

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

RONALD BOOKER, : CIVIL ACTION
 : NO. 04-2906
Petitioner, :
 :
v. :
 :
LOUIS FOLINO, ET AL., :
 :
Respondents. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

December 15, 2005

Before the Court is a Report and Recommendation from Magistrate Judge Carol Sandra Moore Wells recommending that pro se Petitioner, Ronald Booker's, petition for writ of habeas corpus under 28 U.S.C. § 2254 be denied and dismissed as untimely. For the reasons that follow, the Court will approve and adopt the Report and Recommendation.

I. BACKGROUND

On May 23, 2000, following a jury trial in the Court of Common Pleas for Montgomery County over which the Honorable William R. Carpenter presided, Petitioner was convicted of robbery, theft, criminal conspiracy, recklessly endangering another person, terroristic threats, false imprisonment, possessing a concealed weapon, and carrying firearms without a license. On October 23, 2000, Judge Carpenter sentenced Petitioner to seven and one-half to twenty years imprisonment.

Petitioner timely appealed his conviction, and on June 15, 2001, the Pennsylvania Superior Court affirmed the conviction. Petitioner did not file a direct appeal to the Pennsylvania Supreme Court.

On November 12, 2002, Petitioner filed a pro se petition for relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541, et seq. The PCRA court then appointed counsel, who filed an amended petition for relief on January 29, 2003. The amended PCRA petition asserted that appellate counsel was ineffective for: (1) failing to file an appeal to the Supreme Court of Pennsylvania; (2) failing to argue that defendant's identification was tainted; and (3) failing to argue that the jury panel improperly excluded black registered voters from Montgomery County. Appointed counsel also filed a petition to withdraw, stating that he had concluded that Petitioner's allegations had no arguable merit, and that he had advised defendant of the same in a "no-merit letter." On February 5, 2003, the PCRA court issued an order notifying Petitioner of its intent to dismiss his PCRA petition without a hearing. Petitioner responded to this order on February 21, 2003.

After an independent review of the record, the PCRA court granted Petitioner's counsel leave to withdraw, and dismissed the petition as meritless for the reasons stated in

appointed counsel's no-merit letter.¹ Petitioner appealed this decision, and on December 4, 2003, the Superior Court of Pennsylvania affirmed the dismissal on procedural grounds. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on May 18, 2004.

On July 1, 2004, Petitioner filed the instant petition for writ of habeas corpus under 28 U.S.C. § 2254. This petition asserts that: (1) The trial court erred by admitting testimony of a gun observed weeks after the incident but not in defendant's possession or comporting with the description of the weapon used; and (2) the post-conviction court erred by determining defendant's PCRA petition to be untimely, thereby denying him access to the courts; (3) trial counsel was ineffective by failing to impeach defendant's sole accuser with records which would suggest state coercion or tampering with said witness; (4) appellate counsel was ineffective in failing to argue the tainted identification by the sole accuser; and (5) post trial counsel was ineffective in failing to argue the insufficiency of the evidence (given the above failures).

The case was referred to Magistrate Judge Carol Sandra Moore Wells for a Report and Recommendation. On March 17, 2005,

¹The no-merit letter contained appointed counsel's conclusions that the PCRA court did not have jurisdiction to consider the merits of Petitioner's claims because his PCRA petition was untimely, and that Petitioner's claims were substantively meritless as well.

Magistrate Judge Wells issued a Report and Recommendation recommending dismissal of the instant petition as untimely.² On April 11, 2005, Petitioner filed objections to the Report and Recommendation. Petitioner raised nine objections to the Report and Recommendation, seven of which related to the determination of his PCRA petition as untimely, and two of which related to the merits of his habeas petition. The Court reviews de novo the specific portions of the Report to which objections are made. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

A. The Timeliness of the Instant Petition

The Court must analyze Petitioner'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

² Magistrate Judge Wells addressed Petitioner's substantive claims as well, and found them to be meritless.

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 Superior Court affirmed Petitioner's conviction on June 15, 2001. Petitioner did not file an appeal to the Pennsylvania Supreme Court.³ Petitioner's conviction therefore became final on July 16, 2001, upon expiration of the thirty day period during which Petitioner could have filed a petition with the Pennsylvania Supreme Court. Accordingly, Petitioner had until July 16, 2002 to file either a timely petition for writ of habeas corpus or a timely PCRA

³ Petitioner argues that he did not receive notice of the Superior Court's denial of his appeal until December 16, 2001, six months after the appeal was denied. Petitioner contends his appellate counsel did not inform him of the denial, and that this late notice precluded the filing of a timely appeal to the Pennsylvania Supreme Court.

petition. See 28 U.S.C. 2244(d)(1); 42 Pa. Cons. Stat. Ann. § 9545(b).

Petitioner filed his PCRA petition on November 12, 2002, and the PCRA court concluded that the petition was untimely and without merit. The Superior Court affirmed the dismissal on procedural grounds. Unless Petitioner qualified for one of the exceptions to the PCRA's one-year filing requirement, his petition was late, and thus not "properly filed" for the purpose of tolling the AEDPA time limitation. See Brown v. Shannon, 322 F.3d 768, 776 n.5 (3d Cir. 2003).

In order to be excused from the PCRA's one-year filing requirement, a petitioner must prove one of the following:

- (1) the failure to raise the claim earlier was due to the interference of government officials;
- (2) the claim is predicated on facts that were unknown to the petitioner and could not be discovered with due diligence; or
- (3) the asserted right was recognized by the United States Supreme Court or the Pennsylvania Supreme Court as a constitutional right after the petitioner's case was decided and the right is to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(I)-(iii). The PCRA court found that Petitioner in this case did not qualify for any of the exceptions, and that his petition was therefore untimely. After analyzing his claims, Magistrate Judge Wells also concluded that none of the exceptions applied and Petitioner's PCRA petition was therefore not properly filed. Petitioner, however, argues that the statute of limitations should be equitably tolled.

B. Equitable Tolling

Petitioner asks the Court to equitably toll the statute of limitations for two main reasons: (1) he argues that he did not receive notice of the Superior Court's denial of his appeal until December 16, 2001, six months after the appeal was denied, and that he did not therefore have a full year in which to file a PCRA petition; and (2) he argues that he did file a PCRA petition in June 2002 (hence within the one-year limitation), albeit in the wrong forum.⁴ The Third Circuit has held that AEDPA's one-year statute of limitations period is subject to equitable tolling.⁵ 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:

⁴ Petitioner raised nine objections to the Report and Recommendation, seven of which relate to the determination of his PCRA petition as untimely. Of these seven, four concerned the petition filed in the wrong forum, and three concerned his contention that he did not learn of the Superior Court's denial of his appeal until six months later.

⁵ The Supreme Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." Pace v. DiGuiglielmo, 125 S.Ct. 1807, 1814 n.8 (2005).

"(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)).

1. Late notice of the denial of his appeal

Petitioner contends he did not learn of the Superior Court's denial of his appeal until December 16, 2001, six months after the denial, because his appellate counsel failed to communicate the information to him. This allegation does not rise to the extraordinary circumstances necessary for equitable tolling. First, 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." LaCava v. Kyler, 398 F.3d 271, 276 (3d Cir. 2005) (quoting Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003)). Second, when the Petitioner was made aware of the Superior Court's denial, he still had seven months (until July 16, 2002) to file his PCRA petition.

Petitioner objects that the Report and Recommendation did not address his assertion that he had been denied access to Pennsylvania law books while incarcerated in Delaware from

approximately June 5, 2001 until June 24, 2002, and was therefore unaware of the PCRA's time requirements. This contention is supported in Petitioner's Brief in Support of his habeas petition with the following sentence: "In Delaware, defendant had no access to ANY Pennsylvania law references, was totally unlearned in the law and really had no idea how next to proceed." Pet'r Br. in Supp. 3. A petitioner must offer specific evidence to show that denial of access to the courts should constitute a basis for equitable tolling of the AEDPA time limitation. Stevenson v. Palakovich, 2005 WL 1330335, at *7 (E.D.Pa. 2005). Here, the allegation that Petitioner "had no access" to Pennsylvania law does not provide enough evidence for the Court to conclude Petitioner was denied access to the courts, and that this caused his late filing.

2. PCRA petition filed in the wrong forum

Petitioner also states that on or about June 7, 2002, he mailed a "Motion for Post Conviction Relief" to the Supreme Court of Pennsylvania. Petitioner argues that the Pennsylvania Supreme Court should have forwarded the motion to the correct forum, and because the motion mailed to the wrong forum was an attempt to protect his rights and was filed within the one-year PCRA limitation, the one-year statute of limitations should be tolled.

The Report and Recommendation notes that Petitioner's

claim that his motion should have been forwarded to the PCRA court amounts to a claim of governmental interference, and could therefore constitute a basis for tolling the one-year PCRA limitation. However, the Report also notes that Petitioner offered no evidence that he had mailed the June 2002 petition; "as the Superior Court noted, Petitioner provided nothing other than his self-serving assertions that he filed such a document."⁶ R&R, at 9 n.7.

Petitioner objects that the Report and Recommendation does not note that his November 2002 petition was subsequent to his June 2002 petition, and that his erroneously filed motion should have been forwarded to the correct court. However, as the Report and Recommendation explains, Petitioner's own assertions are not sufficient to permit a court to equitably toll a statute of limitations. Petitioner also objects that he has provided all of the evidence within his power to gather, and that he has written to the Delaware facility in which he was incarcerated when the petition was allegedly mailed for evidence of the mailing, but has been ignored.

To qualify for equitable tolling of the AEDPA, it is the petitioner's burden to show that he has pursued his rights

⁶ In affirming the PCRA court's dismissal of the petition as untimely, the Pennsylvania Superior Court wrote that "no evidence of record exists to support" Petitioner's allegation of mailing the June 2002 petition. R&R, at 8.

diligently, and that he has been impeded by extraordinary circumstances. See Pace v. DiGuiglielmo, 125 S.Ct. 1807, 1814 (2005). Petitioner here has simply not offered evidence such that the Court can grant equitable tolling. Petitioner's PCRA petition was untimely, and therefore not properly filed for the purpose of tolling AEDPA's one-year statute of limitations.

C. Merits of the Petition

Although Magistrate Judge Wells found that the petition here should be dismissed on procedural grounds, she also found that "[i]f, notwithstanding Petitioner's default, his claims were considered, they would fail on their merits." R&R, at 9. Petitioner argues that the trial court erred by admitting immaterial and prejudicial testimony concerning a handgun into evidence. The disputed testimony was offered to show Petitioner had access to a gun at the time of the crime, and went to establishing one element of one crime charged. The disputed testimony was supplemented by the victim's testimony that a weapon had been used during the crime. The Report and Recommendation concludes that the admission of the disputed testimony had no "substantial and injurious effect or influence in determining the jury's verdict," Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 898 (3d Cir. 1999), and therefore was harmless error even if admitted erroneously. R&R, at 10.

Petitioner objects that the Magistrate Judge's characterization of the testimony involved was incorrect on two grounds: (1) the color of the gun; and (2) the individual to whom the gun was given. These objections do not change the Magistrate Judge's assessment that the claim here is not cognizable on federal habeas review. Regardless, the Report and Recommendation characterizes the testimony correctly. The Report states, "Mr. Willie Miller testified that he found a silver plated pistol," R&R, at 10 n.8. Mr. Miller's actual testimony was that he found a "nine-millimeter, silver-plated, black handle weapon." Ans. Vol. II, Ex. I. 296. The Report states, "Mrs. Gail Tarbar testified that she ... returned [the silver plated pistol] to Petitioner," R&R, at 10 n.8, and her actual testimony was that she gave the pistol to her daughter and to Petitioner when they visited her together. Ans. Vol. II, Ex. I. 303.

As explained in the Report and Recommendation, the admission of disputed testimony here does not provide a basis for the Court to overturn the state court's adjudication of the issue. See 28 U.S.C. § 2254(d).

Petitioner also objects to the Report and Recommendation's conclusion that the denial of his PCRA petition on procedural grounds does not raise a constitutional issue for the purpose of federal habeas review. This objection has no merit. Any errors that took place in a petitioner's previous

collateral proceedings do not have a place in the federal habeas review of petitioner's case. See Lambert v. Blackwell, 2003 WL 1718511, at *35-36 (E.D.Pa. 2003), aff'd, 387 F.3d 210 (3d Cir. 2004) (citing Abu Jamal v. Horn, 2001 WL 1609690 (E.D.Pa. 2001)).

IV. CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of habeas corpus is dismissed. An appropriate order follows.

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O R D E R

AND NOW, this **15th** day of **December 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 Wells' Report and Recommendation (doc. no. 6), and Petitioner's objections to the Report and Recommendation (doc. no. 7), it is hereby **ORDERED** that:

1. Petitioner's objections to the Report and Recommendation of Magistrate Judge Wells (doc. no. 7) 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.