

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

ROBERT DOUGLAS)
) Civil Action
 v.)
) No. 00-4935
JEFFREY BEARD, ET AL.)

MEMORANDUM

Padova, J.

April , 2002

Petitioner, Robert Douglas, a state prisoner incarcerated at the State Correction Institute in Graterford, Pennsylvania, filed the instant counseled Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Linda K. Caracappa for a Report and Recommendation. The Magistrate filed a Report and Recommendation recommending that the Court deny the Petition on the grounds it is barred by the one-year period of limitations set forth in 28 U.S.C. § 2244(d). Petitioner filed timely objections. For the reasons that follow, the Court overrules Petitioner's objections, adopts the Report and Recommendation consistent with this Memorandum, and denies the Petition without an evidentiary hearing.

I. Background & Procedural History

Petitioner Robert Douglas is currently serving a sentence of 20-40 years for robbery and associated charges. He was also

sentenced to death on a separate conviction for an unrelated crime. Petitioner was originally sentenced for the robbery crimes on July 10, 1984, and his conviction and sentence were affirmed by the Pennsylvania Superior Court on December 13, 1985. Petitioner did not seek allocatur from the Supreme Court of Pennsylvania.

On December 16, 1996, Petitioner filed a Petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, et seq. The PCRA court denied the Petition, and on July 15, 1999, the Superior Court affirmed the PCRA court's denial. Petitioner twice attempted to file a motion for reconsideration, but the filings were returned both times by the Prothonotary of the Superior Court because of various procedural defects. The time period for submission of a petition for allowance of appeal to the Supreme Court of Pennsylvania expired on August 16, 1999. On September 10, 1999¹, Petitioner filed a Petition for allowance of appeal nunc pro tunc, which was denied by the Supreme Court of Pennsylvania on January 28, 2000. Petitioner filed a timely motion for reconsideration on February 4, 2000. The court denied the motion for reconsideration on June 12, 2000.

¹The Magistrate's Report and Recommendation correctly notes that the Motion was technically filed on September 14, 1999. The parties, however, in their briefs relating to the objections, use the September 10, 1999 date under the prison mailbox rule. See Houston v. Lack, 487 U.S. 266, 275-76 (1988); Commonwealth v. Jones, 700 A.2d 423, 425-26 (1997).

Petitioner filed the instant counseled petition for writ of habeas corpus on September 29, 2000.

II. Standard of Review

Where a habeas petition has been referred to a magistrate judge for a report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

III. Discussion

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which went into effect on April 24, 1996, established a one-year statute of limitations, as follows:

(d)(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;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made

retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1) (West Supp. 2001). As Petitioner's date of final conviction was prior to the effective date of AEDPA, a one-year grace period began to run on April 24, 1996. See Nara v. Frank, 264 F.3d 310, 315 (3d Cir. 2001) ("[W]e have implied from the statute a one-year grace period for those petitioners whose convictions became final before the effective date of AEDPA, and AEDPA was effective April 24, 1996 . . .") (citing Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998)). The period was tolled from December 16, 1996, the date on which Petitioner filed his PCRA petition, until August 16, 1999, the deadline for filing a Petition for allowance of appeal with the Pennsylvania Supreme Court. See 28 U.S.C. § 2244(d)(2). Petitioner filed the instant Petition on September 29, 2000, well beyond the one-year limitations period set forth in § 2244(d). Accordingly, the instant Petition is time-barred unless one or more of the applicable exceptions or tolling provisions applies.²

²The Court notes that although the Magistrate examined some of the tolling issues now raised by Petitioner in his objections, not all of Petitioner's tolling theories are reflected in the briefing submitted prior to the issuance of the Report and Recommendation. In particular, Petitioner's actual innocence argument, which is based on a witness statement dated December 11, 2001, is a new argument not contained in the original Petition.

In his objections, Petitioner urges the Court to toll the limitations period or otherwise consider the Petition despite its untimeliness. The Court will examine each of Petitioner's proposed arguments in turn.

A. Statutory tolling pursuant to 28 U.S.C. § 2244(d)(2)

The Magistrate concluded that the statutory tolling provisions applied only to Petitioner's PCRA Petition and subsequent appeal. Petitioner contends, however, that two other motions submitted in state court also tolled the limitations period, specifically, Petitioner's filing of a Petition for appeal nunc pro tunc on September 10, 1999, and Petitioner's filing of a motion for reconsideration of the denial of his appeal nunc pro tunc on February 4, 2000.

Ordinarily, "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 . . ." 28 U.S.C. § 2244(d)(2). An application is considered properly filed under § 2244(d)(2) when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. Artuz v. Bennett, 531 U.S. 4, 8 (2000). A "properly filed application" is "one submitted according to the state's procedural rules governing time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). "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, 264 F.3d at 316. In this circuit, district courts employ a flexible approach in determining whether a motion is properly filed under § 2244(d)(2). Id. at 315. Section 2244(d)(2) covers "various forms of state review." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). This includes motions that do not fall directly under the PCRA but are nonetheless related to collateral review. See, e.g., Nara, 264 F.3d at 316 (applying § 2244(d)(2) tolling to motion to withdraw guilty plea nunc pro tunc).

In support of the application of statutory tolling during the pendency of the nunc pro tunc motion, Petitioner relies on the Third Circuit's opinion in Nara v. Frank, 264 F.3d 310 (3d Cir. 2001). In the Nara, the Third Circuit applied statutory tolling during the pendency of the petitioner's nunc pro tunc request to withdraw guilty plea. The Nara holding does not stand for the proposition that a nunc pro tunc application is always considered a "properly filed application" for state post-conviction or collateral review within the meaning of § 2244(d)(2), but it does stand for the proposition that the nunc pro tunc character of a motion does not render it automatically improperly filed. Nara, 264 F.3d at 315-16.

Although the holding in Nara does not squarely address the issue presented with respect to this Petitioner's nunc pro tunc

filing, the holding does suggest the possible application of statutory tolling under § 2244(d)(2). In this case, Petitioner's nunc pro tunc application was accepted for filing. While there is nothing in the record indicating the reasons for denying the motion, there is likewise nothing to suggest that Petitioner failed to comply with the applicable laws and rules governing the filing. See McNeil v. Snyder, Civ.Act.No.99-8702-GMS, 2002 U.S. Dist. LEXIS 2028, at *7-9 (D. Del. Feb. 8, 2002) ("Nothing on the Superior Court's docket sheet . . . suggests that [movant] failed to comply with the state's 'applicable laws and rules governing filings' in filing this motion.") (citations omitted). See also Rosado v. Vaughn, Civ.Act.No.00-5808, 2001 U.S. Dist. LEXIS 21538, at *8 (E.D. Pa. Dec. 28, 2001) (concluding that Petitioner's late PCRA petition was "properly filed" when receive by the state court and reviewed to see if the PCRA exceptions applied).

The Commonwealth, however, argues that the issue has already been decided to the contrary by the Third Circuit in Swartz v. Meyers, 204 F.3d 417 (3d Cir. 2000).³ In Swartz, the petitioner

³The Commonwealth also cites Cotto v. Price, No.CIV.A.98-6479, 1999 U.S. Dist. LEXIS 12217 (E.D. Pa. Aug. 9, 1999) for support of its position that statutory tolling does not apply. In reaching its conclusion in Cotto, however, the court noted that "petitioner made numerous attempts to correctly file the notice of appeal and petition for leave to appeal nunc pro tunc, but was ultimately unsuccessful. The record contains no evidence that the petition for leave to appeal nunc pro tunc was ever accepted [for] filing, and it was never granted." Id. at *1. Therefore, the conclusion in Cotto has no bearing on the inquiry here, in which the nunc pro tunc filing was accepted for filing, fully briefed, and denied.

failed to file a timely request for allocatur to the Pennsylvania Supreme Court, and instead filed a nunc pro tunc request after the allocatur time limit had already expired. The principal issue was whether the limitations period began to run on the date the Superior Court affirmed the denial of the petitioner's case, or upon expiration of the 30-day time period for filing for allocatur. The Court noted in a footnote that it "agree[d] that the time during which [petitioner's] nunc pro tunc request for allowance of appeal was pending does not toll the statute of limitations."⁴ Swartz, 204 F.3d at 424 n.6. The Third Circuit in Nara emphasized, however, that the approach to determining the applicability of § 2244(d)(2) is a flexible one. Nara, 264 F.3d at 315.

In this case, it is unnecessary for the Court to make a final determination as to whether statutory tolling applies to this Petitioner's nunc pro tunc request, because even applying statutory tolling principles to the nunc pro tunc request and the subsequent motion for reconsideration, Petitioner's habeas Petition was still untimely. The calculation would be as follows. The one-year grace

⁴Petitioner argues that notwithstanding the footnote in Swartz, the court's opinion is not controlling because the court was concerned principally with the issue of whether the grace period was tolling during the period for filing for allocatur, and because the footnote was simply an interpretation of dicta language from the Tenth Circuit opinion. Although the Third Circuit did not discuss at length whether the nunc pro tunc application was considered properly filed for purposes of § 2244(d)(2), the language is explicit in its rejection of the application of statutory tolling with respect to the nunc pro tunc application in that case.

period began to run on April 24, 1996, the effective date of AEDPA. The period stopped on December 16, 1996, the date of filing of Petitioner's PCRA Petition, at which time the statutory period had run a total of two hundred thirty-six (236) days.⁵ The period began to run again after August 16, 1999, the date of the expiration of the period for filing a notice of allowance of appeal to the Pennsylvania Supreme Court. See Pa. R. App. P. 1113(a); Swartz, 204 F.3d at 421. The period tolled again on September 10, 1999, the date of Petitioner's filing of his nunc pro tunc appeal request, or after another twenty-four (24) days had elapsed. The period began to run again after January 28, 2000, the date of the Supreme Court's denial of the nunc pro tunc request. The period

⁵Petitioner's PCRA appeal was filed on December 16, 1996. Petitioner contends that the Court should apply the prison mailbox rule, and thus that "it can only be assumed that [Petitioner] filed [the Petition] at least a few days before." (Pet.'s Obj. at 15.) Under the prison mailbox rule, a pro se inmate's pleadings are deemed filed at the moment the inmate delivers the documents to prison officials to be mailed. See Houston v. Lack, 487 U.S. 266, 275-76 (1988); Burns v. Morton, 134 F.3d 109, 112-13 (3d Cir. 1998). In Pennsylvania, the rule applies to all appeals filed by pro se inmates. Commonwealth v. Jones, 700 A.2d 423, 425-26 (Pa. 1997); Commonwealth v. Castro, 766 A.2d 1283, 1287 (Pa. Super. Ct. 2001). Petitioner provides no proof of the date of delivery of the Petition to prison officials, however. Ordinarily, "[t]o avail himself of the prisoner mailbox rule, . . . an incarcerated litigant must supply sufficient proof of the date of mailing, . . ." Thomas v. Elash, 781 A.2d 170, 177 (Pa. Super. Ct. 2001); see also Jones, 700 A.2d at 426 (discussing the types of proof acceptable to apply prison mailbox rule).

In this case, it is unnecessary to determine whether the prison mailbox rule applies, because even accepting Petitioner's argument and subtracting four to five days from the calculation, the instant Petition is still untimely. The Court's calculation uses the filing date of the PCRA petition.

tolled once again on February 4, 2000, the date Petitioner filed his motion for reconsideration, after an additional six (6) days had run. Finally, the period began again after June 12, 2000, the date that the Pennsylvania Supreme Court denied the motion for reconsideration. Another one hundred eight (108) days elapsed before September 29, 2000, the date on which Petitioner filed his instant Petition. Therefore, even taking into account statutory tolling of the two motions, at the time of the filing of the instant Petition, a total of three hundred seventy-four (374) days had elapsed. Accordingly, the Petition was untimely, and is therefore barred under the limitations period established in § 2244(d). Petitioner's objection is overruled.

B. Equitable Tolling

Petitioner next argues that equitable tolling should apply. The one-year limitation in § 2244(d) is a statute of limitations, not a jurisdictional bar, and may be equitably tolled. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). "Equitable 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 618-19 (internal citations, quotations, and punctuation omitted).

Petitioner's equitable tolling argument relates to three state court filings: (1) Petitioner's late motion for reconsideration on August 9, 1999, which was not filed and was returned to Petitioner by the clerk's office; (2) Petitioner's petition nunc pro tunc for allowance of an appeal; and (3) Petitioner's subsequent motion for reconsideration of the denial of his petition nunc pro tunc.⁶

With respect to Petitioner's first filing, he explains that he mailed a petition for reconsideration to the Superior Court on July 19, 1999, which was within the time period required by the rules. However, the motion was returned to him, unfiled, because of several procedural deficiencies, as noted in the return cover letter dated July 23, 1999.⁷ (Pet. Obj. Ex. C.) Petitioner attempted to refile his Petition for reconsideration, but this again was returned, unfiled, by the Prothonotary, who cited the same procedural deficiencies.⁸ (Pet. Obj. Ex. E.)

⁶Petitioner also contends that equitable tolling is appropriate because Petitioner is "actually innocent." The Court will consider the actual innocence assertion separately below.

⁷The accompanying letter, dated July 23, 1999, read: "There has been no service on opposing counsel, the panel opinion has not been appended, and there are insufficient copies. I direct your attention to Pa R.A.P. 2541 through 2547 and in particular, the time requirements of Pa R.A.P. 2542(a)." (Pet. Obj. Ex. C.)

⁸The accompanying letter, dated August 9, 1999, read: "Please be advised that a reargument/reconsideration motion must be filed within 14 days of the date the decision was filed. Accordingly,

Petitioner fails to present extraordinary circumstances beyond his control that account for his failure to file a timely motion for reconsideration. He contends that because of the conditions of his confinement as a death row inmate, he was unable to submit his motion for reconsideration in a timely and procedurally proper manner. However, without providing a good ground for viewing these conditions as an extraordinary circumstance impeding him from filing a timely § 2254 Petition, such conditions of confinement do not evidence the rare and extraordinary circumstances that justify equitable tolling. Washington v. Byrd, Civil Action No. 00-6389, 2002 U.S. Dist. LEXIS 5010, at *24 (E.D. Pa. Mar. 22, 2002) (holding that lockdown and limited library access do not support equitable tolling); United States v. Ramsey, No.92-590-2, 1999 U.S. Dist. LEXIS 13653, at *8 (E.D. Pa. Aug. 26, 1999) (same). None of the circumstances articulated by Petitioner reflect circumstances beyond his control that explain his failure to submit a properly filed motion for reconsideration.

your reargument petition was required to have been mailed no later than July 29, 1999. See Pa R.A.P. 2542. Additionally, a litigant is required to present an original and twenty-three copies. See Pa R.A.P. 2541. Furthermore, a litigant is required to append a copy of this Court's decision to each copy of the reargument motion. See Pa R.A.P. 2544. Finally, a litigant is required to serve a copy of the motion upon the opposing party. See Pa R.A.P. 2544. Instantly, your proof of service certificate does not reflect that you served the Philadelphia District Attorney's Office with your reargument motion./In closing, if you decide to file an appeal to the Supreme Court of Pennsylvania, your petition for allowance of appeal must be postmarked not later than August 16, 1999. See Pa R.A.P. 903(A)." (Pet. Obj. Ex. E.)

By contrast, with respect to Petitioner's second and third filings, the Court notes that these filings represent diligent and reasonable pursuit of his claims in state court. Given the lack of clarity of the state of the law regarding whether statutory tolling applies while such applications are pending before the state court, in the Court's view it would have been unreasonable to expect this Petitioner to file a habeas petition during the pendency of the nunc pro tunc motion, and also unreasonable to expect Petitioner to file a habeas petition during the pendency of the subsequent motion for reconsideration. Accord Pace v. Vaughn, Civ.Act.99-6568, 2002 U.S. Dist. LEXIS 5473, at *26-28 (E.D. Pa. Mar. 29, 2002). However, as with the statutory tolling with respect to these two motions, the Court notes that the Petition, even excluding the applicable time periods, was still untimely. Accordingly, Petitioner's objection is overruled.

C. Actual Innocence

Finally, Petitioner asserts that the Court should consider the Petition on its merits notwithstanding its untimeliness, under the exception for "actual innocence." Specifically, Petitioner claims that the testimony of two witnesses who were not presented at trial (along with statements made by them to the police that had the potential to impeach the lone eyewitness to the shooting) establishes his actual innocence.

Neither the United States Supreme Court nor the Court of Appeals for the Third Circuit has ruled as to whether there is an "actual innocence" exception to the AEDPA statute of limitations. In the instant case, however, it is unnecessary for the Court to determine whether there is such an exception to the AEDPA statute of limitations, because, even assuming there is, Petitioner has failed to present a sufficient basis to establish that an "actual innocence" exception would apply in this case. See, e.g., Woods v. Brennan, No.CIV.A.99-5240, 2001 WL 1428343, at *2 (E.D. Pa. Nov. 9, 2001) ("In the instant case . . . it is unnecessary for the Court to determine whether there is such an exception to the AEDPA statute of limitations, because even assuming there is, Petitioner has failed to present a sufficient basis to establish that an "actual innocence" exception would apply in this case."); Knowles v. Merkle, No.00-16912, 2001 U.S. App. LEXIS 22500, at *2-3 (9th Cir. Oct. 11, 2001); Helton v. Secretary for the Dep't of Corr., 259 F.3d 1310, 1315 (11th Cir. 2001); Raglin v. Randle, No. 00-3322, 2001 U.S. App. LEXIS 9389, at *6 (6th Cir. May 8, 2001).

In order to establish "actual innocence" on a habeas claim, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."⁹ Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing

⁹The constitutional violation involved here is the claim of ineffective assistance of counsel pursuant to the Sixth Amendment. The habeas jurisprudence "makes clear that a claim of 'actual

Murray v. Carrier, 477 U.S. 478, 495 (1986)); Alexander v. Keane, 991 F. Supp. 329, 339 (S.D.N.Y. 1998) (applying Schlup "actual innocence" jurisprudence to AEDPA statute of limitations context). The petitioner must establish that the constitutional error "has probably resulted in the conviction of one who is actually innocent." United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999) (citing Bousley v. United States, 523 U.S. 614, 622 (1998)). This exception is concerned with actual, as opposed to legal, innocence. Calderon v. Thompson, 523 U.S. 538, 559 (1998). The petitioner must establish that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Garth, 188 F.3d at 107. A claim of actual innocence must be based on reliable evidence that was not presented at trial. Schlup, 513 U.S. at 324; Lee v. Kemna, 213 F.3d 1037, 1039 (8th Cir. 2000) (per curiam). Actual innocence in this context is concerned with factual innocence of the crime. Schlup, 513 U.S. at 328.

Petitioner's new evidence is a proffered sworn statement provided by Petitioner's co-defendant Donald Hall. (Pet. Obj. Ex. L.) Hall's testimony was not presented at trial, and the statement was newly obtained subsequent to the filing of the instant Petition. In the proffer, Mr. Hall admits to carrying out the

innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993).

crime, and explains that Petitioner had nothing to do with it. He says he "was probably as surprised as Robert Douglas when I heard he was going to be tried with me as my co-defendant." (Ex. L ¶ 14.) He says he wanted to take the stand to exonerate Douglas but that his attorney would not let him testify. (Id.)

In light of the testimony presented at trial, which included eyewitness testimony, this new evidence is not sufficient to establish, by a preponderance of the evidence, that no reasonable juror would have convicted Petitioner.¹⁰ Petitioner's arguments regarding the untrustworthiness of the eyewitness identifications is unavailing, and reflects no new evidence regarding the eyewitness identifications themselves. The fact that Petitioner may be able to articulate inconsistencies in the evidence is simply not sufficient for purposes of establishing actual innocence for habeas purposes. See Woods, 2001 WL 1428343, at *3. Petitioner's objection relating to his actual innocence is overruled.¹¹

¹⁰The Commonwealth argues that this evidence is not new. Ordinarily, evidence is not new if it could properly have been discovered through the exercise of due diligence. Woods, 2001 WL 1428343, at *3 n.7. It is unnecessary for the Court to determine whether the evidence is new, because the Court determines that it is insufficient to meet Petitioner's burden of proving actual innocence.

¹¹In light of the Court's determination with respect to actual innocence, it need not examine Petitioner's argument that the one-year statute of limitations violates the Suspension Clause, since Petitioner's argument relies in part on the Petitioner's actual innocence.

IV. Conclusion

For all of the above reasons, the Court concludes that, notwithstanding the potential application of statutory and equitable tolling with respect to Petitioner's September 10, 1999 and February 4, 2000 state court filings, the instant Petition was untimely under the limitations period set forth in 28 U.S.C. § 2244(d). The Court overrules Petitioner's objections, adopts the Magistrate's Report and Recommendation to the extent consistent with this Memorandum, and denies the Petition without an evidentiary hearing.

An appropriate Order follows.

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

ROBERT DOUGLAS)
) Civil Action
 v.)
) No. 00-4935
JEFFREY BEARD, ET AL.)

ORDER

AND NOW, this day of April, 2002, upon careful and independent consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1) and all responsive and supporting briefing, after review of the Report and Recommendation of Magistrate Judge Linda Caracappa, and in consideration of Petitioner's Objections to the Magistrate's Report and Recommendation and all responses thereto,

IT IS HEREBY ORDERED that:

1. Petitioner's Objections are **OVERRULED**.
2. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent consistent with the accompanying Memorandum.
3. The Petition is **DENIED** as untimely without an evidentiary hearing.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

John R. Padova, J.