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

MATTHEW ZIMMERMAN	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-667
JAMES F. SHERMAN, ET AL.	:	

SURRICK, J. **APRIL22, 2005**

MEMORANDUM & ORDER

Presently before the Court is Matthew Zimmerman's ("Petitioner") Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 4), Magistrate Judge Arnold C. Rapoport's Report and Recommendation recommending denial of the Petition (Doc. No. 12), and Petitioner's objections to the Report and Recommendation. (Doc. No. 13.) For the following reasons, we will approve and adopt the Report and Recommendation and dismiss the Petition.

I. BACKGROUND

On October 23, 1998, Petitioner pled guilty to one count of aggravated assault and was sentenced to three (3) years' probation by the Honorable Anthony J. DeFino, Court of Common Pleas, Philadelphia County. (Doc. No. 4 ("Pet.") ¶ 1; Doc. No. 11 Ex. A at 1.) Petitioner did not file a direct appeal from this conviction, and the judgment of sentence became final on November 23, 1998.[1] (Doc. No. 11 Ex. A at 1.)

While on probation, Petitioner was arrested and charged with several violations of the federal narcotics laws. On May 30, 2000, after a jury trial, Petitioner was convicted of

[1] Pursuant to Pennsylvania Rule of Appellate Procedure 903(a), a notice of appeal must be filed within thirty (30) days of the entry of the appealed order. Pa. R. App. P. 903(a).

conspiring to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, possession with intent to distribute cocaine in violation of 21 U.S.C. § 841, and possession with intent to distribute cocaine within 1000 feet of a school in violation of 21 U.S.C. § 860 and 18 U.S.C. § 2. *United States v. Zimmerman*, No. 00-2218, 80 Fed. Appx. 160, 161 (3d Cir. Sept. 30, 2003).[2] As a result of these convictions, a violation of probation hearing was held in state court on December 12, 2000. Finding that Petitioner had violated the terms of his probation, Judge DeFino revoked probation and sentenced Petitioner to a period of incarceration of not less than one or more than three years.

On December 20, 2000, Petitioner filed a pro se petition in state court, seeking relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541–9546. (Pet'r Resp. to Court's Notice of Intent to Dismiss, *Commonwealth v. Zimmerman*, C.P. No. 98-06-1038 (Pa. Ct. Com. Pl. filed June 14, 1998).) Petitioner asserted that his counsel in the aggravated assault proceedings in state court was ineffective for recommending that Petitioner accept a plea bargain in exchange for a sentence of probation, despite Petitioner's claims of innocence, and that his guilty plea was involuntary because counsel coerced him to plead guilty. *Id.* at 6-10. In connection with his PCRA petition, Petitioner submitted an affidavit provided by the victim, the stepfather of Petitioner's girlfriend. The affidavit, dated December, 19, 2000, stated that the victim was willing to recant his accusations and state that no assault actually occurred. *Id.* at 7-8, 12-13. Petitioner asserted that the affidavit was "newly discovered evidence" and that his trial counsel was ineffective for failing to investigate the victim's

[2] Petitioner was sentenced to 235 months' imprisonment for these offenses. *Zimmerman*, 80 Fed. Appx. at 161.

testimony. *Id.* at 12-13. On April 22, 2002, the trial court dismissed the PCRA petition as untimely. *Commonwealth v. Zimmerman*, C.P. No. 98-06-1038 (Pa. Ct. Com. Pl. Apr. 22, 2002) (order denying PCRA petition). On September 22, 2003, the Pennsylvania Superior Court affirmed the dismissal in an unpublished memorandum opinion. *Commonwealth v. Zimmerman*, 835 A.2d 839 (Pa. Super. Ct. 2003) (table) (No. 1735 EDA 2002). Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court. (Pet. ¶ 11(a)(7).)

On February 17, 2004, Petitioner filed the instant Petition. (Doc. No. 1.) Petitioner asserts the following claims: (1) that his trial counsel was ineffective for failing to investigate the facts of the case and urging Petitioner to plead guilty despite his claims of innocence; (2) that his guilty plea was coerced by counsel; and (3) that the trial court failed to properly determine a factual basis for the guilty plea. (Pet. ¶¶ 12(A)-(C).) The matter was assigned to Magistrate Judge Arnold C. Rapoport for a Report and Recommendation. On August 3, 2004, Magistrate Judge Rapoport recommended that the Petition be denied as untimely pursuant to the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). (Doc. No. 11 at 3-6.) Petitioner objected to the Report and Recommendation, asserting that his claims were not time-barred for three reasons: (1) AEDPA's one-year statute of limitations should have commenced with the probation hearing on December 12, 2000, rather than at the time of his guilty plea and sentence of probation on November 22, 1998; (2) the victim's affidavit was not discoverable prior to the December 12, 2000, probation hearing; and (3) he was denied access to his state court case for two (2) days beginning on November 19, 1999. (Doc. No. 13 at unnumbered 1-2.)

II. STANDARD OF REVIEW

We review de novo those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b) (2000); Fed. R. Civ. P. 72(b); *see also Thomas v. Arn*, 474 U.S. 140, 141-42 (1985) ("[A] United States district judge may refer . . . petitions for writ of habeas corpus[] to a magistrate, who shall conduct appropriate proceedings and recommend dispositions. . . . Any party that disagrees with the magistrate's recommendations 'may serve and file written objections' to the magistrate's report, and thus obtain de novo review by the district judge." (citations and footnotes omitted)).

III. DISCUSSION

Under AEDPA, a prisoner has one year from the date of the final disposition of his case in state court to file a habeas petition. 28 U.S.C. § 2244(d)(1) (2000); *see also Long v. Wilson*, 393 F.3d 390, 393 (3d Cir. 2004). The relevant portion of the statute, 28 U.S.C. § 2244(d)(1), provides as follows:

> 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. § 2244(d)(1).

Petitioner pled guilty and was sentenced to a term of probation on October 23, 1998. (Pet. ¶ 1.) Petitioner's convictions thus became final on November 22, 1998, when the thirty (30) day time limit for appealing his judgment of conviction to the Pennsylvania Superior Court expired. *See* Pa. R. App. P. 903(a) (providing a thirty-day limit for filing an appeal from an order of judgment). Under AEDPA, Petitioner was required to file a habeas petition on or before November 21, 1999, one year after his state court judgment became final. The instant Petition was filed on February 17, 2004, more than four years after AEDPA's statute of limitations expired. (Doc. No. 1.)

Petitioner asserts that AEDPA's one-year time limit for filing a habeas petition should have run from the date of the revocation of probation on December 12, 2000, rather than the time that his judgment became final on November 12, 1998. (Doc. No. 13 at unnumbered 1.) Reading Petitioner's pro se filing liberally, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), we construe this objection to assert that AEDPA's statute of limitations should be statutorily tolled from the date of filing of his PCRA petition on December 20, 2000, to the conclusion of state court post-conviction proceedings on September 22, 2003.

The federal habeas statute provides that "[t]he time during which a *properly filed* application for [s]tate post-conviction relief or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2) (2000) (emphasis added).

Under § 2244(d)(2), a properly filed PCRA petition challenging the judgment tolls the AEDPA's statute of limitations during the pendency of the state proceeding. *Sweger v. Chesney*, 294 F.3d 506, 520 (3d Cir. 2002). A petition for post-conviction relief is deemed "'*properly* filed' 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). These rules include all time limitations imposed by relevant state court procedures. *Id.*; *see also Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) ("State petitioners therefore must file their state claims promptly and properly under state law in order to preserve their right to litigate constitutional claims that are more than one year old in federal court."). The Third Circuit has held that an untimely PCRA petition does not toll the statute of limitations under § 2244(d)(2) because an untimely state post-conviction petition is not "properly filed" for purposes of tolling. *Merritt v. Blaine*, 326 F.3d 157, 163 (3d Cir. 2003); *Fahy*, 240 F.3d at 243-44; *see also Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002) (holding that the PCRA's "one-year limitation is a jurisdictional rule that precludes consideration of . . . any untimely PCRA petition" by the state courts).

The Pennsylvania Superior Court determined that the December 20, 2000, PCRA petition was time barred and therefore not properly filed under Pennsylvania law. *Commonwealth v. Zimmerman*, 835 A.2d 839, mem. op. at 1-3. We are bound by a state court's determination of whether a state post-conviction petition was properly filed as a matter of state law. *Merritt*, 326 F.3d at 163; *Fahy*, 240 F.3d at 244. Accordingly, the time that Petitioner's PCRA petition was pending in state court does not toll AEDPA's one-year limitation and the instant Petition is untimely.

Next, Petitioner asserts that his Petition is not time barred because in November, 1999, he

suffered a two (2) day delay in receiving materials related to his state court case. (Doc. No. 13 at unnumbered 1.) This argument is also without merit. Section 2244(d)(1)(B) permits tolling when a "state action" causes an "impediment to filing an application [for writ of habeas corpus] . . . in violation of the Constitution or laws of the United States . . . ." 28 U.S.C. § 2244(d)(1)(B). The confiscation of an inmate's habeas petition or related legal papers would clearly constitute an impediment to filing the petition in violation of the Constitution. *See Zilich v. Lucht*, 981 F.2d 694, 694-95 (3d Cir. 1992) (holding that deprivation of legal documents through confiscation or destruction constitutes a violation of the constitutional right of access to the courts); *cf. Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (concluding that the intentional seizure of a prisoner's habeas corpus petition and related legal papers by a corrections officer may warrant equitable tolling in some circumstances). To violate a prisoner's constitutional right of access to the courts, the confiscation of his legal materials must result in material prejudice. *Sheehan v. Boyer*, 51 F.3d 1170, 1173 n.3 (3d Cir. 1995). A two-day denial of access clearly does not constitute material prejudice. *See, e.g., Barry v. Wilson*, No. 95-1419, 1996 U.S. App. LEXIS 15937, at *5-6 (10th Cir. July 2, 1996) (concluding that five days' delay of access is not materially prejudicial); *Higgins v. Coombe*, No. 94 Civ. 7942, 1998 U.S. Dist. LEXIS 3039, at *7-8 (S.D.N.Y. Mar. 11, 1998) (holding that three days' deprivation of materials shortly before the filing deadline of a motion is not prejudicial). Moreover, Petitioner's habeas petition was filed over four years after the alleged delay, well after AEDPA's one-year statute of limitations.

Finally, Petitioner asserts that he did not know the victim would be willing to testify that he was not assaulted until after the probation revocation hearing, and that AEDPA's statute of limitations should be tolled under 28 U.S.C. § 2244(d)(1)(D) because he could not have

discovered this information through the exercise of due diligence at the time of his guilty plea. (Doc. No. 13 at unnumbered 1-2.) Even if true, this claim does not entitle Petitioner to relief. Petitioner admits that he knew about the victim's purported recantation affidavit at the time he filed his PCRA petition on December 20, 2000. (Doc. No. 13 at unnumbered 2.) Thus, under AEDPA, he had one year from the date he learned of the information contained in the affidavit—December 20, 2001—to file a habeas petition in federal court.[3] *See Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (holding that under AEDPA, a prisoner has one year from the date on which the factual predicate of the claim could have been discovered to file a federal habeas petition). Despite this knowledge, Petitioner did not file the habeas petition until February 14, 2004, more than four years beyond AEDPA's one-year limitation. Petitioner's habeas petition therefore is untimely.[4]

An appropriate Order follows.

[3] As previously discussed, Petitioner's untimely PCRA petition does not toll AEDPA's statute of limitations under 28 U.S.C. § 2244(d)(2).

[4] Petitioner has not objected to the Magistrate Judge's determination that equitable tolling was unavailable, so we will not review this issue. (Doc. No. 13.)

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

MATTHEW ZIMMERMAN	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-667
JAMES F. SHERMAN, ET AL.	:	

ORDER

AND NOW, this 22nd day of April, 2005, upon consideration of Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 4, No. 04-CV-667), Magistrate Judge Arnold C. Rapoport's Report and Recommendation (Doc. No. 12, No. 04-CV-667), and Petitioner's objection to the Report and Recommendation (Doc. No. 13, No. 04-CV-667), it is hereby ORDERED that:

1. Petitioner's objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. The Petition is DISMISSED; and
4. There is no basis for the issuance of a Certificate of Appealability.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge