

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

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|----------------------------------|---|---------------------|
| LAMONT GIST | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | NO. 05-4250 |
| DAVID DIGUGLIELMO, et al. | : | |

MEMORANDUM AND ORDER

Kauffman, J.

November 22, 2006

Now before the Court is the pro se Petition of Lamont Gist (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution at Graterford, Pennsylvania. For the reasons that follow, the Petitioner’s objection to the Magistrate Judge’s Report and Recommendation will be sustained.

I. Procedural History

On August 1, 1997, following a jury trial, Petitioner was convicted of first degree murder, aggravated assault, and possessing instruments of crime. Petitioner was sentenced to life imprisonment on the murder count, and an aggregate term of twelve and a half to twenty-five years on the remaining counts. In February 1998, Petitioner, assisted by counsel, filed a timely appeal to the Pennsylvania Superior Court, which affirmed the conviction and sentence on May 4, 1999. Commonwealth v. Gist, 739 A.2d 586 (1999). The Pennsylvania Supreme Court denied allocatur on August 11, 1999.

On January 28, 2000, Petitioner filed a timely petition pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S. § 9541, et seq. Petitioner subsequently retained counsel, Fortunato N. Perri, Esq., who filed an amended PCRA petition on his behalf. On May 13, 2002, the PCRA Court denied the petition. The PCRA Court’s Order expressly provided that Mr. Perri

shall “remain court-appointed counsel for purposes of pursuing any appeal” of the dismissal. May 13, 2002 Order, Appendix F to Petitioner’s Objections to Magistrate Judge’s Report and Recommendation (hereinafter, “Objections”).

It is uncontested that: (1) On May 20, 2002, Petitioner sent Mr. Perri a letter stating that he understood that Mr. Perri had been appointed by the Court as counsel to handle his appeal and requesting that Mr. Perri file a notice of appeal. See Objections, Appendix G. (2) On June 6, 2002, having received no response from Mr. Perri, Petitioner sent him a second letter inquiring whether the notice of appeal had been filed.¹ See Objections, Appendix G. (3) By letter dated July 2, 2002, after the 30-day period for filing a notice of appeal had expired, Mr. Perri, disregarding the fact that he had been designated by Judge Fitzgerald as “court-appointed counsel for petitioner for the purposes of pursuing any appeal of [the] Court’s Order dismissing the [PCRA] petition,” belatedly informed Petitioner that he had not filed an appeal of the PCRA Court’s Order because no one had made financial arrangements with him to continue representation. See Objections, Appendix G.

After he learned that a notice of appeal had not been filed on his behalf, Petitioner filed a second PCRA petition seeking reinstatement nunc pro tunc of his right to appeal.² The PCRA Court reinstated his appellate rights, but the Pennsylvania Superior Court reversed, finding that the second PCRA petition was untimely. Commonwealth v. Gist, 863 A.2d 1222 (Pa. Super.

¹ Petitioner also reminded Mr. Perri that “we only have a few more days until our time has run out.” See June 6, 2002 Letter.

² Petitioner claims he filed the second PCRA petition on July 31, 2002. See Petition for Writ of Habeas Corpus, at 4. Respondents first state that the second PCRA petition was filed on June 29, 2002, see Response to Petition for Writ of Habeas Corpus, at 2., but later state that the second PCRA petition was filed on July 29, 2002. See id. at 12.

2004). Petitioner's request for reargument was denied on November 9, 2004. On March 28, 2005, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Gist, 871 A.2d 188 (Pa. 2005).

On August 10, 2005, Petitioner filed the instant Petition seeking habeas corpus relief on various grounds. The Court designated United States Magistrate Judge Linda K. Caracappa to submit a Report and Recommendation. See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). Magistrate Judge Caracappa concluded that Petitioner's habeas claims are barred by the applicable statute of limitations. Petitioner filed timely objections challenging this finding. Because Petitioner has objected to the Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(c).

II. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244 et seq., which provides in pertinent part:

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 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)(1). The statute is tolled during the time in 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). Moreover, when principles of equity would make the rigid application of the limitations period unfair, the statute of limitations may

be equitably tolled. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

III. Analysis

The sole issue now before this Court is the timeliness of the August 10, 2005 Petition. Petitioner's judgment of sentence was affirmed by the Superior Court on May 4, 1999, and the Pennsylvania Supreme Court denied allocatur on August 11, 1999. Since Petitioner did not seek to appeal to the United States Supreme Court, direct review ceased on November 11, 1999, ninety days after the Pennsylvania Supreme Court denied allocatur. Petitioner's first PCRA petition was timely, and therefore tolled the statute of limitations until May 13, 2002, the date it was dismissed. Petitioner had approximately nine and a half months remaining to file a habeas petition. Petitioner's second PCRA petition was ruled untimely by the Superior Court, and therefore cannot be considered a "properly-filed application" for purposes of statutory tolling. 28 U.S.C. § 2254(d)(2). The instant habeas Petition was filed on August 10, 2005, well after the expiration of the one-year limitations period, and the Magistrate Judge recommended that the Petition be dismissed as untimely.

While the instant Petition was untimely-filed, the statute of limitations is subject to equitable tolling when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Miller, 145 F.3d at 618 (internal quotations omitted); Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003). "This unfairness generally occurs when the petitioner has in some extraordinary way ... been prevented from asserting his or her rights." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (internal quotations omitted). See also Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) ("any resort to equity must be reserved for those

rare instances where due to circumstances external to the party's own conduct it would be unconscionable to enforce the limitation period against the party and gross injustice would result.”). The petitioner “must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.” Miller, 145 F.3d at 618-19 (internal citations omitted).

An attorney’s failure to file a notice of appeal when explicitly instructed to do so has consistently been held to constitute professionally unreasonable conduct. See Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (“A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner”); Solis v. U.S., 252 F.3d 289, 293 (3d Cir. 2001). In this case, the uncontested evidence reveals that Petitioner explicitly instructed his court-appointed attorney to file a notice of appeal on his behalf, and that the attorney failed to do so because financial arrangements for his continued representation had not been made. Significantly, the PCRA Court’s May 13, 2002 Order dismissing the first PCRA petition expressly provided that Mr. Perri was to “remain court-appointed counsel for petitioner for purposes of pursuing any appeal of this Court’s Order dismissing the petition.” (emphasis added).³ Petitioner thus reasonably believed that he was represented by court-appointed counsel and relied on that belief to his detriment.⁴ Counsel’s July 2, 2002 letter communicating that he chose not to file an appeal – only after the time to do so had expired – was a conscious decision

³ The Court’s intent was confirmed by its Order of January 8, 2003 reinstating Petitioner’s appellate rights nunc pro tunc.

⁴ Petitioner does not have a constitutional right to counsel during post-conviction proceedings that would support a claim for ineffective assistance of counsel. See Holman v. Gillis, 58 F.Supp.2d 587, 597 (E.D. Pa. 1999). Accordingly, counsel’s performance is reviewed only in relation to equitable tolling.

not to follow his client's explicit instructions. Such conduct not only deprived Petitioner of the opportunity to file a timely appeal of the denial of his PCRA petition, but also rendered all subsequently filed petitions – including the instant habeas Petition – untimely.⁵

Respondents do not contest the evidence offered by Petitioner. Rather, they argue that the fact that Petitioner's counsel did not affirmatively misrepresent that he had filed a notice of appeal precludes application of equitable tolling. See Response to Petition for Writ of Habeas Corpus, at 10-11. The Third Circuit's decision in a similar case, Brown v. Shannon, 322 F. 3d 768 (3d Cir. 2003), is instructive. In that case, a habeas petitioner sought equitable tolling of the statute of limitations, arguing that his attorney failed to file an appeal from the denial of his second PCRA petition and then "abandoned" him without filing a habeas petition. Id. at 772. The Court declined to apply equitable tolling because the attorney had informed the petitioner that he would not file an appeal while there was still time to do so: "From the outset, [petitioner's attorney] was forthright about not filing an appeal ... [s]ignificantly, [petitioner] could have

⁵ The Superior Court's September 9, 2004 decision overturning the PCRA Court's reinstatement of Petitioner's appellate rights failed to address Mr. Perri's refusal to file a notice of appeal on Petitioner's behalf. However, in his concurring opinion, Judge McEwen wrote:

I confess that I am unable to logically resolve the procedural anomaly which enables any and every litigant, civil or criminal, to file a motion to reinstate an appeal *nunc pro tunc* - except a PCRA petitioner... In the instant case... as a result of a failure on the part of appointed counsel, the appeal was not timely perfected. Had appellant been a party to any type of litigation other than a PCRA proceeding, a motion to reinstate the appeal *nunc pro tunc* would have been the appropriate vehicle with which to seek leave from the trial court to reinstate the appeal. Appellant's attempt to obtain a remedy must now be confined to Federal Court, where the United States Court of Appeals for the Third Circuit recently described one petitioner's efforts to get PCRA relief from our state courts as "a tale told by an idiot, full of sound and fury, signifying nothing." Commonwealth v. Gist, 863 A.2d 1222 (Pa. Super. 2004) (Concurring Opinion) (emphasis added).

timely filed a pro se notice of appeal in state court after receiving [his attorney's] letter." Id. at 773-74. The case at bar, however, presents a starkly different scenario. By the time Petitioner learned of his court-appointed counsel's failure to appeal, the 30-day limitations period for filing a notice of appeal had already expired. Petitioner's assumption that his counsel would abide by the PCRA Court's order was not unreasonable.

Respondents further argue that Petitioner has not shown that he exercised reasonable diligence in investigating and bringing his claims, a prerequisite to the application of equitable tolling. The Court disagrees. Shortly after Petitioner learned that his court-appointed counsel had failed to file a notice of appeal, he successfully filed a pro se petition seeking reinstatement of his appellate rights. When the Superior Court reversed the PCRA Court's reinstatement of his appellate rights, he immediately sought reargument. When that request was denied, he petitioned the Pennsylvania Supreme Court for allocatur. The record thus reflects that Petitioner was diligent in attempting to bring his claims. His counsel's failure to file a notice of appeal in contravention of the PCRA Court's Order and Petitioner's explicit instructions created a domino effect whereby each subsequent effort by Petitioner to undo the damage resulted in failure. Since a rigid application of the limitations period under these extraordinary circumstances would result in a gross injustice, the Court will equitably toll the limitations period from May 13, 2002, when the PCRA Court dismissed the first PCRA Petition, until March 28, 2005, when the Pennsylvania Supreme Court denied allocatur. Accordingly, the habeas Petition will be considered timely.

IV. Conclusion

Since Petitioner has shown that he is entitled to equitable tolling of the limitations period,

his habeas petition will be considered timely-filed. An appropriate Order follows.-

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ORDER

AND NOW, this 22nd day of November, 2006, upon consideration of the Petition for Habeas Corpus and all amendments thereto (docket nos. 1, 15), the Response thereto (docket no. 9), Petitioner's Reply (docket no. 12), the Magistrate Judge's Report and Recommendation (docket no. 16), and all objections thereto (docket nos. 17-18, 21), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that Petitioner's Objection is **SUSTAINED**.

It is **FURTHER ORDERED** that

- (1) The Petition for Writ of Habeas Corpus is deemed timely-filed; and
- (2) Respondents shall file a response to the Petition for Habeas Corpus on or before December 29, 2006; and
- (3) This matter is **REMANDED** to the Honorable Linda K. Caracappa, United States Magistrate Judge, for a Report and Recommendation on the merits of Petitioner's habeas corpus claims.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.