

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARCO VASQUEZ,)
)
 Petitioner,)
)
 v.) Civil Action No. 02-048-SLR
)
 THOMAS CARROLL, Warden,)
)
 Respondent.)

Marco Vasquez, Smyrna, Delaware. Petitioner, pro se.

Elizabeth R. McFarlan, Deputy Attorney General, Delaware
Department of Justice, Wilmington, Delaware. Counsel for
Respondent.

MEMORANDUM OPINION

Dated: October 29, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Marco Vasquez is an inmate at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for habeas corpus relief pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court concludes that petitioner's application is time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1). Accordingly, the court will dismiss the petition as untimely.

II. BACKGROUND

On October 14, 1998, petitioner pled guilty to one count of murder in the second degree and one count of possession of a firearm during the commission of a felony. (D.I. 10) On December 17, 1998, the Delaware Superior Court sentenced petitioner to twenty years and six months of imprisonment. (Id.) Petitioner did not appeal his conviction or sentence to the Delaware Supreme Court.

On February 10, 1999, petitioner filed a motion for reduction of sentence in Superior Court. (Id.) On March 3, 1999, that motion was denied. (Id.) Petitioner did not appeal the denial of his motion for reduction of sentence to the Delaware Supreme Court. On December 1, 2000, petitioner filed for a writ of habeas corpus in Superior Court, which was denied on December 7, 2000. (Id.) On December 17, 2000, petitioner

filed a motion for relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. (Id.) This motion was summarily dismissed pursuant to Rule 61(D)(4) on January 31, 2001. (Id.) Petitioner did not appeal the ruling on this motion.

On March 23, 2001, petitioner filed another Rule 61 motion for post-conviction relief. (Id.) This motion was summarily dismissed on May 23, 2001, pursuant to Rule 61(I)(2) & (3) for offering no new arguments or grounds suggesting the court's prior dismissal was error. (Id.) On June 3, 2001, petitioner appealed this ruling to the Delaware Supreme Court. (Id.) On November 5, 2001, the Delaware Supreme Court affirmed the Superior Court's dismissal of petitioner's motion. (Id.)

Petitioner has now filed the current application for federal habeas relief. In his application, petitioner alleges: (1) ineffective assistance of counsel; (2) a denial of his right to due process in his state proceedings due to violations of Article 36 of the Vienna Convention; and (3) miscarriage of justice. (D.I. 2) Respondents assert that the petition is subject to a one-year period of limitation that expired before petitioner filed it, and asks the court to dismiss the petition as time barred.

III. DISCUSSION

A. One-Year Period of Limitation

Effective April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended 28 U.S.C. § 2254 to impose a one-year statute of limitations on the filing of a federal habeas petition by a state prisoner.¹ See 28 U.S.C. § 2244(d)(1); Stokes v. District Attorney of County of Philadelphia, 247 F.3d 539, 541 (3d Cir.), cert. denied, 122 S. Ct. 364 (2001). The one-year limitations period begins to 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).

¹Since petitioner's sentence was imposed on December 17, 1998 and his Section 2254 motion is dated January 2, 2001, the AEDPA applies to petitioner without any retroactivity problem. See Lindh v. Murphy, 521 U.S. 320 (1997).

As described above, the petitioner was sentenced on December 17, 1998. Petitioner was then allowed thirty days in which to file an appeal to the Delaware Supreme Court. See 10 Del. C. § 147; Del. Supr. Ct. R. 6(a)(ii) (requiring notice of appeal to be filed within thirty days of imposition of sentence). Although petitioner did not appeal to the Delaware Supreme Court, the thirty day period in which he could have filed such an appeal is encompassed within the meaning of "the expiration of the time for seeking [direct] review," as provided in § 2244(d)(1)(A). Petitioner's conviction became final on January 15, 1999, the expiration of the time for seeking review in the Delaware Supreme Court. Therefore, petitioner had until January 15, 2000 to file his petition.

The court's docket reflects that the current petition was filed on January 18, 2002. (D.I. 2) A pro se prisoner's habeas petition, however, is deemed filed on the date he delivers it to prison officials for mailing to the district court, not on the date the district court docket it. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Here, petitioner certifies that he deposited his petition, addressed to the clerk of this court, in the prison mail system on January 2, 2002. (D.I. 2) The court thus deems his petition filed on January 2, 2002.

In short, the one-year period of limitation began running when petitioner's conviction became final on January 15, 1999.

His habeas petition was filed nearly two years later on January 2, 2002. That, however, does not end the timeliness inquiry, because the one-year period is subject to statutory and equitable tolling. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides that the statute of limitations is tolled during the time that a state prisoner is attempting to exhaust his claims in state court. Section 2244(d)(2) states that

[t]he 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 shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). Such an application is considered “pending” during the time a state prisoner is pursuing his state post-conviction remedies, including the time for seeking discretionary review of any court decisions whether or not such review was actually sought. See Swartz v. Meyers, 204 F.3d 417, 424 (3d Cir. 2000).

Here, petitioner filed for a writ of habeas corpus in Superior Court on December 1, 2000. This motion was denied on December 7, 2000. Although petitioner did not appeal this ruling to the Delaware Supreme Court, he had thirty days to do so. The court thus finds that the period of time from December 1, 2000 through January 7, 2001, is excluded from the one-year period of limitation. The addition of this 38 days to

petitioner's January 15, 2000 deadline to file a timely petition results in the extension of the deadline to February 22, 2000.

Petitioner's December 1, 2000 and December 17, 2000 motions for state post-conviction relief were filed **after** the extended limitations period ended and, therefore, do not implicate the statutory tolling mechanisms of 28 U.S.C. § 2244(d)(2). See Fisher v. Gibson, 262 F.3d 1135, 1142-43 (10th Cir. 2001); Spencer v. Snyder, 2002 WL 1774234 *2 (D. Del. July 24, 2002).

In sum, notwithstanding the application of the statutory tolling provision, over one year lapsed during which no post-conviction proceedings were pending in the state courts. For this reason, the court concludes that the statutory tolling provision does not render the petition timely filed.

C. Equitable Tolling

Additionally, the one-year period of limitation may be equitably tolled. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 122 S. Ct. 323 (2001); Jones, 195 F.3d at 159; Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998). The doctrine of equitable tolling applies

only when the principles 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, 145 F.3d at 618-19 (citations omitted). In other words, equitable tolling "may be 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 mistakenly in the wrong forum." Jones, 195 F.3d at 159 (quoting United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)).

In the instant case, petitioner has failed to articulate any extraordinary circumstances that prevented him from filing his petition with this court in a timely manner. Moreover, the court has independently reviewed the record, and can discern no extraordinary circumstances that warrant applying equitable tolling.

IV. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

When a federal court dismisses a habeas petition on procedural grounds without reaching the underlying constitutional claims, the petitioner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether

the court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."

Id.

As explained above, the court has concluded that petitioner's application is time barred, and that neither the statutory tolling provision nor the doctrine of equitable tolling renders the petition timely. The court is persuaded that reasonable jurists would not debate the correctness of these conclusions. Petitioner, therefore, has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted.

V. CONCLUSION

For the reasons stated, petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARCO VASQUEZ,)
)
 Petitioner,)
)
 v.) Civil Action No. 02-048-SLR
)
 THOMAS CARROLL, Warden,)
)
 Respondent.)

O R D E R

At Wilmington this 29th day of October, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 (D.I. 2) is dismissed and the writ denied.
2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson
United States District Judge