

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

CARMINE A. LAURO, SR.	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	
	:	
GEORGE A. PATRICK, et al.	:	NO. 04-4102
	:	
Respondents.	:	

MEMORANDUM

Baylson, J.

April 26, 2006

I. Introduction

Petitioner Carmine A. Lauro, Sr. (“Petitioner” or “Lauro”) filed a *pro se* Petition for Habeas Corpus in this Court pursuant to 28 U.S.C. § 2254 on August 23, 2004 and a Motion to Stay Proceedings on September 13, 2004. This Court referred the case to Chief Magistrate Judge M. Faith Angell (“the Magistrate Judge”) on September 20, 2004, and on June 17, 2005, the Magistrate Judge issued a Report and Recommendation (“R&R”) pursuant to 28 U.S.C. § 636(b)(1)(C). The Court approved and adopted the R&R on December 29, 2005, dismissing the petition as time-barred under 28 U.S.C. § 2244(d)(1). See Lauro v. Patrick, 2005 WL 3557832 (E.D. Pa. Dec. 29, 2005). Petitioner filed a Motion for Reconsideration on January 17, 2006 and also submitted a supplemental exhibit with the Court on January 25, 2006 (Doc. Nos. 16 and 17). The Respondent sent a letter to the Court (copying Petitioner) on April 5, 2006 setting forth its position on the Motion for Reconsideration and providing an update on the progress of Petitioner’s state post-conviction proceedings. Petitioner filed a reply dated April 11, 2006 taking issue with several of the statements contained in Respondent’s letter.

In its December 29th Memorandum and Order denying the habeas petition, the Court concluded that there should be no stay of the federal habeas proceedings during the pendency of Petitioner's appeal of the denial of his second PCRA petition. The Court held that "whether or not a notice of appeal was or was not timely filed in state court has no bearing on the timeliness of the federal habeas petition." Id. at *2. Finally, the Court concluded that Petitioner did not present, and the record did not support, any grounds for equitable tolling. Id. All other background information in this case as well as its procedural history are provided in the Court's Memorandum and Order of December 29, 2005 and will not be repeated in this opinion.

II. Summary of Petitioner's Motion for Reconsideration

Petitioner's Motion for Reconsideration, though not entirely clear on its face, appears to argue for equitable tolling based on the delay in turning over various documents by his direct appeal attorney. Petitioner alleges that the attorney refused to provide attorney files and trial transcripts until all legal bills were settled. Petitioner contends that he was unable to prepare his first PCRA petition without these documents, and the delay in filing for state post-conviction relief ultimately prevented him from meeting the one-year statute of limitations prescribed by AEDPA. Under AEDPA, a state prisoner seeking federal habeas relief must file his petition within one year from the date on which the petitioner's judgment of conviction becomes final. See 28 U.S.C § 2244(d)(1).

This Court previously denied Petitioner's request to stay the federal habeas proceedings during the pendency of the proceedings concerning his second PCRA petition because that petition was not timely and was therefore not "properly filed" within the meaning of § 2244(d)(2). Petitioner argues, however, that the Superior Court of Pennsylvania has

subsequently agreed to consider an appeal of the denial of his second PCRA petition and that the federal habeas proceedings should be stayed in the interim. The Superior Court issued an order dated March 7, 2006 stating that Lauro's "Petition for Remand and Application for Relief" was denied without prejudice and that he is thus free to reassert the arguments therein in his Appellant's Brief due April 7, 2006. See Commonwealth v. Lauro, Order (Pa. Super. Ct. Mar. 7, 2006).

III. Legal Standard

When deciding a motion for reconsideration, a court may alter or amend a judgment "if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . .; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 676 (3d Cir. 1999).

Reconsideration is an extraordinary remedy, made available to correct manifest errors of law or fact, or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Mere dissatisfaction with the Court's ruling is not the basis for such a reconsideration, nor can such a motion be used as a means to put forth additional arguments which could have been made but which the party neglected to make. Waye v. First Citizen's Nat'l Bank, 846 F. Supp. 310, 314 (M.D. Pa.), aff'd, 31 F.3d 1175 (3d Cir. 1994).

IV. Discussion

Petitioner again makes various arguments concerning his second PCRA petition. Although the Superior Court of Pennsylvania has accepted briefing on the appeal of the denial of

Petitioner's second PCRA petition by the Court of Common Pleas for Delaware County, this Court believes that the state court appeal has no bearing on the timeliness of the instant federal habeas petition. Nonetheless, the pending appeal has prompted the Court, in an abundance of caution, to temporarily withhold judgment on the motion to reconsider its prior determination that the federal habeas petition was untimely.¹

Turning now to Petitioner's argument concerning the delay in filing his original PCRA petition, the Court will treat this as a request for reconsideration of its refusal to permit equitable tolling. First, Plaintiff wholly failed to make any argument on this issue in either his federal habeas petition or his objections to the R&R. As such, he may not use a motion for reconsideration to put forth completely new arguments which could have been made but which he neglected to make before the court ruled. Waye, 846 F. Supp. at 314 (holding that a motion to

¹ Although the one-year statute of limitations is tolled during the time a properly filed PCRA petition is pending in the state courts, see 28 U.S.C. § 2244(d)(2), in this case, Petitioner's second PCRA petition, filed August 25, 2004, most likely did not toll the statute of limitations because it was filed after the habeas statute of limitations expired on January 6, 2001. Petitioner, however, has attempted to invoke the exceptions to the one-year filing deadline for PCRA petitions. See 42 Pa. Cons. Stat. § 9545(b)(1)(i)–(iii) (providing an exception to the one-year filing period in cases where (1) a government official interferes with a presentation of a claim in violation of state or federal constitutions or laws, (2) the facts upon which a claim is predicated were unknown to the petitioner and he could not have ascertained them earlier, or (3) a right asserted was recognized by the Pennsylvania Supreme Court or United States Supreme Court after the one-year period expired and the right has been held to apply retroactively). If the Superior Court does in fact decide to invoke one of those exceptions, it is possible that his second PCRA petition could be considered timely and thus “properly filed.”

Nonetheless, turning to the timeliness of the habeas petition before this Court, it is more likely than not that any potential application of the § 9545(b)(1) exceptions is irrelevant to the instant analysis. Since the second PCRA petition was filed on August 25, 2004, two days *after* the federal petition, even if the Superior Court overruled the Common Pleas Court and decided that the second PCRA petition was somehow timely, it appears that there would be no statutory tolling of the federal habeas petition under 28 U.S.C. § 2244(d)(2). That is to say that if the federal petition was untimely when it was filed, then any tolling that would occur due to the pending second PCRA petition would be irrelevant because there was no time remaining on the AEDPA statute of limitations to be tolled — it had already expired. As mentioned in the accompanying text, however, the Court will withhold its final determination on the pending Motion for Reconsideration in light of the Superior Court's review of Petitioner's appeal.

dismiss is not to be used “to put forth additional arguments which could have been made but which the party neglected to make before judgment”).

Moreover, even if the Court were to address the substance of Petitioner’s arguments on the delay issue, the Motion would nonetheless be denied. Petitioner attempts to invoke equitable tolling based on a delay in filing his first PCRA petition allegedly caused by his direct appeal attorney’s failure to turn over documents. The Court finds this argument unavailing.

The Third Circuit has held that the one-year filing deadline contained in 28 U.S.C. § 2244(d)(1) can be subject to equitable tolling:

only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Miller v. N.J. Dep’t of Corr., 145 F.3d 616, 618 (3d Cir. 1998). Three sets of circumstances permitting equitable tolling are: “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 mistakenly in the wrong forum.” Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted). Looking at the facts of this case, there is no contention that the Respondents have actively misled the Petitioner, nor is there an argument that Petitioner timely asserted his rights but in the incorrect forum.

Considering the contention that a petitioner was in some extraordinary way prevented from asserting his rights, the Third Circuit has held that “[i]n a non-capital case, 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). “Attorney error is not a basis for equitable tolling in the Third Circuit because it

does not rise to the level of the extraordinary circumstances which must be present for equitable tolling to apply.” Manning v. Blaine, 2001 WL 1491066, at *2 (E.D. Pa. Nov. 20, 2001) (holding that equitable tolling was not warranted where attorney erroneously advised petitioner that he could file a timely federal habeas petition in the nine months after the AEDPA limitation period actually expired).

Petitioner contends that he is entitled to equitable tolling because his attorney refused to turn over documents relevant to his PCRA petition, causing him to lose a significant portion of the one-year filing period provided for federal habeas petitions under AEDPA. While attorney error is not grounds for equitable tolling in the Third Circuit, Petitioner appears to argue that the attorney conduct in this case amounts to intentional interference with his habeas petition. See Ex. to Pet’s Br. (“Documentary Evidence”) at 1.

Considering the timing of the various events, it is clear that Petitioner could have, at an earlier point in the proceedings, raised his objections to the delays allegedly caused by his direct appeal attorney. It is therefore difficult not to consider the pending Motion as a late-devised attempt to circumvent the one-year AEDPA filing period. In fact, allocatur review of Petitioner’s conviction was denied on August 24, 2003, and Petitioner waited until August 23, 2004 to file his federal habeas petition. R&R at 10. The Court refuses to find that it was a delay in the filing of the initial PCRA petition, rather than a misunderstanding or ignorance of the AEDPA deadline, which resulted in the late submission of Petitioner’s federal habeas petition. Because Petitioner waited almost exactly one calendar year from the denial of allocatur to file his federal petition, it is difficult to maintain that a delay in filing for state collateral relief resulted in the untimely federal habeas request. In fact, only if the PCRA petition was filed one day after his

state conviction became final would Lauro's federal habeas petition been timely under AEDPA. The Court finds that Petitioner's decision to wait 364 days before filing his federal petition, and not any delay allegedly caused by his direct appeal attorney, was the more significant factor in that petition being denied as time-barred under AEDPA.

The Court therefore concludes that even if the arguments concerning delay of the PCRA petition were not presented to the Court for the first time in the Motion for Reconsideration, Petitioner's attempt to invoke equitable tolling would fail. The fact that Petitioner used almost one entire year before filing his federal habeas petition ultimately dooms his attempt to explain its untimeliness as resulting from the alleged PCRA delays.

In addition to Petitioner's arguments concerning the delays, he also appears to attack the performance of his appointed attorney from the first PCRA petition. While Petitioner alleges that his direct appeal attorney withheld documents needed for seeking state post-conviction relief, he also registers specific complaints in the Motion for Reconsideration regarding the performance of his PCRA attorney.² See Pet's Br. at 4 (noting that "appointed counsel failed to call direct appeal attorney to attend the PCRA evidentiary hearing . . ."). It is unclear whether the allegations as to the actions of the PCRA attorney are another effort by the Petitioner to achieve equitable tolling of the AEDPA filing period, but the Court must again note that attorney error does not constitute an extraordinary circumstance required for invocation of that doctrine. See Fahy, 240 F.3d at 244. Thus, any attempt to show that the AEDPA statute of limitations is subject to equitable tolling based on the performance of Petitioner's PCRA attorney must fail.

² Although not mentioned in the portion of the Motion for Reconsideration concerning the delay issues, an examination of Lauro's federal habeas petition indicates that he was in fact represented by counsel during the course of his first PCRA petition. See Fed. Petition at 11.

V. Conclusion

The Court refuses to find that Petitioner has shown any intervening change in controlling law, new evidence not available when the Court previously denied the habeas petition, or clear error of law or fact which must be corrected to prevent manifest injustice, and therefore rejects Petitioner's attempt to invoke equitable tolling. Although it does not appear that Petitioner is entitled to any relief, the Court finds that the pending appeal before the Superior Court of Pennsylvania counsels in favor of a delay in the final determination of the Motion for Reconsideration. Because it is still a possibility, however remote, that statutory tolling could result from Petitioner's appeal, this Court will place the case in suspense until the state court proceedings have concluded.

An appropriate Order follows.

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	:	NO. 04-4102
GEORGE A. PATRICK, et al.	:	
Respondents.	:	

ORDER

AND NOW, this 26th day of April, 2006, upon careful consideration of Plaintiff's Motion for Reconsideration (Doc. No. 16), it is hereby ORDERED as follows:

1. All proceedings are stayed until further Order of the Court;
2. The case shall be transferred to the Civil Suspense File;
3. The Clerk of the Court shall mark this case closed for statistical purposes;
4. The Court shall retain jurisdiction over the case and the case shall be returned to the Court's active docket in 180 days or upon further order of the Court; and
5. The entry of this Order shall not prejudice the rights of the parties to this litigation.
6. Both parties are under the obligation to advise the Court of developments in the pending state court appeal and should contact the Court either after a ruling by the Superior Court of Pennsylvania or after six months, whichever comes sooner.

BY THE COURT:

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.