

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

Michael Brown	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	
James T. Wynder, et al.,	:	NO. 06-0049
Respondents.	:	

MEMORANDUM

Baylson, J.

July 21 , 2006

I. INTRODUCTION

Petitioner Michael Brown (“Petitioner”) filed a pro se Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254 on January 5, 2006. This Court referred the case to Magistrate Judge Arnold C. Rapoport (“the Magistrate Judge”) on February 10, 2006. On May 22, 2006, the Magistrate Judge issued a Report and Recommendation (“R&R”) (Doc. No. 13) suggesting that this Court deny and dismiss the petition. The Magistrate Judge based this recommendation on the well-reasoned conclusion that the Petition was time-barred. Petitioner filed Objections to the R&R, in which Petitioner contends that he is entitled to the application of the doctrine of equitable tolling because he has lung cancer.

II. BACKGROUND

On September 20, 1994, Petitioner was convicted of second degree murder, criminal conspiracy, two counts of robbery, and one count of simple assault. Post-trial motions were denied on May 10, 1995, and the trial judge imposed a mandatory sentence of life imprisonment on the murder conviction, and a concurrent aggregate sentence of 25 to 50 years for the other

convictions.

Petitioner filed a timely direct appeal in the Pennsylvania Superior Court. Trial counsel was permitted to withdraw, and new counsel was appointed to represent Petitioner. The issues raised in the direct appeal were (1) whether the trial court abused its discretion in denying Appellant's motion to sever; and (2) whether the prosecutor committed misconduct during his closing argument which deprived Appellant of a fair trial. The Superior Court affirmed the judgment of sentence on May 1, 1997. On May 29, 1997, a petition for allowance of appeal was docketed in the Pennsylvania Supreme Court. The petition was denied on September 27, 1997. On December 11, 1997, petitioner filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied by order on May 18, 1998.

On March 31, 1999, Petitioner filed a pro se petition pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"). See 42 Pa. C.S.A. § 9541, et seq. Petitioner challenged his conviction on the grounds of evidence never produced at trial. On June 12, 2003, counsel presented argument to the court, but the PCRA petition was dismissed by the court without an evidentiary hearing. Petitioner filed a Notice to Appeal Pro Se to the Superior Court on June 23, 2003. On June 27, 2003, the court entered a 1925(b) order, and petitioner filed a pro se Statement of Matters on Appeal pursuant to 1925(b) on July 18, 2003. On February 17, 2004, counsel filed a Brief for Appellant raising three issues: (1) whether trial counsel was ineffective for failing to call and present witnesses and for failing to call alibi witnesses on behalf of the defendant; (2) whether appellant counsel was ineffective for failing to raise on direct appeal trial counsel's ineffectiveness; and (3) whether the PCRA court erred when it ruled that appellant was not entitled to an evidentiary hearing on ineffective assistance of counsel because the

attorney failed to present a Certification of Proposed Witnesses for Evidentiary Hearing pursuant to 42 Pa. C.S.A. 9545(d)(1). On November 15, 2004, the Superior Court affirmed the PCRA court's denial of relief. The Pennsylvania Supreme Court denied the petition for allowance of appeal on October 25, 2005.

The instant Petition was signed on December 27, 2005 and was docketed by the Clerk of Courts on January 5, 2006. This Court ordered the Clerk's Office to forward updated habeas forms for Petitioner's completion on January 17, 2006. These forms were received and docketed on February 3, 2006. In addition to his application for a writ of habeas corpus, Petitioner also filed a petition for compassionate medical release under Pennsylvania law.

On February 10, 2006, this case was referred to the Magistrate Judge for preparation of a R&R. The Magistrate Judge filed his R&R on May 22, 2006. Petitioner filed objections to the R&R on May 31, 2006. Respondents filed a Response to Petitioner's Objections on July 7, 2006.

III. SUMMARY OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND PETITIONER'S OBJECTIONS

The Magistrate Judge concluded in the R&R that (1) the habeas petition should be dismissed as time-barred and (2) the subsequently-filed petition for compassionate medical release should be denied based on the failure to satisfy the requirement of the exhaustion of remedies in state court. R&R at 4-11. Regarding the habeas petition, the R&R more specifically concludes that Petitioner's writ of habeas corpus is time-barred because the Petition was not signed until December 27, 2005, which date was thirteen days following the expiration of the one-year deadline set by the Antiterrorism and Effective Death Penalty Act of 1996. The R&R further concludes that Petitioner presented no satisfactory reason for the delay in signing his

habeas petition and is therefore ineligible for equitable tolling of the deadline. Regarding the petition for compassionate release, the R&R more specifically concludes that Petitioner has not sought available relief from his sentencing court.

Petitioner objects to the R&R solely on the grounds that he is entitled to the application of the doctrine of equitable tolling because he has lung cancer, with which Petitioner says he has been ill since the spring of 2004.¹

IV. DISCUSSION

In the Third Circuit, the doctrine of equitable tolling may be applied in three circumstances: (1) if the Respondent has actively misled the Petitioner; (2) if the Petitioner has in some extraordinary way been prevented from asserting his rights; or (3) if the Petitioner has timely asserted his rights mistakenly in the wrong forum. Johnson v. Hendricks, 314 F.3d 159, 162 (3d Cir. 2002). The Petitioner must show that he “exercised reasonable diligence in investigating and bringing [his] claims. Mere excusable neglect is not sufficient.” Miller v. New Jersey State Dep’t of Corr., 145 F.3d 616, 618 (3d Cir. 1998). In determining whether extraordinary circumstances exist to warrant the application of the doctrine of equitable tolling, the Court must examine Petitioner’s due diligence in pursuing the matter under the specific circumstances he faced. Traub v. Folio, 2004 WL 2252115, *2 (E.D. Pa. 2004). It is the petitioner’s burden to show that he acted with reasonable diligence and extraordinary circumstances caused the untimeliness. Id. Respondent correctly indicates that federal courts

¹ Petitioner only objects to the R&R as it pertains to the Petition for Habeas Corpus; he does not object to the R&R as it pertains to his Petition for Compassionate Release under Pennsylvania law. The Court finds that the Magistrate Judge’s conclusions regarding the petition for compassionate release are obvious and correct, and therefore the Court will not discuss them in any further detail herein.

have concluded or assumed that a serious illness can constitute sufficient “extraordinary circumstances” capable of preventing a petitioner from timely asserting his or her rights and thus entitling the petitioner to equitable tolling – provided, inter alia, that the illness was actually the cause of the petitioner’s inability to file on time. See Reply Br. at 2 (collecting cases).

Petitioner originally offered no reason for his delay in filing the instant Petition. On that basis, the Magistrate Judge concluded that equitable tolling was unavailable to Petitioner. In his Objections, Petitioner asserts a reason for the asserted application of the equitable tolling doctrine – namely, that he has lung cancer. Petitioner’s entire factual discussion in support of this argument is:

Petitioner became sick/ill on or about May or June of 2004, while [sic] he was incarcerated at SCI Smithfield. Thereafter the petitioner was temporarily transferred to SCI Rockview hospital from July to Oct 2004 for chemotherapy treatment. Petitioner has been seriously fighting this serious medical condition since he was diagnosis [sic] with this life threaten [sic] illness.

Objections at 1-2.

Although Respondent does not dispute that Petitioner regrettably suffers from cancer, Petitioner does not, however, offer any explanation for how that medical condition actually prevented him from filing on time. For example, Petitioner does not assert that his medical condition is acute or has incapacitated him or prevented him from utilizing the necessary resources to make his filing. Although Petitioner was hospitalized for chemotherapy (which one could presume might limit his ability to act), such hospitalization occurred from July to October of 2004, a time period that was not part of the relevant year for limitations purposes (which was May 18, 1998 to March 31, 1999 and October 26, 2005 to December 14, 2005) and was actually

during the period in which the deadline for filing Petitioner's habeas petition was tolled because his PCRA petition was still pending.²

In short, Plaintiff offers no explanation of a significant event during the relevant time periods that (a) is directly attributable to his unfortunate illness and (b) impeded his ability to timely file the instant habeas petition. Petitioner was fully advised of the Respondent's position in its response to the original Petition, and also, Magistrate Judge Rapoport's conclusion advised Petitioner of the legal requirements concerning timely filings. Petitioner could have, and should have, asserted specific facts that would support the argument that his cancer had really "in some extraordinary way prevented him from asserting his rights," but he has not done so. As the record exists, Petitioner has had ample opportunity to make timely filings. Although his cancer is unfortunate, it is obvious that his cancer did not prevent him from making the filings which he did. There is nothing in the record to show that in the specific time periods during which filings would have been timely, Petitioner was actually prevented by his illness from making these filings. Stated differently, there is nothing in the record to indicate that Petitioner was not in satisfactory medical condition to have made the filings which he did make. The most recent filing is May 31, 2006. Of course, cancer is well known as usually a progressive disease and Petitioner never explains why he could make a filing on May 31, 2006 (his Objections to the Magistrate Judge's R&R), but could not have made filings at an earlier time, for some of the other pleadings. In other words, the Court concludes that Petitioner has made certain specific

² Petitioner filed his PCRA petition on March 31, 1999, which effectively suspended his time to seek a writ of habeas corpus while the application was still pending in the state courts. On October 26, 2005, the one-year limitations period resumed with forty-eight days remaining for Petitioner to timely file the instant Petition. See R&R at 5-6.

filings when convenient for him, and his cancer has not prevented him from making timely filings on at least some occasions. The pleadings that have been filed by the Defendant and Magistrate Judge Rapoport have made clear to the Petitioner that he is required to make a specific showing, with specific details, as to how his illness acted to prevent a timely filing. Petitioner has had several opportunities to make this showing and has failed to do so. For these reasons, Petitioner's objections are overruled and the Court will approve the R&R of Magistrate Judge Rapoport and deny the Petition.

An appropriate Order follows.

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ORDER

AND NOW, this 21st day of July, 2006, it is hereby ORDERED that the Report and Recommendation of Magistrate Judge Rapoport is APPROVED, the Objections are OVERRULED, and the Petition for Writ of Habeas Corpus is DISMISSED. The Clerk shall close this case.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.