONWEALTH OF PENNSYLVANIA, et al :
Respondents :
 : NO. 02-6578

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 15, 2004

I. INTRODUCTION

Petitioner Melvin White ("White") is a state prisoner currently incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania. White, filing a *pro se* petition for a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254, claimed he was actually innocent of the charges for which he was convicted. The Commonwealth, responding to the petition, asserted that White's claims were procedurally defaulted and untimely. The court referred White's petition to Magistrate Judge Linda Caracappa (Judge Caracappa) for a Report and Recommendation (R & R), and Judge Caracappa recommended the petition be denied.¹ Presently before the court are the petitioner's Objections to the R & R.

¹ Judge Caracappa issued a Report and Recommendation on March 24, 2003 (Document No. 15) and a Supplemental Report and Recommendation on May 27, 2003 (Document No. 18) which incorporated White's reply to the defendants' response. The Supplemental Report and Recommendation is accepted as the Report and Recommendation in this action.

II. FACTUAL AND PROCEDURAL HISTORY

On September 26, 2000, White entered a negotiated plea agreement to charges of rape and endangering the welfare of a child² with a sentence of five to ten years' imprisonment. The written plea colloquy informed White that he had a right to a trial and by accepting the plea he was waiving his pre-trial rights and right to a trial by a judge or jury. The written plea colloquy also informed him of his right to appeal and that he could have faced twenty-seven years in jail if he were found guilty at trial.

In addition to the written plea colloquy, White acknowledged that his plea was voluntary and knowing. White admitted orally to the facts presented by the Commonwealth supporting the underlying charges. The judge advised White that he had ten days to ask the judge to reconsider acceptance of the negotiated sentence and thirty days to appeal to the Superior Court. White did not file a state court appeal or petition under the Post Conviction Relief Act ("PCRA") 42 Pa.C.S.A. § 9541, *et seq.*

In his *habeas* petition, filed August 5, 2002, White claimed he was actually innocent of the rape charge because the factual

²Under the plea agreement, the following charges were dismissed: involuntary deviate sexual assault, aggravated indecent assault, attempted rape, attempted involuntary deviate sexual assault, statutory sexual assault, indecent assault, terroristic threats, unlawful restraint, corruption of minors, simple assault, and recklessly endangering another person.

basis of his conviction could support only the charge of "attempted rape." He also asserted his constitutional rights were violated when he pleaded guilty, his lawyer was ineffective because she did not seek any post-conviction relief, and the trial court failed to inform him of the maximum sentence.

Judge Caracappa concluded that White's claims had not been exhausted because they were not raised in state court and the claims had been procedurally defaulted because review by any state court was foreclosed. Judge Caracappa also concluded that White's *habeas* petition was untimely.

III. DISCUSSION

In his Objections, White argues his lawyer "deceived him into believing that a direct appeal was pending," and he is actually innocent of the rape charge.³

³White also insists that his *habeas* petition is filed under 28 U.S.C. § 2241 rather than 28 U.S.C. § 2254. Section 2241 confers jurisdiction on district courts to issue writs of habeas corpus in response to a petition from a state or federal prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a) and (c)(3). Section 2254 confers jurisdiction on district courts to issue "writs of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court...on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

When two statutes cover the same thing, the more specific statute takes precedence over the more general one. A general provision should not be applied "when doing so would undermine limitations created by a more specific provision." *Varity Corp. v. Howe*, 516 U.S. 489, 511, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). Because Congress has made strict provisions regarding timeliness under Section 2254, allowing White to proceed under Section 2241 would circumvent these restrictions and thwart Congressional

A. Timeliness of the *Habeas* Petition

White's petition is governed by the federal habeas statute, 28 U.S.C. § 2241, *et seq.*, amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), effective April 24, 1996. Section 2244(d) of the statute creates a one-year time limitation on filing:

(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 the 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.

28 U.S.C. § 2244(d)(1).

White was sentenced on September 26, 2000; his direct appeal time expired on October 26, 2000. See, Pa. R.A.P.

903(a)(requiring notice of appeal to be filed "within thirty days

intent. Coady v. Vaughn, 251 F.3d 480, 484-485 (3d Cir. 2001). The court will treat White's petition as a petition under Section 2254.

of the entry of the order from which the appeal is taken.”). Because no appeal to the Superior or Supreme Court was filed, White had until October 25, 2001, to file a timely federal *habeas* petition, absent statutory or equitable tolling. White filed his petition on August 5, 2002, more than nine months after the statutory deadline.

There are statutory exceptions to the one year time limitation. See 28 U.S.C. § 2244(d)(1)(B)-(D). However, White fails to satisfy any of these. He does not allege that any state action prevented him from filing his petition or that any claim relies on a new rule of retroactively applicable constitutional law.

In addition to the statutory exceptions, the time limitation can be equitably tolled in situations when the principles of equity would make the rigid application of a limitation period unfair. Miller v. New Jersey State Dep’t of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Equitable tolling is appropriate when the petitioner has been prevented, in some extraordinary way, from asserting his or her rights. Id. at 618-619. The petitioner must show that he exercised reasonable diligence in investigating and bringing the claims. Id.

Equitable tolling may be appropriate if: (1) the defendant actively misled the petitioner; (2) the petitioner, in some extraordinary way, has been prevented from asserting his rights; or (3) the petitioner timely asserted his rights mistakenly in

the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). White asserts that he directed his attorney to file an appeal, she failed to do so and led him to believe an appeal was pending, and he did not learn of her failure to appeal until July 2002.

The Court of Appeals for the Third Circuit has determined that, “[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 v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Even if White did direct his attorney to file an appeal and she failed, this would not meet the requirements for equitable tolling. White’s failure to file a timely petition does not fall into any of these categories.

B. The Exhaustion Requirement

A federal court will not entertain the claims of a *habeas* petitioner unless he has exhausted all available state remedies. 28 U.S.C. § 2254(b); O’Sullivan v. Boerckel, 526 U.S. 838, 839 (1999). Judge Caracappa discussed White’s failure to exhaust his claims in detail in the Report and Recommendation. Because this court finds White’s petition untimely, it is not necessary to discuss exhaustion, procedural default or White’s attempts to overcome procedural default through a claim of actual innocence.⁴

⁴White argues that the evidence did not support the rape charge, but only an attempted charge. However, White pled guilty to the rape charge, and the record is replete with evidence

III. CONCLUSION

For the foregoing reasons, White's Objections to the Report and Recommendation will be overruled. An appropriate Order follows.

supporting the conviction.

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ORDER

AND NOW, this _____ day of July 2004, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Document No. 1), United States Magistrate Judge Linda Caracappa's Report and Recommendation (Document No. 15) and Supplemental Report and Recommendation (Document No. 18), Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 22), for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Supplemental Report and Recommendation (Document No. 18) is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 22) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody (Document No. 1) is **DENIED**;
4. There is no probable cause to issue a certificate of appealability;
5. The Clerk of the Court shall mark this case closed.

S.J.