

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

Harvey Weaver : CIVIL ACTION
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 v. :
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 David Larkins : NO. 97-0061

M E M O R A N D U M

Padova, J.

February 4, 1999

Before the Court is Petitioner's Motion for Leave to Appeal, Nunc Pro Tunc. For the reasons set forth below, the Court will deny Petitioner's Motion.

By final order entered on August 27, 1997, the Court approved and adopted the Report and Recommendation of Magistrate Judge Thomas J. Reuter and thereby denied the Petition for Writ of Habeas Corpus. The Court also did not grant a Certificate of Appealability. Some fifteen months later, on December 2, 1998, Petitioner filed the Motion for Leave to Appeal, Nunc Pro Tunc, which was construed as a notice of appeal and docketed by the United States Court of Appeals for the Third Circuit. The issue before the Court is whether Petitioner's untimely appeal is permissible

under 28 U.S.C.A. § 2107 (West 1994) and Rule 4(a) of the Federal Rules of Appellate Procedure (West 1998 Supp.)

Petitioner maintains that he was unable to file a timely notice of appeal because

(a) when petitioner received Judge Padova's Order of August 25, 1997 he was confined in the Restricted Housing Unit (RHU) at the State Correctional Institution, Dallas, PA;

(b) SCI-Dallas does not provide adequate legal help or assistance to prisoners confined in its RHU area -- and as a result, petitioner was without means or the know how of asserting his right to take an appeal to the Third Circuit.

(Mot. at ¶ 5.)

Rule 4(a) and Section 2107 provide that a notice of appeal must be filed within 30 days after the date of entry of the order from which the appeal is taken. The 30 day time limit is mandatory and jurisdictional. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S. Ct. 400, 403 (1982). However, the district court may extend the time for filing a notice of appeal upon a showing of excusable neglect or good cause. Fed. R. App. P. 4(a)(5); 28 U.S.C. § 2107(c). In order to avail himself of this extension of time, Petitioner was required to file a motion seeking such extension, filed not later than 30 days after the expiration of the 30 day period set forth in Rule 4(a) and in Section 2107(a). Id. He did not do so. Therefore, Petitioner is not entitled to an extension of time under Rule 4(a)(5) and Section 2107(c).

Although Petitioner admits that he received a copy of the Court's final order, he does not state when he received the

order. (Mot. at ¶ 5(a).) Therefore, the Court must consider if Rule 4(a)(6) and Section 2107(c) afford a basis upon which to reopen the time for appeal. If Petitioner did not receive the Court's final order within 21 days of its entry, the Court may, upon motion filed by Petitioner within 180 days after the entry of the order or within 7 days after receipt of the order, reopen the time for appeal for a period of 14 days. Pursuant to this provision, the latest date upon which Petitioner could have asked the Court to reopen the time to appeal was February 23, 1998, which is 180 days after the final order was entered. Petitioner's Motion was not filed until December 2, 1998. Therefore, Petitioner is not entitled to have the time for appeal reopened.

As the above discussion makes clear, Petitioner has failed to satisfy the statutory provisions for extending the time for the filing of a notice of appeal or reopening the time to appeal. Therefore, Petitioner is not entitled to the relief that he has requested in his Motion. Even if the Court were to consider whether "good cause" or "excusable neglect" existed to extend the time to file a notice of appeal, Petitioner's reasons for failing to file a timely notice of appeal are unpersuasive. First, Petitioner's placement in the RHU, in and of itself, does not provide good cause for failing to file a timely notice of appeal.

Second, although he was housed in the RHU when he received the Court's order, Petitioner admits that the RHU had a mini library to which he had access. (Mot. at ¶ 7.) Third, the filing of a notice of appeal does not require extensive legal research or writing or legal assistance. Petitioner has made no showing that the alleged deficiencies in the RHU legal library made it impossible for him to file a timely notice of appeal. Finally, although Petitioner was confined in the RHU on and off throughout 1997 and 1998, Petitioner does not explain why he was unable to file a notice of appeal during those periods of time that he was part of the general population at SCI-Dallas. Even if the Court were able to consider the issues of good cause or excusable neglect, there is no basis for such a finding in this case.

For these reasons, the Court will deny Petitioner's Motion for Leave to File Appeal, Nunc Pro Tunc.¹

¹Although not addressed by the parties, the Court notes that in the final order denying the writ of habeas corpus, the Court also decided not to grant a certificate of appealability. Under 28 U.S.C. § 2253(c)(1)(A)(West Supp. 1997), to appeal a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, a defendant must first obtain a certificate of appealability from a district or circuit court judge. United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," and the showing must be made for each issue for which the certificate is sought. 28 U.S.C.A. § 2253(c)(2), (3).

An appropriate Order follows.

In seeking to appeal the Court's August 27, 1997 order denying his writ, it appears that Petitioner is also seeking to appeal the Court's decision not to issue a certificate of appealability. Under Rule 22(b) of the Federal Rules of Appellate Procedure, a petitioner may request the issuance of a certificate of appealability by a circuit judge if a district judge has denied the certificate. Neither Rule 22(b) nor Section 2253(c) sets for a time limit for seeking a certificate of appealability. Therefore, the Court will apply the applicable timing rules for filing a notice of appeal in a civil case, will consider this appeal untimely, and will deny Petitioner's Motion to file a notice of appeal of the certificate of appealability under Rule 4(a) and Section 2107(c) for the same reasons set forth above.