

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

KEVIN HOGAN, : CIVIL ACTION
 : NO. 04-957
 Petitioner, :
 :
 v. :
 :
 SUPERINTENDENT FRANK D. :
 GILLIS, THE DISTRICT ATTORNEY :
 OF THE COUNTY OF MONTGOMERY, :
 AND THE ATTORNEY GENERAL OF :
 THE STATE OF PENNSYLVANIA, :
 :
 Respondents. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MAY 31, 2005

Petitioner, Kevin Hogan ("Hogan"), was convicted in Pennsylvania state court for the 1994 murder of Wayne Flowers at the BJ Lounge, a tavern that was owned and operated by Mr. Flowers. Hogan brings this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction. Before the Court is a Report and Recommendation from Magistrate Judge Peter B. Scuderi recommending that the petition be dismissed as untimely. For the reasons that follow, the Court will adopt the Report and Recommendation of the Magistrate Judge.

I. PROCEDURAL HISTORY

Following a six day jury trial in the Court of Common Pleas for Montgomery County over which the Honorable William J.

Furber presided, Hogan was convicted of First Degree Murder, Possession of Instruments of Crime and Firearms Not to be Carried Without License. On March 22, 1995, Judge Furber sentenced Hogan to life imprisonment on the charge of First Degree Murder, one to two years imprisonment on the charge of Possession of Instruments of Crime and one to two years imprisonment on the charge of Firearms Not to be Carried Without License, with the sentence for each charge to be served consecutively. Hogan appealed to the Superior Court of Pennsylvania which affirmed the judgment of sentence on October 30, 1996. See Commonwealth v. Hogan, 687 A.2d 856 (Pa. Super. 1996). Hogan then filed a petition for allowance of appeal in the Pennsylvania Supreme Court which was denied on April 28, 1997. See Commonwealth v. Hogan, 693 A.2d 966 (Pa. 1997).

On June 10, 1997, Hogan filed a timely pro se petition for relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541, et seq.. Thereafter the PCRA court appointed counsel who filed an amended PCRA petition on Hogan's behalf. The amended PCRA petition asserted that trial counsel rendered ineffective assistance of counsel by (1) failing to object to improper remarks made in closing arguments by Assistant District Attorney Colleran, and (2) failing to introduce the prior criminal convictions and juvenile adjudications of Robert Hall, a witness at trial. On May 24,

1999, a hearing was held in the PCRA court before Judge Furber to address the arguments raised in Hogan's amended petition. Judge Furber denied and dismissed Hogan's amended petition on August 2, 1999.

Hogan filed a pro se petition for reconsideration on December 20, 2000. Several months later a second PCRA petition, dated April 9, 2001, was filed in which Hogan asserted that he never received notice of the denial of his first PCRA petition from either his appointed counsel or from the PCRA court and, therefore, he was never advised of his right to appeal. A few weeks later, on April 24, 2001, the PCRA court denied Hogan's pro se petition for reconsideration. Thereafter Hogan appealed to the Pennsylvania Superior Court, which affirmed the denial of PCRA relief on April 2, 2002. On October 22, 2002, the Pennsylvania Supreme Court denied Hogan's petition for allowance of appeal declining to review his PCRA claims.

On December 30, 2002, more than two months later (sixty-nine days to be precise), Hogan filed a third PCRA petition asserting layered ineffective assistance of counsel. Specifically, Hogan argued that trial counsel and PCRA counsel rendered ineffective assistance of counsel for failing to raise the defense of voluntary intoxication. On January 7, 2003, the PCRA court dismissed Hogan's third PCRA petition as untimely.

Hogan appealed to the Pennsylvania Superior Court and on December 31, 2003 the Superior Court affirmed the dismissal.

Hogan then filed the instant petition for writ of habeas corpus under 28 U.S.C. § 2254 on February 23, 2004 at the earliest.¹ In his habeas petition, Hogan asserts: (1) a violation of his Fourteenth Amendment rights based on the state courts' failure to address his claims of layered ineffective assistance of all prior counsel for failing to raise the defense of voluntary intoxication; and (2) a violation of his Sixth Amendment rights based on the ineffective assistance of all prior counsel for failing to raise the defense of voluntary intoxication.

The case was referred to Magistrate Judge Peter B. Scuderi for a Report and Recommendation. On June 7, 2004, Magistrate Judge Scuderi issued a Report and Recommendation recommending dismissal of the instant petition as untimely. After the Court granted Hogan an enlargement of time to file objections to the Report and Recommendation, Hogan filed objections on February 3, 2005. In his objections, Hogan does

¹ The "prison mailbox rule" provides that "a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Hogan signed his habeas petition on February 23, 2004, although it was not filed with this Court until March 4, 2004. Assuming he delivered the petition to prison authorities when he signed it, the earliest Hogan could have filed his habeas petition is February 23, 2004.

not dispute that his federal habeas petition is untimely. He argues, however, that he is entitled to equitable tolling of the applicable statute of limitations.

II. DISCUSSION

A. Timeliness of Hogan's Petition

The Court must analyze Hogan's habeas petition under the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. 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 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 a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” is not to be counted in calculation of the one-year period. Id. § 2244(d)(2) (emphasis added).

Here, the Pennsylvania Supreme Court affirmed Hogan’s conviction on April 28, 1997. His conviction became final on July 27, 1997 upon expiration of the ninety day period during which Hogan could have filed a petition for writ of certiorari in the United States Supreme Court. See Sup. Ct. R. 13. Because Hogan has not argued that any of the exceptions to the limitations period set forth in 28 U.S.C. § 2244(d)(1)(B)-(D) apply, the one-year statute of limitations period should have begun to run from that date. However, Hogan had already filed a proper state PCRA petition on June 10, 1997, which effectively tolled the statute of limitations period. It remained tolled until October 22, 2002 when the Pennsylvania Supreme Court denied allocatur declining to review Hogan’s first PCRA petition.² Therefore, Hogan had until October 21, 2003 to file a petition for writ of habeas corpus, or alternatively another properly

² Notably, the statutory period began to run immediately following denial of allocatur and not following the ninety day period thereafter during which Hogan could have filed a petition for writ of certiorari in the United States Supreme Court. The Third Circuit has held that the ninety day period following denial of state post-conviction relief does not toll the one-year limitations period. Stokes v. District Attorney of the County of Phila., 247 F.3d 539, 543 (3d Cir. 2001).

filed PCRA petition that would have tolled the statute of limitations.

The instant habeas petition was not filed until February 23, 2004 at the earliest, which was 125 days after the one-year statute of limitations period expired. It is true that Hogan filed a second PCRA petition on April 9, 2001 and a third PCRA petition on December 30, 2002, well before expiration of the statutory period. These petitions, however, did not have the effect of tolling the statute of limitations period. While it appears that his second PCRA petition has never been ruled on, Hogan's objective in filing that petition was to have his right to appeal his first PCRA petition reinstated based on his belief at the time that his appellate rights had expired by operation of law. The second petition was mooted, however, as Hogan was permitted to pursue, and in fact did pursue, an appeal of the denial of his first PCRA petition following denial of his motion for reconsideration on April 24, 2001. With respect to Hogan's third PCRA petition, this petition was dismissed by the PCRA court as untimely, ergo, it was not "properly filed," ergo, it did not toll the statute of limitations period. See Pace v. DiGuglielmo, 125 S.Ct. 1807, 1814 (2005) (holding that because "time limits, no matter their form, are 'filing' conditions," where a state court rejects a petitioner's PCRA petition as untimely, it is not "properly filed" for purposes of statutory

tolling under § 2244(d)(2)). Accordingly, Hogan's federal habeas petition was untimely.

B. Equitable Tolling

Hogan asks the Court to equitably toll the statute of limitations to permit consideration of the merits of his habeas petition. The Third Circuit has held that AEDPA's one-year statute of limitations period is subject to equitable tolling.³ Lacava v. Kyler, 398 F.3d 271, 275 (3d Cir. 2005) (citing Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617 (3d Cir. 1998)). 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. (quotation marks and citations omitted). It is appropriate only when a petitioner establishes: "(1) that 'the petitioner has in some extraordinary way been prevented from asserting his or her rights;' and (2) that the petitioner has shown that 'he or she exercised reasonable diligence in investigating and bringing [the] claims.'" Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003) (quoting Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001)).

³ The Supreme Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." Pace, 125 S.Ct. at 1814 n.8.

Hogan asserts that there are extraordinary circumstances in the instant matter that have prevented him from asserting his federal rights until now. Specifically, Hogan argues that he first learned that his initial PCRA petition was denied in March 2001, more than twenty months after August 2, 1999, the date on which Judge Furber denied it. Consequently, Hogan argues, it became necessary for him to file a second PCRA petition on April 9, 2001⁴ to reinstate his appellate rights, which Hogan believed had expired by operation of law. Though not explained in his objections, it is presumably Hogan's position that the fact that this second PCRA petition was never ruled on by the state courts warrants tolling of the statute of limitations.⁵ This argument is unavailing. As stated above, Hogan's second PCRA petition was mooted because following the PCRA court's denial of his first PCRA petition on August 2, 1999 and subsequent denial of Hogan's pro se motion for reconsideration on April 24, 2001, Hogan pursued an appeal in the Pennsylvania Superior Court and thereafter filed a petition for

⁴ In his objections, Hogan stated that he filed his second PCRA petition on August 9, 2001. However, the PCRA petition Hogan is referring to was date stamped on April 9, 2001.

⁵ "[A] habeas corpus petition prepared by a prisoner without the aid of counsel may be inartfully drawn and should therefore be read 'with a measure of tolerance.'" United States ex rel. Montgomery v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969) (quoting Wade v. Yeager, 377 F.2d 841, 846 (3d Cir. 1967)). "It is the policy of the courts to give a liberal construction to pro se habeas petitions." Id.

allowance of appeal in the Pennsylvania Supreme Court.

Therefore, a decision on Hogan's second PCRA petition was never necessary as Hogan retained his appellate rights.

Further, there is no evidence that the state courts' failure to address Hogan's second PCRA petition prejudiced him in any way. Once his motion for reconsideration was denied, he exhausted the appeal of his first PCRA petition, filed a third PCRA petition eight days after denial of allocatur asserting a layered ineffective assistance of counsel claim, and filed the instant federal habeas petition less than two months after the Pennsylvania Superior Court affirmed dismissal of the third PCRA petition. Tracking this chronology of events closely reveals no evidence of a delay in Hogan's pursuit of collateral relief in either state or federal court caused by the state courts' failure to rule on Hogan's second PCRA petition.

Though not explicitly raised, Hogan's objections could be construed to support an additional argument by Hogan that he is entitled to equitable tolling for the time during which his untimely third PCRA petition was pending in the state courts. This argument, however, would fail because it should have been clear to Hogan that his petition was untimely and that "under Pennsylvania law, an ineffective assistance of counsel claim will not excuse an untimely PCRA petition." Shaird v. Wolf, No. Civ.A.03-18, 2004 WL 555413, at *4 (E.D. Pa. Feb. 26, 2004) (citing Commonwealth v. Pursell, 749 A.2d 911, 916 (Pa. 2000)).

Moreover, the Third Circuit has held 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 at 244. In other words, “ineffective assistance of counsel claims are not considered ‘extraordinary’ enough to equitably toll the habeas limitations.” Shaird, 2004 WL 555413, at *6 (citing Fahy, 240 F.3d at 244).

Even if this Court accepted Hogan’s argument that there were extraordinary circumstances that prevented him from asserting his federal rights earlier, Hogan would not be entitled to relief because he has not established the requisite diligence. As to Hogan’s argument that the state courts’ failure to address his second PCRA petition is an extraordinary circumstance that prevented him from filing his federal habeas petition sooner, Hogan presented no evidence that he ever inquired into the status of that petition at any time after it was filed. As to the argument raised by Hogan in his objections that the filing of his third PCRA petition on December 30, 2002 asserting layered ineffective assistance of trial and PCRA counsel demonstrates his due diligence, Hogan should have been aware that his third PCRA petition was untimely. Moreover, Hogan’s obligation to exercise reasonable diligence “does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that

exists during the period appellant is exhausting state court remedies as well." Lacava, 398 F.3d at 277.

In the end, Hogan has not established that the instant matter involves extraordinary circumstances which would make the rigid application of the limitation period unfair or that he has exercised the requisite diligence in bringing his claim. Therefore, Hogan is not entitled to equitable tolling of AEDPA's one-year statute of limitations period.

III. CONCLUSION

Hogan's claim is barred by the one-year statute of limitations set forth under AEDPA. Moreover, there is no basis for equitable tolling in this case. Therefore, the instant petition for writ of habeas corpus is dismissed as untimely.

An appropriate order follows.

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ORDER

AND NOW, this **31st** day of **May 2005**, upon consideration of the petition for writ of habeas corpus (doc. no. 1), a response to the petition for writ of habeas corpus (doc. no. 4), Magistrate Judge Scuderi's Report and Recommendation (doc. no. 6), and Hogan's objections to the Report and Recommendation (doc. no. 12), it is hereby **ORDERED** that:

1. Petitioner's objections to the Report and Recommendation of Magistrate Judge Scuderi (doc. no. 12) are **OVERRULED**;
2. The Report and Recommendation (doc. no. 6) is **APPROVED** and **ADOPTED**;
3. The instant petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (doc. no. 1), is **DISMISSED**, and the case shall be marked **CLOSED**; and

4. There is no probable cause to issue a Certificate of Appealability.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.