

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

CHARLES FRIPP)
)
) CIVIL ACTION
 v.)
)
 SUPERINTENDENT MEYERS, et al.) NO. 03-40

Padova, J.

MEMORANDUM

August __, 2004

Before the Court is Charles Fripp's *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). For the reasons that follow, the Court will adopt the Report and Recommendation of Magistrate Judge Wells, and dismiss the Petition in its entirety as untimely.

I. RELEVANT BACKGROUND

On August 27, 1988, Petitioner forcibly raped J.B., his girlfriend's eight-year-old daughter. See Commonwealth v. Fripp, No. 5226 Phl. 97 (Ct. Com. Pl. June 30, 1998). Following a jury trial, on January 17, 1990, Petitioner was convicted of Rape, Corruption of a Minor, and Simple Assault. See id. at 1-2. The Honorable Marvin R. Halbert sentenced Petitioner to seven and one-half to fifteen years of imprisonment for the rape conviction; two and one-half to five years of imprisonment for the corruption conviction; and one to two years of imprisonment for the assault conviction. See id. at 1-2. On January 8, 1991, Petitioner appealed his conviction to the Pennsylvania Superior Court. See

Commonwealth v. Fripp, No. 00248, Mem. Op., 620 A.2d 1233 (Pa. Super. 1992). On November 13, 1992, the Pennsylvania Superior Court affirmed the judgment of sentence. Id. at 5. The state Supreme Court, on May 18, 1993, denied allowance of appeal. See Commonwealth v. Fripp, 626 A.2d 1155, 534 Pa. 636 (Pa. 1993) (Table). On October 12, 1993, Petitioner's request for a writ of certiorari in the United States Supreme Court was denied. See Fripp v. Pennsylvania, 510 U.S. 920 (1993).

On September 12, 1997, Petitioner sought collateral relief, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq. See Commonwealth v. Charles Fripp, No. 5226, 737 A.2d 805, Mem. Op. (Pa. Super. Ct. Feb. 10, 1999). On November 21, 1997, the Honorable Genece E. Brinkley dismissed the petition as untimely, without a hearing or appointing counsel. Id. at 2; see also Commonwealth v. Charles Fripp, No. 0743, Order (Ct. Com. Pl. Phila. County, Nov. 21, 1997). Petitioner appealed this dismissal to the Superior Court. On February 10, 1999, the state intermediate court reversed and remanded the case finding that, notwithstanding the fact that the petition was untimely, the PCRA court should have determined Petitioner's eligibility to proceed *in forma pauperis*. See Commonwealth v. Charles Fripp, 737 A.2d 805, Mem. Op. at 5.

On December 20, 1999, the Honorable Barbara Joseph dismissed the PCRA petition as frivolous. See Commonwealth v. Charles Fripp,

CP 8907-0743, Order (Ct. Com Pl. Phila. County, Dec. 20, 1999). On July 17, 2000, the PCRA court granted Petitioner's request to file an amended petition.

Accordingly, on November 1, 2000, Petitioner filed an amended, counseled petition. See Petitioner's Amended Petition, Nov. 1, 2000. On November 9, 2000, Petitioner filed a second amended petition. See Ct. Com. Pl. Phila. County, Docket Entry. Moreover, while this appeal was pending, on February 15, 2002, Petitioner filed a notice of appeal in the Superior Court of Pennsylvania. See Resp. at 13. On June 21, 2002, the PCRA court again dismissed the petition as untimely. See Commonwealth v. Charles Fripp, No. 0632, Mem. Op. (Ct. Com. Pl. Phila. County, June 24, 2002). On September 26, 2002, the Superior Court dismissed Petitioner's appeal "without prejudice to [Petitioner's] rights under the [PCRA]," because counsel had failed to file an appellate brief. See Commonwealth v. Charles Fripp, No. 89-07-743, Order (Pa. Super. Ct. Sept. 26, 2002). On January 3, 2003, Petitioner sought a federal writ of Habeas Corpus.

II. THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court referred this case to Magistrate Judge Sandra Moore Wells for a Report and Recommendation. The Magistrate Judge recommended that the instant Petition be dismissed as untimely, pursuant to 28 U.S.C. § 2244(d) ("§ 2244(d)"). Section 2244(d) provides for a one year statute of

limitations for the filing of federal habeas corpus petitions. With certain exceptions, the one year period begins to run on the date on which the state court judgment becomes final, and is tolled only by a properly filed application for post conviction relief or collateral review. 28 U.S.C. § 2244(d)(1)(A) & (d)(2).

The Magistrate Judge found that the one year statute of limitations began to run in this case on April 24, 1996, the enactment date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Burns v. Morton, 134 F.3d 109, 110 (3d Cir. 1998)(holding that any period prior to the enactment date of the AEDPA should not be included in the one-year statute of limitations calculation). The Magistrate Judge further noted that Petitioner had filed a PCRA petition on September 12, 1997, over one year after the statute of limitations had begun to run, and that this PCRA Petition had been dismissed by the state courts as untimely. Accordingly, the Magistrate Judge found that there was no basis to toll the statute of limitations for habeas corpus petitions pursuant to 28 U.S.C. § 2244(d)(2).¹ The Magistrate Judge therefore found that the habeas corpus petition, which had been

¹ Section 2244(d)(2) provides that "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 or limitation under this subsection." 28 U.S.C. § 2244(d)(2) (emphasis added). However, if a petitioner files an out of time application and the state court dismisses it as either time barred or waived, then it is not deemed to be a "properly filed application." Merritt v. Blaine, 326 F.3d 157, 165-66 (3d Cir. 2003).

filed nearly ten years after Petitioner's conviction had become final, and over six years after the statute of limitation period had begun to run, was untimely.

III. DISCUSSION

Petitioner's objections to the Report and Recommendation of the Magistrate Judge have no merit. Petitioner first argues that his counsel was ineffective in failing to file appropriate memoranda in connection with his PCRA petition. However, Petitioner fails to explain how his counsel's ineffectiveness prevented him from filing his PCRA petition until nearly four years had elapsed since his conviction. Moreover, "[t]here is no constitutional right to an attorney in state post-conviction proceedings Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman v. Thompson, 501 U.S. 722, 752 (1991).

Petitioner also appears to invoke the doctrine of equitable tolling. The one year statute of limitations found in Section 2254 for the filing of habeas corpus petitions is subject to equitable tolling. Miller v. New Jersey State Dept. of Corr., 145 F.3d 616, 619 (3d Cir. 1998). Equitable tolling is only appropriate "when the 'principles of equity would make [the] rigid application [of a limitation period] unfair.'" Id. at 618 (quoting Shendock v. Dir., Office of Workers Comp. Programs, 893 F.2d 1458, 1462 (3d Cir. 1990))(alteration in original). The United States Court of Appeals

for the Third Circuit ("Third Circuit") has therefore held that equitable tolling is only appropriate in certain narrow circumstances: where 1) the defendant has "actively misled" the plaintiff; 2) the plaintiff has been prevented from asserting his rights "in some extraordinary way"; 3) the plaintiff mistakenly asserted his rights in the wrong forum in a timely manner; 4) the plaintiff "received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations and internal quotation marks omitted). Moreover, equitable tolling is to be invoked sparingly, United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998), and can only be invoked when the petitioner establishes that he exercised reasonable diligence in pursuing his claims. Miller, 145 F.3d at 618-19.

In this case, Petitioner appears to assert that he received inadequate assistance from the law library staff at S.C.I. Rockview prison, who were as a matter of policy barred from assisting him in his preparation of legal documents. Petitioner appears to argue that the failure of the law library staff at S.C.I. Rockview to assist him somehow led to the delay in the filing of his PCRA Petition and the instant Habeas Corpus Petition. However, in his objections Petitioner fails to assert that he exercised reasonable

diligence in pursuing his claim, or explain how the failure of the staff at S.C.I. Rockview to assist him resulted in the nearly four year delay between the date that his conviction became final and the filing of his PCRA petition. See United States v. Ramsey, Civ. A. No. 97-3624, 1999 WL 1210827, at *3 n.7 (E.D. Pa. Dec. 9, 1999)(equitable tolling of statute of limitations based upon period when petitioner had no access to library because of prison lock down not appropriate where petitioner presented no evidence that he exercised reasonable diligence in bringing his claims.) Moreover, there is nothing in the record to indicate that Petitioner's attorney or any other person actively misled him in any manner, or to suggest that he was prevented from exercising his rights "in some extraordinary way". See Jones, 195 F.3d at 159.

Finally, Petitioner complains that Respondents' answer to his Habeas Corpus Petition was in violation of Habeas Corpus Rule 5, 28 U.S.C. foll. § 2254 ("Rule 5").² Petitioner argues that Respondents' answer failed to include the briefs or PCRA Petition filed in state court, and that this prejudiced his ability to respond. However, there is no requirement in Rule 5 that such documents be included in the respondent's answer. Rather, Rule 5 provides that "there shall be attached to the answer such portions

² In his objections, Petitioner argues that Respondents violated "Rule 5." (Pet. Obj. ¶ 1.) Upon examination of the Habeas Corpus Rules, the Court has reached the conclusion that Petitioner intended to refer to Rule 5 of the Habeas Corpus Rules.

of the transcript as the answering party deems relevant." Habeas Corpus Rule 5, 28 U.S.C. foll. § 2254. Respondents' Response to the Habeas Corpus Petition does not discuss the merits of Petitioner's PCRA Petition, or refer to specific passages from it. Rather, Respondents simply note that the PCRA petition was filed in an untimely manner. Moreover, Petitioner fails to explain how he was prejudiced by Respondents' failure to attach his PCRA Petition to their Response. Accordingly, all of Petitioner's objections are without merit.

IV. CONCLUSION

For the foregoing reasons, the Court adopts the Report and Recommendation of Magistrate Judge Wells, and dismisses the Petition in its entirety as untimely.