

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

FRANCIS BOYD : CIVIL ACTION
 :
 v. :
 :
 ROBERT MYERS, et al. : NO. 97-7160

MEMORANDUM AND ORDER

HUTTON, J.

December 21, 1998

Presently before the Court are the Report and Recommendation of Magistrate Judge M. Faith Angell (Docket No. 8), Petitioner's Objections (Docket No. 9), and Respondents' Memorandum of Law in Support of the Report and Recommendation (Docket No. 14).

I. BACKGROUND

At a hearing held by this Court on October 22, 1998, the parties agreed to the following summation of the facts in this case. On December 1, 1976, a jury found Petitioner Francis Boyd guilty of second degree murder, robbery, criminal conspiracy, and carrying a prohibited offensive weapon. Petitioner robbed a bar with two other men. After collecting the money, Petitioner recognized a man in the bar. Petitioner, afraid that the man could identify him, shot and killed the man as he left the bar. A judge sentenced Petitioner to life imprisonment.

Petitioner filed a direct appeal to the Superior Court of Pennsylvania. On October 19, 1979, the Superior Court affirmed the

conviction. Petitioner did not file an appeal with the Pennsylvania Supreme Court.

On October 27, 1981, Petitioner filed a post-conviction petition under the Pennsylvania Post-Conviction Hearing Act (PCHA). Counsel was appointed. The PCHA court declined to grant post-conviction relief. The Superior Court affirmed the PCHA court. Petitioner filed a second post-conviction petition which was also denied. The Supreme Court of Pennsylvania declined to review this denial of relief.

Petitioner then hired an attorney to represent him in a habeas corpus petition in federal court. Petitioner paid the attorney \$5000. On October 29, 1996, Petitioner sent a letter to this attorney informing him that, under the Antiterrorism and Effective Death Penalty Act (AEDPA), there is a one year limitation and that the attorney had to file the habeas corpus on his behalf prior to April 23, 1997. On November 4, 1996, the attorney wrote back to Petitioner. In that letter, the attorney said that he was well aware of the time deadline and that he would file the habeas petition on time. The attorney did note that he was busy with other trials and clients. Apparently, the attorney was too busy because the petition was not filed until November 21, 1997. This was almost a full five months after the deadline on April 23, 1997 imposed by the Antiterrorism and Effective Death Penalty Act and the rule set forth in Burns v. Morton, 134 F.3d 109, 111 (3d Cir.

1998).

In his petition, Petitioner alleged two basis for relief. First, Petitioner claimed ineffective assistance of counsel in failing to pursue defenses of diminished capacity and involuntary intoxication in order to reduce the grading of the murder. Second, Petitioner claimed that the conviction was obtained by use of evidence confiscated in an unlawful search.

Magistrate Judge Angell recommended that the petition for writ of habeas corpus be dismissed as untimely based on the one year limitation imposed by the enactment of the Antiterrorism and Effective Death Penalty Act of April 24, 1996. The Petitioner filed objections to this report and recommendation in which he argues that he warned his attorney of the impending deadline to no avail. The Commonwealth filed a memorandum of law in support of Magistrate Judge Angell's report and recommendation. This Court held a hearing on October 22, 1998.

II. STANDARD OF REVIEW

Federal district courts have jurisdiction over state prisoners' petitions for habeas corpus pursuant to 28 U.S.C. § 2254. Section 2254(a) provides, in pertinent part: "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only 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) (1994). The district court reviews a magistrate judge's report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(C). Section 636(b)(1)(C) provides, in pertinent part: "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made [and] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C) (1994).

III. DISCUSSION

A. AEDPA One Year Limitation

The petition in this case is clearly untimely. The AEDPA provided for a one year limitation for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. See 28 U.S.C. § 2244(d)(1) (1994). Relevant to this writ, the Act states that the limitation period begins to run from the date on which the judgment became final by conclusion of direct review or expiration of time for seeking such review. See id.

Magistrate Judge Angell found that the one year time limitation began to run on November 26, 1990, which was the date the Supreme Court of Pennsylvania declined to consider the denial of Petitioner's second post-conviction relief. Because his state court proceedings concluded before the effective date of the Antiterrorism and Effective Death Penalty Act, Magistrate Judge Angell applied the rule set forth in Burns. See Burns, 134 F.3d at

111. In Burns, the Third Circuit held that habeas corpus petitions filed on or before the effective date of the AEDPA, April 24, 1996, had until April 23, 1997 to initiate their habeas actions. See id. Under Burns, Petitioner had to file his writ of habeas corpus by April 23, 1997. Despite being paid \$5,000 and receiving a warning of this deadline from his client, Petitioner's attorney filed the petition in this case on November 21, 1997.

Based on these facts, Magistrate Judge Angell concluded the writ was time barred by 28 U.S.C. § 2244(d)(1) and Burns. Magistrate Judge Angell recommended that the petition for writ of habeas corpus be dismissed as time-barred. This Court agrees that, under a reading of the AEDPA, Petitioner's petition is time barred. Nevertheless, there is a remaining issue in this case of whether the one year limitation period should be equitably tolled to permit Petitioner to be heard on the merits.

B. Equitable Tolling of the AEDPA One Year Limitation

In Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998), the Third Circuit held that the one year period of limitation in § 2244(d)(1) is a statute of limitations, and not a jurisdictional bar, and thus subject to equitable tolling. See id. The Miller court further held that the district courts may equitably toll this one year period of limitation found in § 2244(d)(1) in appropriate cases. See id. The Third Circuit stated that:

In view of our conclusion that Congress intended the one year period of limitation to function as a statute of limitation, and thus be subject to equitable tolling, we will grant the certificate of appealability, vacate the order of the district court dismissing Miller's motion, and remand for consideration of the equitable tolling issue. For the guidance of the district court, we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Shendock, 893 F.2d at 1462. Generally, this will occur when the petitioner has "in some extraordinary way ... been prevented from asserting his or her rights." Oshiver, 38 F.3d 1380. The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims." New Castle County, 111 F.3d at 1126. Mere excusable neglect is not sufficient. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L. Ed.2d 435 (1990); New Castle County, 111 F.3d at 1126.

Id. at 618-19.

This Court concludes that, under Miller, equitably tolling is appropriate in this case because of the grossly ineffective assistance of Petitioner's counsel prevented Petitioner from asserting his rights in an extraordinary way. See id. at 619. Petitioner hired an attorney to file his petition for writ of habeas corpus. Petitioner paid this attorney \$5,000 to file this petition. Petitioner provided his attorney with the necessary information to file his petition. Moreover, after reading in the newspaper about the newly imposed AEDPA deadline on habeas corpus petitions, Petitioner wrote his attorney. In this letter, Petitioner warned his attorney of this impending deadline.

Therefore, the Court concludes under Miller that the Petitioner clearly showed that he "exercised reasonable diligence in investigating and bringing [his] claims". Miller, 145 F.3d at 618.

The Court also finds that the attorney's actions prevented Petitioner from filing his petition and asserting his rights. Incredibly, despite extraordinary efforts by Petitioner to ensure that his attorney filed a timely petition for writ of habeas corpus, the attorney missed the deadline by five months. There is no other reason to explain the failure to file a timely petition in this case other than the shockingly deficient performance by counsel.¹

Furthermore, this Court finds that these circumstances are extraordinary and prejudiced the Petitioner in asserting his habeas corpus claims. The Respondents argue that these facts suggest "mere excusable neglect" which is not sufficient to equitably toll the limitation period under Miller. See id. This Court disagrees. First, Petitioner did not commit any neglect. Indeed, Petitioner did more than could be expected of a lay person by warning his

¹ At the October 22, 1998 hearing, the Petitioner stated:

I'd just like to add, your Honor, that -- I just -- this is my last -- I'm doing life -- I'm a lifer -- I'm doing life. And I paid [my attorney] my money to try to get me back in court. This is my last chance at it, after this, I have no more chances, other than commutation and I -- I've dealt with Governor Ridge and whatever. And I would just like to get my appellate rights back and have a fair opportunity to litigate my claims, that's all I ask for, your Honor, you know.

attorney of the limitation period on his petition. Second, even the attorney's actions were more than mere excusable neglect. The attorney's absolute disregard for the limitation period constituted ineffective assistance of counsel that prejudiced the Petitioner in the filing of his petition. See Henderson v. Johnson, 1 F. Supp.2d 650, 654 (N.D. Tex. 1998) (noting that "if the prisoner was represented by counsel in the federal habeas process, whether counsel rendered ineffective assistance that was both constitutionally deficient and actually prejudiced the prisoner filing of a timely petition" is a factor for courts to consider when determining whether to equitably toll the AEDPA one year limitation).

This Court equitably tolls the period of limitation under the AEDPA because "principles of equity would make [the] rigid application [of the limitation period] unfair." Miller, 145 F.3d at 619. A rigid application of the AEDPA in this case would be consistent with the letter of the law, but not its spirit. Moreover, interests of justice and equity prevent such an unyielding and unjust result. Accordingly, the Court does not approve the report and recommendation and remands the case to the Magistrate Judge to consider the merits of Petitioner's claims.

An appropriate Order follows.

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O R D E R

AND NOW, this 21st day of December, 1998, upon consideration of the Report and Recommendation of Magistrate M. Faith Angell, IT IS HEREBY ORDERED that the Report and Recommendation is **NOT APPROVED** and the case is **REMANDED** to Magistrate Judge Angell for further proceedings consistent with this opinion.

BY THE COURT:

HERBERT J. HUTTON, J.