

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

MELVIN WHITE, : CIVIL ACTION
 :
 : Petitioner :
 :
 : v. :
 :
 : ROBERT D. SHANNON, et al., :
 :
 : Respondents : NO. 01-4298

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 24, 2003

I. Introduction

Petitioner Melvin White is a state prisoner currently serving a life sentence for first-degree murder at the State Correctional Institute - Mahoney, at Frackville, Pennsylvania. On September 12, 2001, White filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Document No. 4). White also filed motions for appointment of counsel, an evidentiary hearing, and a certificate of appealability.

On December 19, 2001, the petition was referred to United States Magistrate Judge Linda K. Caracappa ("Judge Caracappa"). After respondents filed a response to the petition, Judge Caracappa issued a Report and Recommendation (Document No. 22) ("R & R") that the petition be dismissed

as untimely because it was filed beyond the one-year statute of limitations under 28 U.S.C. § 2244(d). Judge Caracappa also recommended denying White's motions for appointment of counsel and an evidentiary hearing, and that no certificate of appealability be granted.

Presently before the court are Petitioner's Objections to the R & R (Document No. 26). Upon de novo review, White's objections will be overruled and Judge Caracappa's recommendations adopted. The petition will be denied as untimely and the motions for appointment of counsel and an evidentiary hearing will also be denied. No certificate of appealability will be granted.

II. Background

In the early afternoon of October 20, 1979, police officers responded to a disturbance call at petitioner Melvin White's residence, entered the house, and identified themselves. White called out from upstairs for the police to leave because they did not have a warrant. While in the house, the police officers heard chopping noises; a short time later, White walked down the stairs naked with the severed head of the mother of one of his children. The officers immediately placed him under arrest and conducted an investigation of the second floor. They found White's

co-defendant Gregory Tarkenton sitting with White's two children overlooking the decapitated body of the victim lying in a pool of blood.

Subsequent to his arrest, White provided a signed confession stating: the victim came to the house to pick up her child; he did not want her to take the child; he then ordered his co-defendant to decapitate the victim; and the co-defendant complied. After a jury trial in the Philadelphia County Court of Common Pleas, White was convicted of first-degree murder on April 4, 1983, and sentenced to life imprisonment.

On appeal to the Superior Court of Pennsylvania, the judgment of sentence was affirmed on March 29, 1985. Commonwealth v. White, 494 A.2d 487 (Pa. Super. Ct. 1985). On July 25, 1985, the Supreme Court of Pennsylvania denied allocatur. White's conviction became final September 25, 1985, upon expiration of the sixty-day period to petition the United States Supreme Court for a writ of certiorari. See former Sup. Ct. R. 20.1 (effective June 30, 1980)

(petitioner has 60 days from conviction to file petition for certiorari).¹

On July 20, 1999, almost fourteen years later, White filed a pro se petition for relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, et seq. The PCRA court appointed counsel who, after a review of the record, filed a "no merit" letter; see Commonwealth v. Finley, 550 A.2d 213 (Pa. 1988). On May 15, 2000, the PCRA court dismissed the petition as untimely. On February 26, 2001, the Superior Court of Pennsylvania, affirming the PCRA court's dismissal of the petition, found that the PCRA petition was jurisdictionally time-barred under Pennsylvania law, and no exception applied.² Commonwealth v. White, 776 A.2d 1011

¹ This rule has since been amended by the adoption of successor Rule 13(1), effective January 1, 1990, which extended to 90 days the period after entry of the lower court's judgment for filing a petition for a writ of certiorari. See David B. Sweet, Annotation, Time Requirements Under Supreme Court Rule 13 (and Similar Predecessors) for Petitions for Writ of Certiorari - Supreme Court Cases, 112 L. Ed. 2d 1278 (1999).

² (B) TIME FOR FILING PETITION. -

(1) Any petition filed 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:

(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

(Pa. Super. Ct. 2001). A petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on July 23, 2001. Commonwealth v. White, 782 A.2d 545 (Pa. 2001). On September 12, 2001, White, proceeding in forma pauperis, filed a pro se federal petition for a writ of habeas corpus under 28 U.S.C. § 2254 with over twenty-three claims.

III. Discussion

There is a one-year statute of limitations for actions under 28 U.S.C. § 2254. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

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

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. Ann. § 9545(b) (2001).

and made retroactively applicable to cases on collateral appeal; 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. § 2244(d)(1).

There is a "one-year grace period" following the AEDPA effective date of April 24, 1996. See Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring) ("[T]he Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA."); Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999) ("AEDPA's one-year statute of limitations does not begin to run until April 24, 1996 (the date of AEDPA's enactment) for a petitioner whose conviction became final before that date."); Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998) ("[A]pplying § 2241(d)(1) to bar the filing of a habeas petition before April 24, 1997, where the prisoner's conviction became final before April 24, 1996, would be impermissibly retroactive."). Under this grace period, a petitioner whose conviction was final prior to the enactment of AEDPA's limitations period was permitted to file for federal habeas corpus relief on or before April 23, 1997.

White's judgment of sentence became final on September 25, 1985, upon the expiration of the deadline for filing a petition for a writ of certiorari in the Supreme Court of the United States following his direct appeal. Because his judgment of sentence was final prior to the enactment of AEDPA's one-year period of limitations, White was required to file any federal habeas petition no later than April 23, 1997. As White did not file until more than four years after that date, his petition can only be considered if it falls under certain stated exceptions to the period of limitations or is subject to statutory or equitable tolling.

In general, the statute of limitations for federal habeas corpus petitions is subject to two tolling exceptions: (1) statutory tolling during the time a "properly filed" application for state post-conviction review is pending in state court; and (2) equitable tolling, a judicially crafted exception. Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The instant petition does not fall within either of these exceptions.

Under AEDPA, the one-year time limitation is tolled while "a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending" 28 U.S.C. § 2244(d)(2). At issue here is whether White's state

PCRA application, found untimely by the state courts, can nevertheless toll the limitations period as a "properly filed application" under AEDPA.

When establishing the timeliness of a federal habeas petition under AEDPA, if a state court determines that a state relief claim is untimely, the application is not "properly filed," and does not toll AEDPA's statute of limitations.³ "An untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition." Merritt v. Blaine, 326 F.3d 157, 165 (3d Cir. 2001). See also Carey v. Saffold, 536 U.S. 214 (2002) ("properly filed" application for collateral review in state court must satisfy the state's timeliness requirement); Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001) (same).

Federal courts do not have the power to review a state court's decision on the state timeliness of a PCRA application. "The AEDPA requires us to interpret state law as we do when sitting in diversity cases, and we therefore must defer to a state's highest court when it rules on an issue." Fahy, 240 F.3d at 243-44. "[T]he Pennsylvania

³ "[W]e must look to state law to determine whether the state petition is 'properly filed.' But it is federal law that sends us to the state court. '[It] is correct that in applying a federal statute we must construe its terms as a matter of federal law . . . Therefore, to apply this statute [AEDPA] as a matter of federal law we must look to state law governing when a petition for collateral relief is properly filed.'" Merritt v. Blaine, 326 F.3d 157, 167 (3d Cir. 2001), citing Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001).

Superior Court (the highest Pennsylvania court to have ruled on the matter) has already expressly rejected the one ground on which [petitioner] claims his PCRA claim was timely, [and] . . . it would be an undue interference for a federal district court to decide otherwise." Merritt, 326 F.3d at 168. Since White's application was time-barred under state law, it was not "properly filed," and there is no statutory tolling of AEDPA's one-year period of limitations.

White's petition does not satisfy any other statutory exception to AEDPA's period of limitations; see § 2244(d)(1)(B)-(D). No state action prevented him from filing the petition; he asserts no claim that relies on a new rule of constitutional law retroactively applicable; and the factual predicates upon which his claims are based concern events that took place during his trial proceedings and were discoverable years ago through the exercise of due diligence.

Equitable tolling is appropriate only when the principles of equity would make the rigid application of a limitations period unfair. Courts must be sparing in their use of equitable tolling, and procedural requirements established by Congress for gaining access to the federal courts should not be disregarded by courts out of a vague

sympathy for particular litigants. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999).

Equitable tolling is only appropriate in a limited set of circumstances: “[I]f (1) the defendant has actively misled the plaintiff, (2) [] the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) [] the plaintiff has timely asserted his rights mistakenly in the wrong forum.” Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted). The petitioner must also show that he or she exercised reasonable diligence in investigating and bringing the claims. Merritt, 326 F.3d at 168.

White claims that he has been prevented in some extraordinary way from asserting his rights because the state court discarded and failed to transcribe the stenographic trial notes from the final day of his trial, April 4, 1983. He claims the missing notes would show the prosecutor’s use of hearsay in his closing argument, and the judge’s failure to give curative instructions to the jury.

White also claims he asserted his rights mistakenly in the wrong forum, and delayed filing his federal habeas petition because of a reasonable belief he was required to exhaust all state remedies first.⁴ He believed that for his

⁴ 28 U.S.C. § 2254(b)(1) requires that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the

PCRA state claims to be effective, he needed to produce the missing transcript.

After thirteen years of searching, White received written notification that the notes were unavailable, and filed his PCRA claim immediately thereafter. Only after his PCRA claim was dismissed as untimely by the PCRA court and the Superior Court of Pennsylvania, and his petition for allowance of appeal was denied by the Supreme Court of Pennsylvania, did White believe he was able to file his federal habeas petition.

The Magistrate Judge found White's contentions regarding the missing stenographic notes and his belief he must exhaust state remedies before filing a federal claim were insufficient to allow equitable tolling in a non-capital case. The Court of Appeals has held that "in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fahy v. Horn, 240 F.3d at 244.

Similarly, equitable tolling does not apply if the petitioner, with reasonable diligence, could have filed on

judgment of a State court shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." (emphasis added).

time notwithstanding the extraordinary circumstance. See Brown v. Shannon, et al., 322 F.3d 768, 773 (3d Cir. 2001). Because White's state PCRA and federal habeas claims could have been timely filed, without waiting thirteen years for a missing transcript, the circumstances in this case are not extraordinary and do not warrant equitable tolling.

Whether or not the failure to transcribe the prosecutor's closing argument at White's trial was state action, this action did not prevent him from filing a habeas petition. It is not required that a petitioner have a complete trial record when filing a state PCRA or a federal habeas claim. The majority of White's claims did not rely on the missing transcript, so most of his claims could have been reviewed on their merits long ago. Although White may have alleged state action in his petition, he did not allege state action preventing him from filing that petition. White's objection will be overruled.

White also argues, in the alternative, that if his reasons for untimely filing were not state action, but attorney error, then there should be equitable tolling. White cites cases (none involving the AEDPA) in which equitable tolling has been applied for attorney error, but only one of these cases is from this circuit, and all of them are easily distinguishable from the instant action.

Equitable tolling was granted in Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236 (3d Cir. 1999), a non-capital case. However, in Seitzinger, a civil EEOC action, the court granted equitable tolling only because the attorney's error and deception⁵ were directly responsible for the plaintiff's complaint arriving one day late. White has failed to show how attorney error or deception prevented him from timely filing his petition.

Seitzinger stresses the rarity with which equitable tolling should be granted, especially as a result of attorney error. "[T]he theory that an attorney's delinquency is chargeable to the client and, at all events, is not a basis for equitable tolling . . . is generally true, consistent with the rule that equitable tolling is to be used sparingly, particularly in the context of attorney default." Seitzinger, 165 F.3d at 237. "Though the Supreme Court has repeatedly recognized the equitable tolling doctrine, it has also cautioned that '[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out

⁵ "[W]here - as here - the allegation is that a diligent client persistently questioned the lawyer as to whether he had filed the complaint in time, and he affirmatively misrepresented to her that he had, we think there is a sufficient claim of attorney abandonment to bring the case within the narrow line of cases in which lawyer misconduct justifies equitable tolling." Seitzinger, 165 F.3d at 237-38.

of vague sympathy for particular litigants'" Id. at 240 (quoting Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984)).

The other cases cited by White are not from the Third Circuit, are not binding on this court, and contain facts dissimilar to this action.⁶ White has failed to show that attorney error prevented the timely filing of this petition, and, even if it had, it would still not justify equitable tolling. This objection will also be overruled.

White also objects to the Magistrate Judge's omission of "proffered facts that explain petitioner's due diligence in asserting rights; . . . [and] that explain why it was unreasonable for petitioner to file his habeas petition prior to its actual filing" (Objections to R & R, p. 13). He contends that for thirteen years he diligently sought the missing transcript, and only after hiring a private investigator did he learn that the stenographic notes he sought had been destroyed, and only after learning this was it reasonable to file first his PCRA claim and then his petition for federal habeas relief.

⁶ White cites two civil actions: Cantrell v. Knoxville Cmty. Dev. Corp., 60 F.3d 1177, 1180 (6th Cir. 1995), in which equitable tolling was granted because the plaintiff had been abandoned by a mentally ill attorney, and Volk v. Multi-Media, Inc., 516 F.Supp. 157 (S.D. Ohio 1981), in which equitable tolling was granted because plaintiff's attorney failed to inform the Department of Labor that his client intended to sue his former employer under the Age Discrimination in Employment Act - a level of malpractice far beyond any alleged in the instant petition.

White may well have exercised due diligence in seeking the transcript, but locating the missing transcript was not a prerequisite to filing his PCRA claim; White could have filed his PCRA claim long before learning the transcript was unavailable. This objection will be overruled.

White argues that under the language of the AEDPA, the limitation period should be tolled until September 17, 1999, the date he first learned that a complete transcription and trial record would be unavailable. White further asserts that because he filed his state PCRA claim promptly after receiving that information, the grace period should further be tolled until July 23, 2001, the date when the Pennsylvania Supreme Court denied allowance of appeal from denial of his PCRA application. If tolling were appropriate, his instant habeas petition, filed August 23, 2001, would be timely under AEDPA, and the merits of his petition could be considered.

Even were the limitation period tolled until the date White learned the transcript was unavailable, his habeas petition would be untimely. A PCRA claim is not "properly filed" if it is found untimely by a state court, and a federal court is bound by the finding of the state court. If a claim is not "properly filed," it cannot toll AEDPA's limitation period.

Therefore, even if the limitation period were tolled until September 17, 1999, when White learned the transcript he sought was unavailable, it would not be tolled while his improperly filed PCRA claim was pending, and the time for filing would have expired on September 16, 2000. White's habeas petition, filed September 12, 2001, would still be almost one year late. White's petition does not qualify for tolling of any kind.

White's objections are overruled, and his habeas petition will be denied as time-barred.

Outstanding Motions

White's outstanding motions for appointment of counsel and for an evidentiary hearing will also be denied. No amount of legal assistance or evidence presented can change the fact that White is procedurally barred from filing a petition for a writ of habeas corpus under AEDPA.

White will not be issued a certificate of appealability (COA). The Supreme Court has held that:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 478 (2000).

White's habeas petition is procedurally time-barred, and may not be considered on the merits. White's motion for a COA will be denied.

IV. Conclusion

For the foregoing reasons, petitioner Melvin White's objections to the Magistrate Judge's Report and Recommendation will be overruled. His motions for appointment of counsel and an evidentiary hearing will be denied, and no certificate of appealability will be granted.

An appropriate order follows.

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

MELVIN WHITE, : CIVIL ACTION
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 Petitioner :
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 v. :
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 ROBERT D. SHANNON, et al., :
 Respondents : NO. 01-4298

ORDER

AND NOW, this ____ day of July, 2003, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Document No. 4), United States Magistrate Judge Linda K. Caracappa's Report and Recommendation dated June 11, 2002 (Document No. 22), Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 26), and all related filings, for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Document No. 22) is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 26) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody (Document No. 4) is **DENIED**;
4. Petitioner's motion for appointment of counsel is **DENIED**;
5. Petitioner's motion for an evidentiary hearing is **DENIED**;
6. There is no probable cause to issue a certificate of appealability;
7. The Clerk of the Court shall mark this case closed for statistical purposes.

S.J.

