

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

ANTOINE SAUNDERS,	:	
[CY-8059] Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 03-3115
	:	
DONALD T. VAUGHN, et. al.	:	
Defendants	:	

Memorandum and Order

Yohn, J.

November____, 2004

Presently before this court is a *pro se* petition for a writ of habeas corpus filed, pursuant to 28 U.S.C. § 2254, by state prisoner Antoine Saunders (“Petitioner”). Petitioner is currently incarcerated at State Correctional Institution Graterford, Pennsylvania, where he is serving a life sentence for murder. After conducting a *de novo* review of Magistrate Judge M. Faith Angell’s findings and recommendations and upon consideration of petitioner’s objections to the Report and Recommendation, Saunders’ petition will be dismissed as untimely under 28 U.S.C. §2244(d)(1).

Background and Procedural History

Petitioner was arrested and charged with murder, robbery, and related offenses arising from the August 29, 1994 shooting death of Al-Moez Alimohamed. On January 18, 1996, pursuant to a negotiated plea agreement, he pled guilty to first-degree murder, robbery, violation of the Uniform Firearms Act, possession of an instrument of crime, and criminal conspiracy. Under the agreement, petitioner agreed to testify against two co-defendants, Anthony Archer and

Gregory Pennington, in return for the Commonwealth's promise to request life imprisonment rather than the death penalty on the first-degree murder charge. Petitioner testified at the trial of Archer and Pennington, both of whom were convicted on February 12, 1996 of robbery and weapons offenses but acquitted of murder. A third co-defendant in the case, Ollie Taylor, also pled guilty to first-degree murder and related offenses.

On March 4, 1996, petitioner filed a pre-sentence motion to withdraw his guilty plea. (State Court Record: Docket Entries at 3-4-96.) In his motion to withdraw, petitioner averred that he was innocent of the crimes to which he had pled guilty. (State Court Record: Motion to Withdraw Guilty Plea at ¶ 4.) Petitioner's argument was heard by the trial court on March 13, 1996, and his motion was denied. The judge concluded that petitioner's assertion of innocence was "totally without merit" based in part on petitioner's own inculpatory statements and his testimony at the trial of his co-defendants. (State Court Record: April 1997 Trial Court Opinion at 4-5.) Petitioner was sentenced in accordance with the terms of his plea agreement to life imprisonment on the first-degree murder charge plus a concurrent aggregate term of twenty to forty years on the remaining charges. (State Court Record: Docket Entries at 3-13-96.)

On April 1, 1996, petitioner filed a direct appeal to the Pennsylvania Superior Court. That appeal was dismissed on July 24, 1997 without prejudice to petitioner's Post Conviction Relief Act ("PCRA") rights, because petitioner's counsel failed to file a brief on his behalf. By letter dated September 23, 1997, petitioner was informed by the Post Trial Unit of the Court of Common Pleas that his direct appeal had been dismissed without prejudice to his PCRA rights. (State Court Record: September 23, 1997 letter.) The letter advised him that it would be to his advantage to file a PCRA petition within thirty days if he wanted his appellate rights to be

reinstated.¹

On December 14, 1998, petitioner filed a *pro se* PCRA petition, in which he asserted that his guilty plea had been unlawfully induced. (State Court Record: PCRA Petition at 3.)

Subsequently, the PCRA court appointed counsel to represent petitioner. Counsel filed an amended PCRA petition, alleging that trial counsel had been ineffective because he failed to file an appellate brief and seeking reinstatement of petitioner's right to appeal *nunc pro tunc*. (State Court Record: Amended PCRA Petition.) On July 16, 1999, the PCRA court dismissed petitioner's PCRA petition without prejudice and reinstated his appeal rights *nunc pro tunc*. (State Court Record: July 16, 1999 Order.)

On July 21, 1999, petitioner filed a notice of appeal *nunc pro tunc*. He claimed that the trial court erred in denying his pre-sentence motion to withdraw his guilty plea and that trial counsel was ineffective in advising him to plead guilty. (State Court Record: Appellant's 1925(b) Statement.) The trial court filed a supplemental opinion addressing petitioner's claims on appeal *nunc pro tunc*. The court concluded that petitioner's motion to withdraw his guilty plea had been properly denied and that his ineffective assistance of counsel claim was without merit because petitioner's counsel had a "reasonable strategy for either advising the defendant to plead guilty and, or, for aiding him in the plea negotiations." (State Court Record: Opinion of April 1997.)

By Memorandum and Opinion dated December 28, 2001, the Superior Court affirmed the judgment of sentence on procedural grounds, holding that the PCRA court lacked jurisdiction to

¹Petitioner now denies having received the letter. (Petitioner's Objections to Report and Recommendation at 23.) According to petitioner, he did not know until he was informed by family members on November 28, 1998 that his direct appeal had been dismissed. *Id.* Petitioner alleges that his counsel "kept telling petitioner and his family that the appeal was in and pending a decision." *Id.*

reinstate petitioner's appellate rights *nunc pro tunc* because his PCRA petition was untimely.² (State Court Record: Superior Court Opinion of December 28, 2001.) Petitioner sought an allowance of appeal (*allocatur*) review in the Pennsylvania Supreme Court on January 9, 2002. His petition was denied on May 14, 2002. (State Court Record: Supreme Court Docket Entries.)

On May 15, 2003 petitioner filed this petition for federal habeas relief.³ He claims in his petition that he was denied the right to withdraw an involuntary guilty plea, which he alleges was unlawfully induced by his trial counsel. He also claims that he is actually innocent. (Revised Habeas Petition at 9-10.) On January 2, 2004, the Commonwealth ("Respondents") answered the habeas petition, arguing that it is time-barred under 28 U.S.C. § 2244(d)(1)(A), or, in the alternative, that petitioner's habeas claims are procedurally defaulted. (Response to Petition for Writ of Habeas Corpus at 7.)

Petitioner filed a traverse on June 8, 2004, in which he argued that the state court improperly restricted his right to appeal *nunc pro tunc* by applying timeliness requirements of the PCRA, and that he "should be allowed to overcome faulty rulings by state court's decisions and move pass the misstatement of untimely appeal. Under the above circumstances, Petitioner request's equitable tolling to this habeas petition." (Traverse Brief and Memorandum of Law at

²The court's opinion made explicit reference to the September 23, 1997 letter to petitioner from the Court of Common pleas, which notified petitioner that he should act expeditiously to preserve his PCRA rights. (State Court Record: Superior Court Opinion of Dec. 28, 2001.) The state court record from the period following the December 2001 ruling contains no evidence that petitioner objected at that time to the factual accuracy of the court's statement that he had received the letter.

³The petition was signed and dated May 9, 2003, which the court will accept as the date of filing under the prison mailbox rule. On September 29, 2003, upon the court's order, petitioner filed a revised petition on a current § 2254 form.

11.)

On July 1, 2004, United States Magistrate Judge M. Faith Angell filed a Report and Recommendation in which she concluded that petitioner's habeas petition should be dismissed as time-barred under 28 U.S.C. § 2244(d)(1) and that, even if there is an "actual innocence" exception to the AEDPA statute of limitations, petitioner has not met his burden of proof. On September 10, 2004, petitioner filed objections to the magistrate judge's Report and Recommendation. He alleged "specific inaccuracies" in the report, including the factual statement that he received a letter from the Court of Common Pleas in September 1997 notifying him of the dismissal of his direct appeal. (Objections to Recommendation and Report at 23.) He also alleged that the magistrate judge "understate[d] the impact" on petitioner's due process rights of the trial court's denial of his motion to withdraw his guilty plea, and that she wrongly concluded that equitable tolling of the AEDPA statute of limitations is not justified in his case. (Objections to Recommendation and Report at 6, 25-26.)

After submitting his objections, petitioner submitted to the court on September 15, 2004 signed statements by Darlene Eddy and Sarah Hugee, his grandmother. The statement by Ms. Eddy avers that she and petitioner's family members met with petitioner's trial counsel after petitioner's arrest to discuss the option of his entering into a plea agreement to avoid the death penalty. It further avers that trial counsel told her that petitioner "could be home in 10 to 15 years" if he were to plead guilty. The statement also asserts that trial counsel told petitioner's family that he was going to file an appeal on behalf of petitioner so that petitioner "could have a jury trial." The statement by Ms. Hugee is substantially similar in content to the statement by Ms. Eddy.

Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a one-year statute of limitations on applications for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1)(A). The statute of limitations begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” *Id.* AEDPA’s statute of limitations is subject to two tolling exceptions: (1) statutory tolling, during the time a “properly filed” application for state post-conviction review is pending in state court, and (2) equitable tolling, a judicially crafted exception. *Merritt v. Blaine*, 326 F.3d 157, 161 (3d Cir. 2003) (citing *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999)).

Petitioner’s state court judgment became final on August 23, 1997, which was the last day of the thirty-day period during which he could have filed for review of the dismissal of his direct appeal in the Pennsylvania Supreme Court. Absent statutory or equitable tolling, petitioner’s right to apply for federal habeas relief expired on August 23, 1998, one year after his state court judgment became final and approximately four years and eight months before petitioner filed the instant habeas petition on May 9, 2003. Unless petitioner can show a reason why the statute of limitations should be tolled in this case, his claim for habeas relief is time-barred.

A. Statutory Tolling

AEDPA expressly provides that its one-year statute of limitations is tolled for the “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.” 28 U.S.C. § 2244(d)(2). The AEDPA statute of limitations can be statutorily tolled only when a collateral petition for state relief was

“submitted according to the state’s procedural requirements, such as the rules governing time and place of filing.” *Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) (internal citation omitted).

In deciding whether petitioner’s PCRA petition was “properly filed” for purposes of statutory tolling under AEDPA, the federal court must look to applicable state law. *Fahy*, 240 F.3d at 243. Under the PCRA, a petitioner is required to file “within one year of the date the judgment becomes final” unless the petition meets one of three exceptions, 42 Pa.C.S.A. § 9545(b)(1), none of which petitioner has pled.⁴ In petitioner’s case, the Pennsylvania Superior Court held that the PCRA court lacked jurisdiction to reinstate petitioner’s right of appeal *nunc pro tunc* because his PCRA petition was not filed until approximately sixteen months after his judgment of sentence became final.⁵ (State Court Record: Superior Court Opinion of December

⁴Exceptions to this filing deadline are made where the petitioner can prove that: (i) the failure to raise the claim before the statute of limitations expired was the result of interference by government officials; (ii) facts upon which the claim is predicated were unknown to the petitioner and could not have been 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. 42 Pa.C.S.A. § 9545(b)(1). Any petition invoking one of these three exceptions must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S.A. § 9545(b)(2).

⁵Petitioner argues that the Superior Court erred in holding that the right to appeal *nunc pro tunc* is governed by the PCRA. (Traverse at 6-7.) The Pennsylvania Supreme Court has held, however, that when petitioners seek to have direct appeal rights reinstated *nunc pro tunc* premised upon counsel’s failure to perfect a direct appeal, there is “no residual common law or statutory authority to entertain the claim except under the strictures of the PCRA.” *Commonwealth v. Eller*, 807 A.2d 838, 843 (Pa. 2002). Petitioner asserts that a different rule should apply to him because he filed his petition before the Pennsylvania Supreme Court’s decision in *Commonwealth v. Lantzy*, 736 A.2d 564, 572 (Pa. 1999) (holding that claims seeking restoration of appellate rights due to counsel’s alleged failure to prosecute a requested direct appeal are cognizable under the PCRA and therefore subject to its exclusivity provision). This claim is without merit, though, because the Pennsylvania Supreme Court has made it clear that *Lantzy* “was not creating a new judicial rule of procedure, but instead was interpreting and applying the plain language of the [PCRA].” *Eller*, 736 A.2d at 842-843. Whether petitioner’s

28, 2001.) Petitioner argues that this court should “move past” the Superior Court’s ruling that his PCRA petition was untimely, but AEDPA’s statutory tolling provision does not allow this. The Third Circuit has held that once the highest Pennsylvania court to have ruled on the matter has decided that a PCRA petition is not timely, “it would be an undue interference for a federal district court to decide otherwise.” *Merritt*, 326 F.3d at 168. Because the Pennsylvania Superior Court has ruled that petitioner had no “properly filed” state petition pending prior to the August 23, 1998 expiration of the statute of limitations on his federal habeas claim, he is not entitled to statutory tolling under AEDPA.

B. Equitable Tolling

The one-year filing deadline in 28 U.S.C. § 2244(d)(1) can be subject to equitable tolling, but “only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims.” *Miller v. New Jersey Dept. of Corr.*, 145 F.3d 616, 618-619 (3d Cir. 1998) (internal citations and alterations omitted).

Magistrate Judge Angell concluded that petitioner’s case is not the kind of extraordinary case that would warrant equitable tolling. I agree. Petitioner argues that the AEDPA statute of limitations should be equitably tolled both because he never received the notice-of-dismissal letter from the Court of Common Pleas and because his trial counsel led him to believe that his direct appeal was still pending even after it had been dismissed. (Objections to Report and

claim was filed before or after *Lantzy* is therefore immaterial to the question of whether it was “properly filed” under Pennsylvania law.

Recommendation at 23.) “In 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. The case law does allow that attorney malfeasance may be a basis for equitable tolling, but it is not a sufficient basis on its own. *Schlueter v. Varner*, 2004 U.S.App. LEXIS 19248 (3d Cir. 2004) at *21. The court must also consider petitioner’s “due diligence in pursuing the matter under the specific circumstances he faced.” *Id.*

The record in this case indicates that petitioner’s trial counsel abandoned the case, without properly withdrawing, even though he had notice that petitioner was seeking to appeal. Accepting *arguendo* that counsel not only negligently failed to perfect the appeal but also actively misled petitioner into thinking his appeal was still pending after it had been dismissed, proof of petitioner’s own diligence in pursuing federal relief is required before equitable tolling is justified. *Id.* In this case, the AEDPA statute of limitations expired on August 23, 1998, one year after petitioner’s state court judgment became final. Yet petitioner’s application for federal habeas relief was not filed until May 9, 2003, more than four years after the expiration of the statute of limitations. Even if I were to conclude that the AEDPA statute of limitations should be equitably tolled for the lengthy period between July 24, 1997 (when petitioner’s direct appeal was dismissed without prejudice by the Pennsylvania Superior Court) and November 28, 1998 (when petitioner claims he first received notice of the dismissal), petitioner’s federal habeas claim would still be much too late.⁶ I am convinced that petitioner could have been more diligent

⁶And even if equitable tolling were granted and the December 1998 PCRA petition were accepted as timely under Pennsylvania law, petitioner’s habeas petition would still be eleven days too late: Sixteen days of the limitations period ran between the time petitioner claims to

under the circumstances in pursuing his federal rights, notwithstanding any misconduct by his trial counsel. I must therefore conclude that equitable tolling is not warranted in this case.

C. Actual Innocence

In his habeas petition, petitioner asserts that he is actually innocent of the crimes to which he pled guilty. He asserts that “[t]he record is clear that your Petitioner was not the killer and also clear that he did not harbor intent to have Mr. Mohammed killed.” (Traverse at 29, 32.) The question of whether there is an “actual innocence” exception to the AEDPA statute of limitations has not been decided by the U.S. Supreme Court or the Third Circuit. If such an exception were to be held to exist, the burden would be on the petitioner to convince the district court, by means of “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

It appears that petitioner has submitted the statements by Ms. Eddy and Ms. Huges with the intention that they be reviewed by the court as new evidence, but such statements are not new and reliable evidence of the kind contemplated in *Schlup*. In addition to the fact that the affiants are not disinterested parties, the statements do not allege any new facts about the crimes in question. Instead, they describe trial counsel’s conduct during plea negotiations and attest to subjective statements made by petitioner after the crime concerning his state of mind at the time

have received notice of the Superior Court’s dismissal of his appeal (November 28, 1998) and the time he filed his PCRA petition (December 14, 1998); 360 additional days ran between the time allocatur was denied by the Supreme Court of Pennsylvania (May 14, 2002) and the time he filed the instant petition for federal relief (May 9, 2003).

of the crime. Petitioner's assertions of innocence are already on the record, and the trial court concluded long ago, when it denied petitioner's motion to withdraw his guilty plea, that they were "totally without merit" in light of petitioner's statements to police and his testimony at the trial of his co-defendants.

A petitioner does not meet the threshold requirement for establishing actual innocence "unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. After evaluating petitioner's recently submitted affidavits, I must conclude that petitioner has not produced any new evidence of the kind the law requires. Therefore, even if the Third Circuit were to rule that there is an actual innocence exception to the AEDPA statute of limitations, I agree with Magistrate Judge Angell that petitioner has failed to carry his very high burden of proof with respect to his actual innocence claim.

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	:	
	:	NO. 03-3115
DONALD T. VAUGHN, et. al.	:	
Defendants	:	

Order

Yohn, J.

AND NOW on this _____th day of November 2004, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge M. Faith Angel, petitioner's traverse, and petitioner's objections to the Report and Recommendation, and for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. The Report and Recommendation of Magistrate Judge M. Faith Angell is APPROVED AND ADOPTED as supplemented herein.
3. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED;
4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground for a certificate of appealability, see 28 U.S.C. § 2253(c); and
5. The Clerk shall CLOSE this case statistically.

William H. Yohn, Jr., Judge