

The trial court denied Petitioner's post-trial motions, and on October 15, 1990, sentenced Petitioner to twelve to twenty-four years in prison. The trial court also barred Petitioner from practicing medicine in Pennsylvania, including prescribing any controlled substance. Petitioner's request to modify his sentence was also denied. The court did, however, grant Petitioner bail pending his appeal, Petitioner having pledged the deed to his home in Huntingdon Valley, Pennsylvania as security.

On November 12, 1991, the Superior Court affirmed Petitioner's conviction and sentence. See Ex. A. to doc. no. 13. The Pennsylvania Supreme Court granted Petitioner's petition for allowance of appeal. On appeal, the Pennsylvania Supreme Court considered the issue "whether electronically intercepted conversations in a physician's office between the physician [Petitioner] and his patient regarding illegal drug activity warrant suppression where the interception was undertaken without a warrant but with the patient's consent and after a court determination that probable cause existed for seizure of the conversations." Commonwealth v. Alexander, 708 A.2d 1251, 1252 (Pa. 1998). On March 5, 1998, the Pennsylvania Supreme Court "affirm[ed] the Superior Court's ruling affirming the trial court's denial of [Petitioner's] suppression motion." Id.

On May 19, 2004, Petitioner filed the instant petition for writ of habeas corpus under 28 U.S.C. § 2254. His petition

asserts one ground for relief: that his conviction resulted from ineffective assistance of trial and appellate counsel.

Specifically, Petitioner contend's that:

[his] counsel's performance was constitutionally deficient, in that there was a lack of preparation for the trial; there was inadequate discovery made or sought; there was a failure to challenge the validity of the wiretap authorization based upon facts that may have demonstrated the authorization to be not authentic; there was a failure to argue on appeal that the evidence was insufficient to support the essential element of "possession," counsel failed to pursue petitioner's assertion that certain documents or records essential to the Commonwealth's case were forged.

Pet., at 9. The case was referred to Magistrate Judge Rapoport for a Report and Recommendation. On November 15, 2004, Magistrate Judge Rapoport issued a Report and Recommendation recommending that the instant petition be dismissed as untimely.

On November 30, 2004, petitioner filed objections to the Report and Recommendation. In his objections, petitioner concedes that the instant petition was filed well beyond the one-year period within which a petition for writ of habeas corpus must be filed under 28 U.S.C. § 2244(d)(1). Petitioner contends, however, that he is entitled to equitable tolling of the applicable statute of limitations.

II. DISCUSSION

A. Timeliness of the Instant Petition

Petitioner's claims must be analyzed under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, enacted April 24, 1996, imposes a one-year statute of limitations on prisoners seeking federal habeas review of state convictions. 28 U.S.C. § 2244(d)(1). The one-year period for filing a petition for a writ of habeas corpus runs 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.

Id. The habeas statute provides, however, that the time during which an application for state post-conviction or collateral review is "pending" is not to be counted in calculation of the one-year period. Id. § 2244(d)(2).

The Pennsylvania Supreme Court affirmed Petitioner's conviction on March 5, 1998. On June 3, 1998, upon expiration of the ninety-day period in which to file a petition for writ of

certiorari in the U.S. Supreme Court, Petitioner's convictions became final. See 28 U.S.C. § 2244(d)(1)(A); Sup. Ct. R. 13. Accordingly, Petitioner had until June 2, 1999 to file either a timely petition for writ of habeas corpus or a timely petition under the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541-9545. See 28 U.S.C. 2244(d)(1); 42 Pa. Cons. Stat. Ann. § 9545(b). Petitioner never filed a PCRA petition and failed to file the instant petition for writ of habeas corpus until May 19, 2004, almost six years after the statute of limitations had run. The instant petition is, therefore, untimely.

B. Equitable Tolling

Petitioner contends that the Court should equitably toll the statute of limitations. The Third Circuit has held that the AEDPA's one-year statute of limitations period is subject to equitable tolling. Lacava v. Kyler, 398 F.3d 271, NO. 03-1398, 2005 U.S. App. LEXIS 2240, at *10-12 (3d Cir. Feb. 11, 2005). The doctrine of equitable tolling, however, is to be used "sparingly," applied "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." Id. (citation omitted). The Third Circuit has explained that equitable tolling is appropriate

when "the principles of equity would make the rigid application of a limitation period

unfair," . . . such as when a state prisoner faces extraordinary circumstances that prevent him from filing a timely habeas petition and the prisoner has exercised reasonable diligence in attempting to investigate and bring his claims. . . . Mere excusable neglect is not sufficient.

Lacava, 2005 U.S. App. LEXIS 2240, at *10. (citations omitted).

Petitioner contends that the Court should equitably toll the statute of limitations because his collateral counsel, Eugene C. LaManna, Esquire, allegedly misled Petitioner to believe that a PCRA petition would be properly filed, citing to Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001). He also contends that he reasonably believed that a PCRA petition had been filed. After a comprehensive analysis of Petitioner's arguments in light of the controlling law, the Magistrate Judge rejected them. See R&R, at pp. 5-13 (doc. no. 15). The conclusion of the Report and Recommendation was that even assuming that Attorney LaManna's alleged conduct amounted to an extraordinary circumstance (a tenuous assumption), "Petitioner took absolutely no action" for five years to protect his rights. Id. at 12. Petitioner thus failed to act with reasonable diligence in attempting to preserve his rights. Id. at 13. Accordingly, "Petitioner's equitably tolling argument fails." Id.

Petitioner has raised several objections to the Report and Recommendation: First, the Report and Recommendation ignores

the fact that plaintiff believed that a PCRA petition had been properly filed on his behalf. Second, the Report and Recommendation failed to properly consider Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001). Third, the Report and Recommendation improperly concluded that Petitioner failed to act with reasonable diligence.

Each of Petitioner's objections is without merit. First, Petitioner's argument that he believed a PCRA petition had been properly filed fails to address why, for approximately five years, he neglected to inquire into the status of any such petition with his putative PCRA attorney. Second, Nara is distinguishable. Unlike the present case, the petitioner in Nara listed multiple ways in which his attorney's affirmative actions, including making misrepresentations to him, unfairly prevented him from asserting his rights in a timely fashion. 264 F.3d at 320. In the instant case, although Petitioner parrots the word "misled" from Nara, Petitioner alleges only that Attorney LaManna did not file the PCRA petition after Petitioner allegedly sent it to him. It should be noted that "[i]n 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 239, 244 (3d Cir. 2001). As the Magistrate Judge correctly noted, "Petitioner is silent about the circumstances surrounding

the preparation of the PCRA petition. For example, Petitioner does not allege that his attorney assured or promised him that he would file the PCRA petition or even that Petitioner himself insisted that the petition should be filed." R&R, at 10.

Moreover, unlike the present case, Nara involved a petitioner who was arguably incapable of diligently investigating and pursuing his claims. The petitioner in Nara presented evidence that he was "severely mentally disabled" and "a clear and present danger to himself" such that an evidentiary hearing was warranted to determine whether his disability affected his ability to file a timely habeas petition. 264 F.3d at 312, 320. Petitioner here has offered no evidence of any such disability and has offered no valid reason for his failure (for five years) to investigate the status of his putative PCRA petition. Petitioner's primary justification for failing (for five years) to diligently investigate his PCRA claims is that "the eight years which he spent on appeal created a reasonable belief that a five year lull . . . was not inordinary." Pet'r's Objs. to R&R, at 3. However, just as "ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing," Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), ignorance of the law does not, under the circumstances of this case, excuse plaintiff from diligently investigating and pursuing his putative PRCRA claims. Finally, because Petitioner has

provided no evidence that he has diligently pursued his federal claims, he has failed to demonstrate his entitlement to equitable tolling.¹

¹ Petitioner seeks permission to amend his Petition to include a claim that he is entitled to relief under Blakely v. Washington, 124 S. Ct. 253 (2004). As the Magistrate Judge correctly ruled, however, any amendment to the Petition is time-barred because the Petition itself is time-barred. Accordingly, the Motion to Amend will be denied as futile. Fed. R. Civ. P. 15.

In addition, subsequent to the Report and Recommendation and Petitioner's objections thereto, Petitioner filed a motion to remand to the Magistrate Judge and for leave to amend his petition to include a claim of actual-innocence. Petitioner claims that a statute under which he was convicted for possession with intent to distribute a controlled substance, 35 Pa. Cons. Stat. Ann. § 780-113(a)(16),(30), exempts his conduct because he was a "practitioner" at the time he committed the offense. Like the claim in Petitioner's earlier motion to amend, this claim is time-barred. Moreover, the Court need not reach the issue whether there is an actual-innocence exception to AEDPA's statute of limitations because Petitioner has failed to establish that an actual-innocence exception would apply in this case. As the Pennsylvania Superior Court held when it addressed this argument on direct appeal, Petitioner's claim is without merit. Section 780-113(16),(30) states:

The following acts and the causing thereof within the Commonwealth are hereby prohibited:

(16) knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act. (Emphasis added.)

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus will be denied. An appropriate order follows.

35 Pa. Cons. Stat. Ann. § 780-113(a)(16),(30) (emphasis added). In addressing whether a pharmacist, as a "practitioner," may be prosecuted under these provisions, the Pennsylvania Supreme Court held that "to fall within the definition of practitioner, either individually as a pharmacist, . . . the party claiming the exemption must act within the course of professional practice." Commonwealth v. Gordon, 511 Pa. 481, 486 (Pa. 1986) (internal quotation marks omitted). Like the defendant in Gordon, Petitioner was not acting within the course of professional practice when he delivered Dilaudid pills and/or possessed Dilaudid pills with intent to deliver them. That Petitioner was convicted of writing illegitimate prescriptions of Dilaudid for resale, and the defendant in Gordon sold the pills without a prescription, is not a relevant distinction; the relevant question is whether the party claiming the exemption was acting within the course of professional practice, regardless of the precise criminal conduct that takes his conduct outside that course. See Commonwealth v. Fremd, 860 A.2d 515, 519 (Pa. Super. Ct. 2004) ("[F]or the 'practitioner' exemption to apply, the party claiming the exemption must have acted within the course of his professional practice." (citing Gordon, 515 A.2d at 560-61)). Furthermore, Petitioner has offered no new evidence, i.e., evidence not presented at his trial, that would alter this conclusion. See Calderon v. Thompson, 523 U.S. 538, 559 (1998) ("To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial."). Accordingly, Petitioner has not established a claim of actual innocence.

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

LAWRENCE ALEXANDER, : CIVIL ACTION
 : NO. 04-2174
Petitioner, :
 :
v. :
 :
EDWARD KLEM, ET AL., :
 :
Respondents. :

ORDER

AND NOW, this 8th day of April, 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (doc. no. 15) and Petitioner's objections thereto (doc. no. 17), it is hereby **ORDERED** as follows:

1. Petitioner's objections to the Report and Recommendation of Magistrate Judge Rapoport are **OVERRULED**;
2. The Report and Recommendation is **APPROVED AND ADOPTED**;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED as untimely**;
4. There is no probable cause to issue a Certificate of Appealability;
5. Petitioner's Motion to Amend Petition (doc. no. 7) is **DENIED**; and

6. Petitioner's Motion to Remand Petition; for Leave to Amend Petition (doc. no. 20) is **DENIED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.