

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER N. COBB, :
 :
 Petitioner, :
 :
 v. : Civil Action No. 00-727-JJF
 :
 ROBERT SNYDER, Warden, :
 and M. JANE BRADY, Attorney :
 General of the State of :
 Delaware, :
 :
 Respondents. :

Roger N. Cobb, Pro Se Petitioner.

Loren C. Meyers, Esquire of THE STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Respondents.

MEMORANDUM OPINION

February 7, 2001
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (the "Petition") (D.I. 2) filed by Petitioner, Roger N. Cobb. For the reasons set forth below, the Petition will be dismissed and the Writ of Habeas Corpus will be denied.

BACKGROUND

In January 1990, a Delaware Superior Court jury convicted Petitioner of cocaine trafficking, possession with intent to deliver cocaine, possession of marijuana, possession of drug paraphernalia, maintaining a vehicle for keeping controlled substances, and second degree conspiracy. The jury acquitted Petitioner of the racketeering charge against him. Granting the State's motion to treat Petitioner as a habitual offender under 11 Del. Code Ann. § 4214(b), the superior court sentenced Petitioner to life imprisonment without parole.

On direct appeal, Petitioner was permitted to waive counsel and proceed pro se. However, the Delaware Supreme Court later dismissed Petitioner's direct appeal for failure to prosecute. Cobb v. State, No. 251, 1990 (Del. Oct. 15, 1991).

On February 20, 1992, Petitioner filed a motion for state post-conviction relief in the Delaware Superior Court. On October 29, 1993, the superior court denied Petitioner's motion, and Petitioner appealed. On appeal, the Delaware Supreme Court

affirmed the superior court's decision. Cobb v. State, No. 425, 1993 (Del. Jul. 11, 1994).

In January 1995, Petitioner filed a second motion for state post-conviction relief in the superior court. On August 21, 1995, the superior court denied the motion, and Petitioner appealed. On appeal, the Delaware Supreme Court affirmed the superior court's decision. Cobb v. State, No. 362, 1995 (Del. Jan. 10, 1996).

On February 26, 1998, Petitioner filed a third motion for state post-conviction relief in the Delaware Superior Court. On January 13, 1999, the superior court denied Petitioner's request for relief. Petitioner did not appeal the superior court's decision.

In seeking federal habeas relief, Petitioner raises six claims. Specifically, Petitioner contends that (1) trial counsel was ineffective, because he did not challenge the state's motion to declare Petitioner a habitual offender; (2) the probable cause sheet provided insufficient evidence to support the police's search warrant; (3) the search warrant was defective because it was overbroad; (4) the search warrant was defective because it failed to describe the statutes that Petitioner allegedly violated; (5) the trial court erred in failing to sever Petitioner's racketeering charge from the remaining charges against him; and (6) trial and appellate counsel were ineffective for failing to press Petitioner's position that the racketeering

charge should have been severed from the remaining charges. The State has filed an Answer to the Petition, and therefore, this matter is ripe for the Court's review.

DISCUSSION

Before turning to the merits of Petitioner's claims, the Court must determine, as a threshold matter, whether the Petition is time barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Effective April 24, 1996, the AEDPA amended 28 U.S.C. § 2254 to impose a one year limitations period on the filing of federal habeas petitions. In pertinent part, Section § 2244(d) provides:

(d)(1)A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall 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. . .

(2) 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 shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

In applying Section 2244(d), the Court of Appeals for the Third Circuit concluded that, if a prisoner's conviction became final prior to the enactment of the AEDPA, a court may not dismiss as untimely a Section 2254 Petition filed on or before April 23, 1997. Burns v. Morton, 134 F.3d 109, 111 (3d Cir.

1998). Essentially, this rule gave prisoners whose convictions became final prior to the enactment of the AEDPA, "one full year with notice" to file their petitions. Id. at 112. Petitions filed after the one-year grace period; however, are subject to dismissal for failure to adhere to the timing limitations imposed by the AEDPA. United States v. McNair, 1999 WL 281308 (E.D. Pa. May 3, 1999). As the Third Circuit recognized in United States v. Duffus, "the effect of [the rule enunciated in] Burns v. Morton was to make . . . all other convictions in this circuit otherwise final before the effective date of the AEDPA, April 24, 1996, final on that day for purposes of calculating the one year limitations period." 174 F.3d 333, 335 (3d Cir. 1999).

In the context of a Section 2254 petition, the Third Circuit has concluded that a judgment becomes "final" on the later of two dates: (1) the date on which the United States Supreme Court affirms the conviction and sentence on the merits or denies a timely petition for certiorari review; or (2) the date on which the time for filing a timely petition for certiorari review expires. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). In this case, Petitioner's direct appeal was dismissed on October 15, 1991. Petitioner did not seek certiorari review of the Delaware Supreme Court's dismissal, and therefore, for purposes of applying the AEDPA limitations period, Petitioner's conviction would have become final in January 1992, ninety days from the date of the Delaware Supreme Court's dismissal. Id. at 575.

Because Petitioner's conviction became final before the enactment of the AEDPA on April 24, 1996, Petitioner was required to file his federal habeas petition no later than April 23, 1997.

For purposes of applying the AEDPA's statute of limitations, the Third Circuit has held that a pro se prisoner's petition is deemed filed "the moment it is delivered to the prison officials for mailing to the district court." Burns, 134 F.3d at 113. Petitioner does not indicate the date on which the Petition was delivered to prison authorities for mailing. However, absent proof of mailing, this Court has treated the date on the petition as the date of filing. See e.g. Fennell v. Snyder, Civ. Act. No. 99-289-SLR, order at 4(D. Del. Feb. 8, 2000) (citing Murphy v. Snyder, Civ. Act. No. 98-415-JJF at 4 (D. Del. Mar. 8, 1999)).

In this case, the Petition is dated July 17, 2000. Because the Petition is deemed filed more than three years after the April, 23, 1997 filing deadline, the Court concludes that the Petition is time barred under Section 2244(d), unless the statute of limitations has been tolled pursuant to 28 U.S.C. §2244(d)(2).

Pursuant to 28 U.S.C. § 2244(d)(2), the one year statute of limitations imposed by 28 U.S.C. § 2244(d)(1) is tolled during the pendency of a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim. However, if the one year limitations period has already expired, the tolling provision cannot revive it. See Smith v. McGinnis, 208 F.3d 13, 17 (2d

Cir. 2000); Jones v. Snyder, Civ. Act. No. 00-179-JJF, mem. op. at 5 (D. Del. Jan. 28, 2000) (citing Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)).

In this case, Petitioner filed three post-conviction motions in the state courts. Two of the three motions were decided prior to the enactment of the AEDPA, and therefore, they have no impact on the limitations period. Petitioner's third post-conviction motion was filed in February 1998 and denied on January 13, 1999. Because Petitioner's third post-conviction motion was filed well after the expiration of the one year limitations period, the motion could not toll the limitations period. Thus, the Court concludes that the Petition is time barred under Section 2244(d). Accordingly, the Court will dismiss the Petition as untimely.

CONCLUSION

For the reasons discussed, the Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody filed by Petitioner, Roger N. Cobb, will be dismissed and the Writ of Habeas Corpus will be denied.

An appropriate Order will be entered.