

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

BOBBY BEES : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 01-0279

O R D E R

AND NOW, this 12th day of July, 2002, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter, together with the petitioner's objections and the respondents' response thereto, IT IS HEREBY ORDERED THAT:

(1) the petitioner's objections to the Report and Recommendation are **OVERRULED** for the reasons stated below;

(2) the Report and Recommendation is **APPROVED** and **ADOPTED**;

(3) the petition for a court order mandating the Clerk of Court of Common Pleas to provide defendant with copies of the state court record (Docket No. 6) is **DENIED**; and

(4) a certificate of appealability is **DENIED**.

In his Report and Recommendation, Magistrate Judge Thomas J. Reuter recommended dismissal of the petition as untimely. The petitioner filed written objections, in which he argued that equitable tolling should apply. Equitable tolling is appropriate

when: (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 asserts his rights mistakenly in the wrong forum. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001) (citations omitted). The petitioner argues that his case falls into the second category, because his attorney failed to inform him of the disposition of his intermediate appeal, and he therefore learned about it five and a half months late.

The Court will assume that equitable tolling would be appropriate here. However, the Court still finds that the petition was untimely filed. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year limitations period applies for an application for a writ of habeas corpus. It begins to run from the latest of several dates. 28 U.S.C. § 2244(d). Here, the relevant date triggering the running of the statute of limitations is the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review". Id. at 2244(d) (1)(A) .

In Pennsylvania, "a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days of the entry of the order of the Superior Court or the Commonwealth Court sought to be reviewed." Pa. R. App. P. 1113. The petitioner's conviction was affirmed on March 26, 1997. The order became final when the time for appeal expired on April 26, 1997.

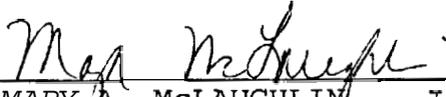
The petitioner argues that neither he nor his family, despite repeated inquiries, was informed by his attorney that his appeal at the Superior Court had been denied. On September 8, 1997, he learned of the disposition of **the case when** he received a letter from the Superior Court that included a copy of the decision and a docket. The **letter was a** response to an inquiry that Bees had sent directly to the Superior Court. Bees argues that he should be credited for the time during which he did not know of the disposition of the Superior Court case.

If equitable tolling were so applied, the one-year statute of limitations would have begun to run on September 8, 1997, when Bees learned that his appeal had been denied. Thirty-seven days later, on October 15, 1997, the petitioner filed a PCRA action in state court. These thirty-seven days must be counted against his one-year limitations period. But the one-year statute of limitations would have been tolled during the time that the properly filed PCRA petition pended. 28 U.S.C. § 2244(d)(2).

The PCRA action was appealed to the Superior Court, and then to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied review of the decision on PCRA relief on February 1, 2000. On that date, the PCRA ruling became final, and the statute of limitations for filing the habeas petition **began to run again**. Three-hundred twenty-eight (328) days remained in which the petitioner could file a timely **application**.

The petitioner did not file his habeas petition until January 14, 2001, which was 348 days after the limitations began to run again, and 385 days after the statute of limitations began to run initially.' The petition was therefore filed 20 days late, even with the benefit of equitable tolling.

BY THE COURT:



MARY A. McLAUGHLIN, J.

¹ Although the petition is docketed on January 19, 2001, the petition bears the date January 14, 2001, which marks the earliest date the petitioner delivered his petition to prison officials for mailing. Burns v. Morton, 134 F.3d 109, 112 (3d Cir. 1998).