

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

WINSLOW SHAW	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS LAVAN, et al.	:	NO. 04-1992
	:	
O'NEILL, J.	:	JULY 13, 2005

MEMORANDUM

Petitioner, Winslow Shaw, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 7, 2004 claiming ineffective assistance of counsel and error by the state trial court. On August 18, 2004, I approved and adopted the report and recommendation of Magistrate Judge Charles B. Smith denying Shaw's habeas petition. Following petitioner's appeal, the Court of Appeals remanded the case to me to determine whether a reason exists to extend the time under Federal Rule of Appellate Procedure 4(a)(5) for petitioner to file a notice of appeal.

As Judge Smith stated in his report and recommendation, "petitioner was convicted, on March 9, 1995, of rape, robbery, theft by unlawful taking, receiving stolen property, criminal trespass, indecent assault, possessing an instrument of crime, terroristic threats, unlawful restraint, simple assault, recklessly endangering another person and indecent exposure." Petitioner's conviction was upheld by the Pennsylvania Superior Court. Commonwealth v. Shaw, 687 A.2d 861 (Pa. Super. Ct. 1996). Shaw subsequently filed a petition under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S.A. § 9541, which the trial court granted in

part and dismissed in part. Petitioner then sought an appeal of the claims dismissed by the trial court, which was granted by the lower court but quashed by the Pennsylvania Superior Court as untimely. Commonwealth v. Shaw, 832 A.2d 543 (Pa. Super. Ct. 2003).

On May 7, 2004, Shaw filed a petition for a writ of habeas corpus with this Court. I referred the case to Judge Smith for a report and recommendation. On July 28, 2004, Judge Smith recommended that the habeas petition be denied. Petitioner subsequently failed to file his objections to the report and recommendation within the ten days required by Rule 8 of the Rules Governing § 2254 Cases. Rules Governing § 2254 Cases, Rule 8, 28 U.S.C. foll. § 2254 (2005) (“Within 10 days after being served, a party may file objections as provided by local court rule.”). See also 28 U.S.C. § 636(b)(1) (2005); United States v. Polishan, 336 F.3d 234, 239 (3d Cir. 2003) (holding that 28 U.S.C. § 636 mandates that objections to a magistrate judge’s report and recommendation be filed within ten days). On August 18, 2004, I adopted the report and recommendation. Five days later, on August 23, 2004, petitioner filed objections, which I considered untimely.¹

On September 30, 2004, petitioner filed a motion for permission to proceed in forma pauperis (dated by petitioner as September 21, 2004). Because petitioner had not yet filed a notice of appeal, I denied his motion without prejudice on October 4, 2004. Although I stated in my August 18, 2004 Order approving and adopting Judge Smith’s report and recommendation

¹Petitioner alleges that after filing a response to the Magistrate’s report and recommendation he filed a notice of appeal on August 25, 2004 with the prison authorities, and that “it was misplaced”. (Mot. of Pet’r to Extend Time and Leave to File Am. Notice of Appeal Pursuant to Rule 4(a)(5) ¶ 22.) There is no evidence on record to support petitioner’s allegations that he filed a notice of appeal on August 25, 2004. See Houston v. Lack, 487 U.S. 266, 275 (1998); Acheampong v. United States, No. 99-6133, 2002 WL 32130108, at *3 (E.D. Pa. Oct. 16, 2002).

that “[t]here is no probable cause to issue a certificate of appealability,” Shaw filed an application for a certificate of appealability (dated by petitioner as October 22, 2004) with this Court on October 27, 2004. On November 2, 2004, I issued an Order stating that this application would be treated as a notice of appeal and granted petitioner leave to proceed in forma pauperis. On May 17, 2005, the Court of Appeals remanded this case so that I may consider:

whether a reason exists to extend the time for filing a notice of appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. The District Court is requested to consider whether the appellant’s in forma pauperis motion (Docket Entry #9), together with appellant’s application for a certificate of appealability (Docket Entry #11), provide grounds for Rule 4(a)(5) relief. See Fed. R. App. P. 4(a)(5).

Subsequently, on May 23, 2005, petitioner filed with this Court a “Motion to Extend Time to File Amended Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(5).”

In civil cases, a notice of appeal must be filed within thirty days of the entry of judgment. Fed. R. App. P. 4(a)(1)(A) (2004); Poole v. Family Court of New Castle County, 368 F.3d 263, 264 (3d Cir. 2004); Welch v. Folsom, 925 F.2d 666, 668 (3d Cir. 1991) (“This time limitation is both mandatory and jurisdictional and may not be waived.”) (citations omitted). For inmates in prison, a notice of appeal is considered filed once the notice is deposited in the prison’s mail system. Fed. R. App. P. 4(c)(1) (2004); Houston v. Lack, 487 U.S. at 276. Since I adopted Judge Smith’s report and recommendation on August 18, 2004, petitioner had thirty days—or until September 17, 2004—to deposit a timely notice of appeal in the prison’s mail system.

Shaw filed his application for a certificate of appealability (dated by petitioner as October 22, 2004) on October 27, 2004. Because I am to construe the pleadings of a pro se party liberally, see Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003), I treated his application for a certificate of appealability as his notice of appeal. So construed, petitioner’s notice of appeal is untimely as it

was filed forty days after September 17, 2004. If petitioner had deposited this document in the prison mail system on the day it was dated, it would still have been submitted over a month after the September 17, 2004 deadline.

If petitioner's IFP motion were to be considered his notice of appeal, see 3d Cir. Local R. App. P. 3.4 (2005), it too would be untimely. Shaw filed his IFP motion (dated by petitioner September 21, 2004) on September 30, 2004—thirteen days after the deadline to file a timely notice of appeal. Assuming again that the motion was given to prison authorities the day petitioner dated it, the motion would have been filed two days beyond the thirty days allowable under Rule 4(a)(1). Thus, neither petitioner's application for a certificate of appealability, nor his motion to proceed in forma pauperis can be considered timely notices of appeal.

However, I may extend the time to file a notice of appeal if a party files a motion for extension of time within thirty days after time has run under Rule 4(a) and that party shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A) (2004); Herman v. Guardian Life Ins. Co., 762 F.2d 288, 289-90 (3d Cir. 1985) quoting App. R. 4(a)(5), Committee Notes, 1979 Amends. (“[A] motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time....”). An essential requirement for a Rule 4(a)(5) motion is that a timely motion be filed by the party. Poole, 368 F.3d at 269. If petitioner's application for a certificate of appealability were to be considered a Rule 4(a)(5) motion, it would nevertheless be untimely as it was both dated and filed more than sixty days after entry of judgment. Any motion for extension of time should have been filed by October 18, 2004. Therefore, petitioner's application for a certificate of appealability cannot be a timely filed motion for extension of time.

Petitioner's motion to proceed in forma pauperis also cannot be considered a motion for

extension of time, though it was filed within sixty days of the entry of judgment. For a Rule 4(a)(5) motion filed after the expiration of the original thirty days, “notice must be given to the other parties in accordance with local rules.” Fed. R. App. P. 4(a)(5)(B) (2004); Amatangelo v. Borough of Donora, 212 F.3d 776, 778 (3d Cir. 2000). Even assuming that petitioner mailed his IFP motion the day it was dated, Shaw filed his IFP motion beyond the original thirty days given to appeal, and did so without giving notice to respondents. Therefore, this motion does not constitute a Rule 4(a)(5) motion and will not be granted.² Petitioner’s motion for an extension of time under Rule 4(a)(5), filed May 23, 2005, must also be denied as untimely because it was filed beyond sixty days after the entry of judgment.

However, I will now construe petitioner’s untimely objections to Judge Smith’s report and recommendation as a Rule 59(e) motion for reconsideration. Cf. Dluhos v. Strasberg, 321 F.3d at 369 (“We must liberally construe his pleadings, and we will apply the applicable law, irrespective of whether the *pro se* litigant has mentioned it by name.”); Ahmed v. Dragovich, 297 F.3d 201, 208 (3d Cir. 2002); Stevenson v. Palakovich, No. 04-1908, 2005 WL 1330335, at *1 (E.D. Pa. June 2, 2005). So construed, petitioner’s motion for reconsideration, filed on August 23, 2004—five days after final judgment—is timely. Fed. R. Civ. P. 59(e) (2005); Albright v. Virtue, 273 F.3d 564, 571 (3d Cir. 2001) (“Rule 59(e) gives the right to move for reconsideration ‘not later than 10 days *after entry of judgment*.’”).

²Because no Rule 4(a)(5) relief would be sufficient to make Shaw’s notice of appeal timely, I will not address whether such relief would be granted under the excusable neglect or good cause standard. See Amatangelo, 212 F.3d at 778 (“Under Fed. R. App. P. 4(a)(5)(A), if a party shows ‘excusable neglect or good cause’ the district court may extend the time for filing a notice of appeal if a motion seeking the extension is filed *no later than 30 days* after the expiration of the time prescribed for the appeal under Rule 4(a).”) (emphasis added).

Shaw's motion for reconsideration will be denied. The purpose of a motion for reconsideration under Federal Rule of Civil Procedure 59(e) is "to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985). Therefore, a motion for reconsideration is generally allowed only on one of three grounds: (1) where there has been an intervening change in the controlling law; (2) where new evidence that was not previously available has become available; or (3) where it is necessary to correct a clear error of law or to prevent manifest injustice. Malaysia Int'l Shipping Co. v. Sinochem Int'l Co. Ltd., No. 03-3771, 2004 WL 825466, *2 (E.D. Pa. April 13, 2004). In a motion for reconsideration, the burden is on the movant to show one of these three grounds. See Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985). Here, Shaw has failed to meet his burden on any of these grounds.

Nevertheless, so construed as a motion for reconsideration, petitioner's objections to the report and recommendation have tolled the time to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A); United States v. Fiorelli, 337 F.3d 282, 288 (3d Cir. 2001) ("Federal Rule of Appellate Procedure 4(a)(4) provides that motions under Federal Rules of Civil Procedure 50(b), 52(b), 54, 59, or 60 timely filed in the district court toll the period for filing a notice of appeal until the district court enters an order disposing of the motion."). Moreover, since petitioner filed a notice of appeal prior to my disposing of this motion, his notice of appeal automatically becomes effective upon my denial of his motion for reconsideration.³ Fed. R. App. P. 4(a)(4)(B)(i); United States v. McGlory, 202 F.3d 664, 668 (3d Cir. 2000) ("Federal Rule of Appellate Procedure 4(a)

³The notice of appeal to which I refer is petitioner's application for a certificate of appealability, which I treated as a notice of appeal on November 2, 2004.

provides that a notice of appeal filed before the disposition of one of the motions specified in Rule 4(a)(4)(A), including a Rule 59(e) motion, will become effective upon entry of the order disposing of the motion.”). Thus, petitioner has filed a timely notice of appeal. Petitioner’s motion for an extension of time to file a notice of appeal will be denied as moot.

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THOMAS LAVAN, et al.	:	NO. 04-1992

ORDER

AND NOW, this 13th day of July 2005, upon consideration of petitioner's "Response to Magistrate Report and Recommendation," petitioner's motion to proceed in forma pauperis, petitioner's application for a certificate of appealability, petitioner's "Motion to Extend Time to File Amended Notice of Appeal under Federal Rule of Appellate Procedure 4 (a)(5)," and for the reasons set forth in the accompanying memorandum, it is ORDERED that petitioner's motion for reconsideration and petitioner's motion to extend time to file a notice of appeal are DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J