

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

LARRY TURNER,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	NO. 04-5784
FRANK D. GILLIS, ET AL.	:	
Respondents.	:	

Diamond, J.

November 1, 2005

MEMORANDUM

Larry Turner, acting *pro se*, petitions for a writ of habeas corpus, seeking relief from his state court convictions. 28 U.S.C. § 2254. The Magistrate Judge has recommended that I deny the writ. Turner objects to the Magistrate’s conclusion that his Petition was untimely. I overrule the objections and deny the writ.

BACKGROUND

In 1997, a jury convicted Turner of second-degree murder, conspiracy, and robbery for his role as a getaway driver in a July 1, 1993 shooting. *Petitioner’s Memorandum of Law in Support of Petition for Writ of Habeas Corpus* at 1; *Resp. to Petition for Writ of Habeas Corpus* , at 1. The state trial court sentenced Turner to life imprisonment and a consecutive 12 to 24 month sentence for conspiracy. *Petitioner’s Memorandum* at 2. On direct appeal, the Pennsylvania Superior Court affirmed. *Commonwealth v. Turner* 742 A.2d 213 (Pa. Super. Ct. 1999) (table). On January 28, 2000, the Pennsylvania Supreme Court declined *allocatur*; Turner did not petition for a writ of *certiorari*. *Commonwealth v. Turner* 749 A.2d 470 (Pa. 2000) (table); *Resp.*

to *Petition* at 2.

On January 29, 2001, Turner sought relief in state court under the Pennsylvania Post Conviction Relief Act. See 42 Pa. Cons. Stat. §§ 9541-46; *Petitioner's Memorandum* at 2. The PCRA Court denied Turner's petition on September 10, 2001. Id. The Superior Court vacated and remanded, instructing the PCRA Court to hold an evidentiary hearing on Turner's allegations that his trial counsel was ineffective. *Commonwealth v. Turner* No. 2443 EDA 2001 (Pa. Super. Ct. July 23, 2002). On November 13, 2002, the PCRA Court held the evidentiary hearing, at which Turner's post-conviction counsel elected not to call trial counsel to testify, stating that she believed his testimony would help only the Commonwealth. *Petitioner's Memorandum* at 4; *Resp. to Petition* at 2. The PCRA Court subsequently denied relief and the Superior Court affirmed. *Commonwealth v. Turner* 1106 EDA 2003 (Pa. Super. Ct. Mar. 30, 2004). On August 27, 2004, the Supreme Court of Pennsylvania again denied *allocatur*. *Commonwealth v. Turner*, 857 A.2d 679 (Pa. 2004) (table).

Turner filed this petition on December 12, 2004 by giving it to prison officials. *Petitioner's Memorandum* at 5; see *Burns v. Morton*, 134 F.2d 109, 113 (3d Cir. 1998) (deeming habeas petitions filed when given to prison officials, not when received by the Court). Turner asserted prosecutorial misconduct and ineffective assistance of trial counsel.

On April 28, 2005, I referred Turner's petition to the Honorable David R. Strawbridge, United States Magistrate Judge. On July 1, 2005, Judge Strawbridge issued a Report and Recommendation, concluding that the petition was untimely under 28 U.S.C. §2244(d) and controlling Third Circuit authority. See Report and Recommendation at 9. Judge Strawbridge also concluded that Turner is not entitled to equitable tolling of the limitation period. Id.

Accordingly, he recommended that I deny habeas relief.

On August 16, 2005, Petitioner objected to Judge Strawbridge's Report and Recommendation, arguing that the Magistrate Judge had "wrongly applied" Third Circuit case law on timeliness and "mistaken[ly] conclud[ed]" that the doctrine of equitable tolling did not apply. See Petitioner's Objections at 3, 5.

STANDARD OF REVIEW

The extent of my review of a Magistrate's Report is entirely committed to my discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa., 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). I must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). I may "accept, reject or modify, in whole or in part, the [M]agistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001). I am obligated to construe Turner's *pro se* contentions liberally to ensure the maximum permissible review of the claims brought. See, e.g., Hunterson v. DiSabato, 308 F.3d 236, 243 (3d Cir. 2002).

DISCUSSION

Congress has created a one-year limitations period governing habeas applications. 28 U.S.C. §2244(d)(1). Congress has also provided that the limitations clock does not continue to run while "a properly filed application for State post-conviction review or other collateral review

. . . is pending.” 28 U.S.C. §2244(d)(2).

As Judge Strawbridge fully set out in his admirable opinion, the one year limitations period began on April 28, 2000 (when Turner’s time to seek *certiorari* expired), and continued to run for 277 days, until January 29, 2001 (when he filed his PCRA petition). The one-year limitations period began to run again on August 28, 2004 (the day after the Pennsylvania Supreme Court denied *allocatur*), and so expired on November 23, 2004. Turner did not file his habeas petition until December 12, 2004 – some three weeks after the expiration of the one-year period.

Turner argues that: 1) Judge Strawbridge should have excluded 90 days from his calculation, beginning after the August 27, 2004 denial of *allocatur*; and 2) he is entitled to equitable tolling of the running of the limitations period. I disagree.

I. Turner is not Entitled to a 90-Day Tolling of the Limitations Period Following the Second Denial of Allocatur.

Turner argues that the Magistrate Judge improperly included the 90 days following the Pennsylvania Supreme Court’s August 27, 2004 denial of *allocatur*. See Petitioner’s Objections at 5-7. The Magistrate properly followed the Third Circuit’s holding that the tolling ends when the Pennsylvania Supreme Court denies *allocatur* of post-conviction relief, not 90 days later. Stokes v. District Att’y of County of Phila., 247 F.3d 593 (3d Cir. 2001). The Sixth Circuit’s contrary rule does not control here, Turner’s arguments notwithstanding. See Abela v. Martin, 348 F.3d 164 (6th Cir. 2003) (en banc) (suspending the limitations clock during post-conviction review, but acknowledging that the Third Circuit and numerous other circuit courts disagree).

Nor does the Supreme Court's denial of *certiorari* in Abela "overrule" the Third Circuit's opinion in Stokes. See Stebbing v. Maryland, 469 U.S. 900, 907 (1984) ("It is axiomatic that denials of writs of *certiorari* have no precedential value."). In these circumstances, Judge Strawbridge ruled correctly. Accordingly, I adopt his conclusion that Turner's writ is untimely.

II. Turner is not Entitled to Equitable Tolling.

In the alternative, Turner argues that he is entitled to equitable tolling because the Pennsylvania Supreme Court's Prothonotary and Turner's own post-conviction counsel delayed Turner's learning of the denial of post-conviction relief. See *Petitioner's Objections* at 4.

The Third Circuit has held that Turner must meet a high standard to benefit from equitable tolling. "Courts must be sparing in their use of equitable tolling," because the "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239-40 (3d Cir. 1999) (quoting Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984)). Thus, the Third Circuit has declared that equitable tolling is appropriate if:

(1) the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir.1999).

Turner argues that the purported delay in notifying him of the PCRA denial is an "extraordinary" circumstance that excuses the timely filing of his habeas petition. The Third Circuit's opinion in LaCava v. Kyler forecloses his claim, however. See 398 F.3d 271, 276 (3d

Cir. 2005). As counsel represented Turner during his state-court collateral proceedings, Turner “was not entitled to personal notice of the Pennsylvania Supreme Court’s order.” Id.; Pa. R. App. P. 1123(a). Likewise, any failure by counsel “to timely notify him of the state court’s disposition” is not an extraordinary circumstance. LaCava at 276. Turner makes no allegation of an “affirmative misrepresentation” by his counsel, as required by the language from Seitzinger v. Reading Hosp. and Med. Ctr. that he cites. See 165 F.3d 236, 242 (3d Cir. 1999); *Petitioner’s Objections* at 3.

Even if Turner had identified an extraordinary circumstance, however, he has also failed to demonstrate that he “exercised reasonable diligence” in trying to overcome those circumstances. Miller v. New Jersey State Dep’t of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998). Turner learned of the Pennsylvania Supreme Court’s *allocatur* denial on October 8, 2004. See Exhibit B to Petitioner’s Memorandum. The limitations period did not expire until November 23, 2004, more than six weeks later. Turner thus had six weeks timely to petition for a writ of habeas corpus. See Brown v. Shannon, 322 F.3d 768, 774 (3d Cir. 2003) (“Significantly, there was nearly one month left in the limitations period -- time enough for [petitioner], acting with reasonable diligence, to prepare and file at least a basic pro se habeas petition”) (emphasis added).

Moreover, in contrast to several cases in which equitable tolling has been granted, Turner did not demonstrate diligence by contacting his counsel or the court during the time when the outcome of his appeal remained uncertain. See Seitzinger at 241; Davis v. Lavan, 2004 U.S. Dist. LEXIS 7035 (E.D. Pa. 2004) (approving and adopting 2004 U.S. Dist. LEXIS 7100) (rejecting request for equitable tolling where “[p]etitioner apparently never checked the status of his appeal

on his own.”); see also Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004) (reasonable diligence not exercised where petitioner failed to ascertain status of his appeal from counsel). Turner could have contacted the court or his counsel at any time and learned that his appeal had been denied. Absent such efforts, he is not entitled to equitable tolling.

In sum, Turner has presented no valid reason to overcome the one-year limitations period that bars his petition. Accordingly, I overrule his objections, and adopt the Magistrate’s Report and Recommendation.

An appropriate order follows.

Paul S. Diamond, J.