

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

DANIEL ROSADO : CIVIL ACTION  
 :  
 v. :  
 :  
 DONALD T. VAUGHN, et al. : NO. 00-5808

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

December 28<sup>th</sup>, 2001

Petitioner Daniel Rosado ("Rosado"), a state prisoner convicted of murder, robbery, criminal conspiracy, and possession of an instrument of crime, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. This court referred Rosado's petition to Magistrate Judge Jacob P. Hart who issued a Report and Recommendation. For the reasons stated below, Judge Hart's Report will be approved in part and disapproved in part and his Recommendation will be accepted. Rosado's petition will be dismissed without an evidentiary hearing.

**BACKGROUND**

Rosado was convicted on November 1, 1985 after a jury trial. Judge Juanita Kidd Stout denied post-verdict motions and sentenced him to life imprisonment for second degree murder and a concurrent term of two and one half years for possession of an instrument of crime. She suspended his sentences for robbery and

criminal conspiracy. (C.C.P., Philadelphia County, Information Nos. 1750-1754, December Term, 1984).

Rosado appealed to the Pennsylvania Superior Court on grounds that: (1) the trial court erred by permitting the Commonwealth to present testimony concerning Rosado's alleged prior drug sale; (2) the evidence presented was insufficient to sustain a conviction; and (3) the trial court erred in permitting a prosecution witness to mention an old police photograph of Rosado. The Superior Court affirmed the conviction on April 14, 1987. See Commonwealth v. Rosado, 528 A.2d 259 (Pa. Super. Ct. 1987). Rosado's subsequent petition for reargument was denied on June 24, 1987; he did not seek review with the Pennsylvania Supreme Court.

Rosado filed a pro se petition for post conviction relief under the Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. §§ 9541-9551, on April 5, 1988. He claimed violation of his right to a fair trial because of perjured testimony of the only eyewitness, Jose Aponte, and ineffective assistance of counsel on grounds of: (1) failing to assert properly Rosado's right to a speedy trial; (2) failing to object to prejudicial hearsay testimony; (3) failing to adequately cross-examine Aponte; (4) failing to cross-examine four other witnesses; (5) failing to use a prior inconsistent statement to impeach Aponte; (6) failing to call defense witnesses Virgil Colon and Frank

Shanno; (7) failing to raise issues of arguable merit on direct appeal and filing boilerplate motions instead; and (8) failing to object to a jury charge concerning possession of a gun. The PCHA petition was denied on March 21, 1994. On appeal, that denial was affirmed by the Superior Court. See Commonwealth v. Rosado, 665 A.2d 1302 (Pa. Super. Ct. 1995). The Pennsylvania Supreme Court denied allocatur on November 30, 1995. See Commonwealth v. Rosado, 668 A.2d 1129 (Pa. 1995).

On December 3, 1996, Rosado filed a second collateral appeal under the Pennsylvania Post Conviction Relief Act ("PCRA").<sup>1</sup> On October 10, 1997, that petition was dismissed as successive. Rosado appealed, and the Superior Court upheld the denial of Rosado's PCRA petition as untimely. See Commonwealth v. Rosado, 742 A.2d 1151 (Pa. Super. Ct. 1999).

On November 15, 2000, Rosado filed the instant petition for habeas corpus pro se, but counsel entered her appearance on November 16, 2000. On March 29, 2001, the petition was referred to Magistrate Judge Joseph P. Hart.

On October 17, 2001, Judge Hart filed a Report and Recommendation that Rosado's petition was time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d).

---

<sup>1</sup>The PCRA superseded the PCHA in 1988. See 42 Pa. C.S.A. § 9545 et seq.; 1988 Pa. Laws 336.

Rosado, filing a timely objection to Judge Hart's Report and Recommendation, asserts his petition is not untimely under AEDPA.

#### DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective on April 24, 1996. Section 2244(d) of AEDPA provides in relevant part:

(1) 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 period 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; ...

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

See 28 U.S.C. § 2244(d).

Rosado's sentence became final on May 14, 1987, thirty days after the Superior Court affirmed his conviction, because he did not seek direct review in the Pennsylvania Supreme Court.

Where the prisoner's conviction became final before April 24, 1996, as here, it would be impermissibly retroactive to bar the filing of his habeas petition before April 24, 1997, one

year after AEDPA's effective date. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). AEDPA's one-year deadline for Rosado's habeas claim expired on April 24, 1997, except for equitable or statutory tolling.

**A. Statutory Tolling is Appropriate, But Rosado's Petition Was Still Too Late**

Judge Hart found Rosado's PCRA petition did not toll the AEDPA limitation period because it was procedurally barred under Pennsylvania law and therefore not "properly filed" under § 2244(d)(2). Rosado argues that his 1996 PCRA petition was "properly filed" within the meaning of § 2244(d)(2) and statutory tolling is appropriate. Rosado is correct.

The United States Supreme Court held in Artuz v. Bennett, 531 U.S. 4 (2000), that

[A]n application is "properly filed" [under § 2244(d)(2)] when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

Artuz, 531 U.S. at 8.

Rosado's PCRA petition was filed too late to obtain relief under Pennsylvania law,<sup>2</sup> but it nonetheless was "properly

---

<sup>2</sup>(B) TIME FOR FILING PETITION.--

1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

filed" under federal law. "The question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." See Nara v. Frank, 264 F.3d 310, 2001 U.S. App. LEXIS 19340 at \*13 (3d Cir. 2001), quoting Artuz, 531 U.S. at 9.

Rosado's last PCRA petition was procedurally barred in Pennsylvania under 42 Pa. Const. Stat. § 9545(b) because it was filed more than one year after his conviction became final and did not fall under any of the Pennsylvania statute's exceptions.

---

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. ...

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

See 42 Pa. Cons. Stat. § 9545(b) (2001).

But it was "properly filed" when it was received by the state court and reviewed to see if PCRA § 9545(b) exceptions applied.

As the Ninth Circuit recently held, "if a state's rule governing the timely commencement of state post-conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed'." See Dictado v. Ducharme, 244 F.3d 724, 727-28 (9<sup>th</sup> Cir. 2001), cited with approval in Nara, 2001 U.S. App. LEXIS 19340 (3d Cir. 2001). Title 42 Pa. Cons. Stat. § 9545(b) discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement. See Smith v. Ward, 209 F.3d 383, 384-85 (5<sup>th</sup> Cir. 2000) (petition is "properly filed" when it satisfies "those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review," and a state statute of limitations is a limitation on relief, not a "procedural filing requirement"); Robinson v. Ricks, 2001 U.S. Dist. LEXIS 14227, \*15-\*16 (E.D.N.Y. 2001) (following Dictado).<sup>3</sup>

---

<sup>3</sup>The Pennsylvania Supreme Court's language in Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (Pa. 1999), does not decide the issue. The Pennsylvania Supreme Court held "the time limitations pursuant to the amendments to the PCRA are jurisdictional[;] ... the court has no jurisdiction to address an

The Third Circuit has followed the Fifth and Ninth Circuits' approach to 28 U.S.C. § 2244(d)(2) questions. See, e.g., Nara, 2001 U.S. App. LEXIS 19340 at \*12-\*15 (describing the court's "flexible approach" to AEDPA tolling issues and holding a motion to withdraw a guilty plea nunc pro tunc a "properly filed application for state post-conviction or other collateral review within the meaning of § 2244(d)(2)"); accord Dictado, 244 F.3d 724 (9<sup>th</sup> Cir. 2001) (cited with approval in Nara); Villegas v. Johnson, 184 F.3d 467, 469-70 (5<sup>th</sup> Cir. 1999) (petition dismissed in state court as successive or an abuse of the writ still "properly filed" under § 2244(d)(2)) (cited with approval in Nara); but cf. Morris v. Horn, 187 F.3d 333, 338 (3d Cir. 1999) (pre-Artuz and Nara opinion stating in dicta a PCRA petition filed outside the state statutory time guidelines would not be "properly filed").<sup>4</sup>

---

untimely petition[:] ... jurisdictional time limits go to a court's right or competency to adjudicate a controversy. These limitations are mandatory and interpreted literally." Id., 737 A.2d at 222-23. This jurisdictional bar will prevent a Pennsylvania court from reviewing an untimely PCRA petition on the merits unless the petition satisfies one of the statute's exceptions, see 42 Pa. Cons. Stat. § 9545(b)(1)(i)-(iii). Pennsylvania courts will accept and examine an untimely filed petition to determine whether it satisfies a statutory exception, so the jurisdictional bar implied by the Pennsylvania Supreme Court does not prevent a petition from being "properly filed" under AEDPA. See Artuz, 531 U.S. at 9.

<sup>4</sup> Respondents cite Fahy v. Horn, 240 F.3d 239, 243-44 (3d Cir. 2001), to support their argument that an untimely PCRA petition is not "properly filed" under federal law. Writing after the U.S. Supreme Court's decision in Artuz (but without

Rosado properly filed his PCRA petition on December 3, 1996, after 222 days of AEDPA's 365-day habeas filing window had passed. Under § 2244(d)(2), the one year statutory period of limitation was tolled for the entire time the petition was pending, that is, until December 2, 1999, when the Pennsylvania Supreme Court denied allocatur. Rosado then had 143 days (365 - 222), until April 25, 2000, to file a habeas corpus petition under AEDPA. He filed the instant petition on November 15, 2000, 204 days after his statutorily tolled AEDPA deadline had passed. Rosado's habeas petition was time-barred under AEDPA.

**B. There Are No Grounds for Equitable Tolling**

The one-year limitation in § 2244(d) is a statute of limitations, not a jurisdictional bar, and may be equitably tolled. See Miller v. New Jersey State Dep't of Corrections, 145

---

citing it), the Court of Appeals held that "to apply [AEDPA] as a matter of federal law we must look to state law governing when a petition for collateral relief is properly filed." Id. at 243. In Fahy, this state law inquiry was simple because "the Pennsylvania Supreme Court ha[d] specifically ruled that Fahy's PCRA petition was not properly filed as a matter of state law." Id. at 244. In petitioner Rosado's case, there has been no similar determination by Pennsylvania's highest court: this court must resolve the issue by following Nara, the most recent Court of Appeals opinion following Artuz. In Nara, the Court of Appeals held that a PCRA petition filed nunc pro tunc, and therefore untimely by definition, was "properly filed" for AEDPA purposes.

F.3d 616, 618 (3d Cir. 1998).

[E]quitable tolling is proper only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Id. at 618-619 (internal citations, quotations, and punctuation omitted). As Judge Hart found, Cooper failed to demonstrate any "extraordinary circumstances" that unfairly prevented him from asserting his rights. Id. at 618. He has also failed to show he "exercised reasonable diligence in investigating and bringing" his claim. Id.

Rosado's objections, filed pro se, are to be liberally construed. See Turack v. Guido, 464 F.2d 535, 536 (3d Cir. 1972). Rosado seems to argue equitable tolling is appropriate under the Court of Appeals' decision in Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), but the Court of Appeals limited its holding in Fahy to "capital cases where there is no evidence of abuse of the process." See Fahy, 240 F.3d at 245. This is not a capital case; Fahy does not apply.

#### CONCLUSION

Rosado's AEDPA deadline tolled until April 25, 2000,

but he did not file his habeas corpus petition until November 15, 2000: it is time-barred under AEDPA. The instant petition under 28 U.S.C. § 2254 will be denied without an evidentiary hearing.

An appropriate order follows.