

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

KESHAWN WESTON, :  
 :  
 Petitioner, :  
 :  
 v. : Civ. Act. No. 07-835-JJF  
 :  
 PERRY PHELPS, Warden, and :  
 ATTORNEY GENERAL OF THE :  
 STATE OF DELAWARE, :  
 :  
 Respondents. :

---

Keshawn Weston. Pro Se Petitioner.

Loren C. Meyers, Deputy Attorney General, Delaware Department of  
Justice, Wilmington, Delaware. Counsel for Respondents.

---

**MEMORANDUM OPINION**

January 21, 2009  
Wilmington, Delaware

  
Farnan, District Judge

Pending before the Court is an Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 ("Petition") filed by Petitioner Keshawn Weston ("Petitioner"). (D.I. 1.) For the reasons discussed, the Court concludes that the Petition is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d) (1).

#### **I. FACTUAL AND PROCEDURAL BACKGROUND**

In June 2003, a Delaware Superior Court jury convicted Petitioner of possession of a firearm during the commission of a felony; four counts of possession of a firearm by a person prohibited; maintaining a dwelling for keeping controlled substances; tampering with physical evidence; second degree conspiracy; possession of cocaine; endangering the welfare of a child; and two counts of possession of drug paraphernalia. The Delaware Supreme Court affirmed Petitioner's convictions and sentences. Weston v. State, 852 A.2d 908 (Table), 2004 WL 1551341 (Del. July 2, 2004).

On June 16, 2005, Petitioner filed a typed motion for state post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61, asserting five specific claims of ineffective assistance of counsel. ("Rule 61 motion"). Thereafter, on June 30, 2005, Petitioner filed another Rule 61 motion asserting the same five ineffective assistance of counsel claims, but this time

Petitioner used the proper form for a Rule 61 motion, with a typed heading stating "Relate Back to the time the original post-conviction was filed." (D.I. 19, App. to State's Ans. Br. in Weston v. State, No.96,2006, at pp. B-107 to B-118.) The Superior Court summarily denied the motion. State v. Weston, 2006 WL 257202 (Del. Super. Ct. Jan. 23, 2006). The Delaware Supreme Court affirmed the Superior Court's judgment. Weston v. State, 918 A.2d 339 (Table), 2007 WL 135606 (Del. Jan. 11, 2007)

Petitioner filed the pending habeas Petition in 2007, asserting that defense counsel was ineffective for failing to file a motion to dismiss Count 30 of the Indictment and for failing to consult with Petitioner about the issues to raise on direct appeal. The State filed an Answer requesting the Court to dismiss the Petition as untimely.

## **II. DISCUSSION**

### **A. One-Year Statute of Limitations**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law by the President on April 23, 1996, and habeas petitions filed in federal courts after this date must comply with the AEDPA's requirements. See generally Lindh v. Murphy, 521 U.S. 320, 336 (1997). The AEDPA prescribes a one-year period of limitations for the filing of habeas petitions by state prisoners, which 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;

© 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).

The Petition, filed in 2007, is subject to the one-year limitations period contained in § 2244(d)(1). See Lindh, 521 U.S. at 336. Petitioner does not allege, nor can the Court discern, any facts triggering the application of § 2244(d)(1)(B), ©, or (D). Accordingly, the one-year period of limitations began to run when Petitioner's conviction became final under § 2244(d)(1)(A).

In this case, the Delaware Supreme Court affirmed Petitioner's conviction and sentence on July 2, 2004, and Petitioner did not file a petition for a writ of certiorari in the United States Supreme Court. Consequently, Petitioner's conviction became final for the purposes of § 2244(d)(1) on September 30, 2004. See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); see Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999). Accordingly, to comply with the one-year

limitations period, Petitioner had to file his § 2254 Application by September 30, 2005. See Wilson v. Beard, 426 F.3d 653 (3d Cir. 2005) (holding that Federal Rule of Civil Procedure 6(a) and (e) applies to federal habeas petitions).

Petitioner did not file his Petition until December 15, 2007,<sup>1</sup> one year, two months, and fifteen days after AEDPA's statute of limitations expired. Thus, the Petition is time-barred, unless the limitations period can be statutorily or equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The Court will discuss each doctrine in turn.

#### **B. Statutory Tolling**

Statutory tolling of the one-year limitations period is authorized by Section 2244(d)(2) of the AEDPA, which provides:

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 should not be counted toward any period of limitation under this subsection.

---

<sup>1</sup>It is well-settled that a prisoner's pro se habeas petition is deemed filed on the date he delivers it to prison officials for mailing to the district court. See Longenette v. Krusing, 322 F.3d 758, 761 (3d Cir. 2003) (the date on which a prisoner transmitted documents to prison authorities is to be considered the actual filing date); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Although the Petition is dated September 15, 2007, the certificate of mailing attached to the Petition and signed by Petitioner is dated December 15, 2007, and the envelope in which the Petition was mailed to the Clerk's Office is postmarked December 17, 2007. Therefore, the Court adopts December 15, 2007, the date on the certificate of mailing, as the filing date. See Woods v. Kearney, 215 F. Supp. 2d 458, 460 (D. Del. 2002); Gholdson v. Snyder, 2001 WL 657722, at \*3 (D. Del. May 9, 2001).

28 U.S.C. § 2244(d)(2). A properly filed application for State collateral review tolls the AEDPA's limitations period during the time the action is pending in the state courts, including any post-conviction appeals. Swartz v. Meyers, 204 F.3d 417, 424-25 (3d Cir. 2000). However, a properly filed application for State collateral review will only toll the limitations period if it was filed and pending before the expiration of the AEDPA's limitations period. See Price v. Taylor, 2002 WL 31107363, at \*2 (D. Del. Sept. 23, 2002).

Petitioner's Rule 61 motion tolls the limitations period from June 16, 2005, the date on which Petitioner's first Rule 61 motion was filed,<sup>2</sup> through January 11, 2007, the date on which the Delaware Supreme Court decided Petitioner's post-conviction appeal. When Petitioner filed his Rule 61 motion on June 16, 2005, 258 days of the AEDPA's one-year filing period had already expired. Consequently, Petitioner only had 107 days left to comply with the AEDPA's one-year period when the limitations clock started to run again on January 12, 2007. There is nothing

---

<sup>2</sup>The Court uses June 16, 2005 as the filing date of the Rule 61 motion, rather than June 30, 2005, the date on which Petitioner filed the form motion, for three reasons. First, there is nothing in the record to indicate that the Superior Court rejected the first motion for not being filed on the proper form. Second, both motions assert identical claims, and Petitioner included a heading on the June 30, 2005 asking that the motion relate back to the first June 16, 2005 motion. And finally, the Petition is time-barred regardless of which filing date is used to trigger statutory tolling.

in the record to suggest that Petitioner filed any other state post-conviction applications that would trigger statutory tolling, therefore, it appears that the limitations period ran without interruption until it expired on April 29, 2007. Accordingly, statutory tolling does not render the Petition timely filed.

### **C. Equitable Tolling**

The AEDPA's limitations period may be equitably tolled, but "only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." Jones, 195 F.3d at 159 (3d Cir. 1999). In order to trigger equitable tolling, a petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims" and that he was prevented from asserting his rights in some extraordinary way; mere excusable neglect is insufficient. Miller, 145 F.3d at 618-19 (citations omitted); Schlueter v. Varner, 384 F.3d 69, 77 (3d Cir. 2004). Consistent with these principles, the Third Circuit has specifically limited equitable tolling of AEDPA's limitations period to the following circumstances:

- (1) where the defendant (or the court) actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights; or
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum.

Jones, 195 F.3d at 159; see also Brinson v. Vaughn, 398 F.3d 225,

231 (3d Cir. 2005) (equitable tolling is appropriate where the court misleads petitioner about steps necessary to preserve habeas claim).

Petitioner does not allege that any extraordinary circumstances prevented him from timely filing the instant Petition. In addition, the fact that Petitioner waited nearly a year after his direct appeal before seeking collateral review in the Delaware State Courts, and another eleven months after his state post-conviction appeal was decided before filing this Petition, demonstrates that he did not diligently pursue available avenues to collateral relief. And finally, to the extent Petitioner made a mistake in computing the relevant deadlines under the AEDPA's statute of limitations, that mistake does not warrant equitably tolling the limitations period. See LaCava v. Kyler, 398 F.3d 271, 276 (3d Cir. 2005) ("in 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") (internal citation omitted); Simpson v. Snyder, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002) (a petitioner's lack of legal knowledge does not constitute an extraordinary circumstance for equitable tolling purposes). Accordingly, the Court will dismiss the Petition as time-barred.

### III. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. See 3d Cir. L.A.R. 22.2(2008). A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). If a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates 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. Id.

The Court has concluded that Petitioner's Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 is time-barred. The Court is persuaded that reasonable jurists would not find this conclusion to be debatable, and therefore, the Court declines to issue a certificate of appealability.

### IV. CONCLUSION

For the reasons discussed, Petitioner's Application For A

Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 will be denied. (D.I. 1.)

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

KESHAWN WESTON, :  
 :  
 Petitioner, :  
 :  
 v. : Civ. Act. No. 07-835-JJF  
 :  
 PERRY PHELPS, Warden, and :  
 ATTORNEY GENERAL OF THE :  
 STATE OF DELAWARE, :  
 :  
 Respondents. :

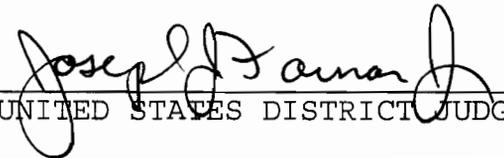
O R D E R

At Wilmington, this 21 day of January, 2009, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Keshawn Weston's Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 (D.I. 1.) is **DISMISSED**, and the relief requested therein is **DENIED**.

2. The Court declines to issue a certificate of appealability, because Petitioner has failed to satisfy the standards set forth in 28 U.S.C. § 2253(c)(2).

  
UNITED STATES DISTRICT JUDGE