

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HERBERT HANDY, :
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 Petitioner, :
 :
 v. : Civil Action No. 01-433-JJF
 :
 RICHARD KEARNEY, Warden, and :
 ATTORNEY GENERAL OF THE :
 STATE OF DELAWARE, :
 :
 Respondents. :
 :

Herbert Handy, Pro Se Petitioner.

Thomas E. Brown, Esquire of THE STATE OF DELAWARE DEPARTMENT OF
JUSTICE, Wilmington, Delaware.
Attorney for Respondents.

MEMORANDUM OPINION

May 7, 2002

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2) filed by Petitioner Herbert Handy. For the reasons set forth below, the Court will dismiss the Petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

I. BACKGROUND

On May 24, 1999, a jury in the Delaware Superior Court found Petitioner guilty of one count of delivery of cocaine. The Superior Court sentenced Petitioner on July 2, 1999, to ten years in prison to be suspended after five years for decreasing levels of supervision. The Delaware Supreme Court affirmed Petitioner's conviction and sentence. Handy v. State, No. 308, 1999, 1999 WL 1319143 (Del. Dec. 16, 1999). Petitioner is currently serving his sentence at the Sussex Correctional Institution in Georgetown, Delaware.

Petitioner did not seek postconviction relief in the state courts. Rather, he attempted to appeal a second time by filing a notice of appeal on June 16, 2000. The Delaware Supreme found the notice of appeal untimely, and dismissed the appeal for lack of jurisdiction. Handy v. State, No. 297, 2000, 2000 WL 1011123 (Del. July 10, 2000).

Petitioner has now filed with the Court the current Petition

seeking federal habeas corpus relief. Petitioner alleges that: (1) certain testimony offered against him was inconsistent and not credible in violation of his right to due process; (2) counsel rendered ineffective assistance by failing to file a motion to dismiss or a motion to suppress; (3) the prosecutor engaged in misconduct by relying on evidence he knew was inaccurate; and (4) the Superior Court erred by allowing certain inconsistent testimony. (D.I. 2.) Respondents assert that the Petition is subject to a one-year period of limitation that expired before Petitioner filed it, and ask the Court to dismiss the Petition as untimely.

II. DISCUSSION

A. One-Year Period of Limitation

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress amended the federal habeas statute by prescribing a one-year period of limitation for the filing of habeas petitions by state prisoners. Stokes v. District Attorney of the County of Philadelphia, 247 F.3d 539, 541 (3d Cir.), cert. denied, 122 S. Ct. 364 (2001). Effective April 24, 1996, the AEDPA provides:

- (1) A 1-year period of limitation 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 limitation 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 . . .

28 U.S.C. § 2244(d)(1).

As described above, the Delaware Supreme Court affirmed Petitioner's conviction and sentence on December 16, 1999. Petitioner was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. See Sup. Ct. R. 13.1. Although Petitioner did not file a petition with the United States Supreme Court, the ninety-day period in which he could have filed such a petition is encompassed within the meaning of "the expiration of the time for seeking [direct] review," as provided in § 2244(d)(1)(A). See Kapral v. United States, 166 F.3d 565, 576 (3d Cir. 1999) (holding that on direct review, the limitation period begins to run at the expiration of the time for seeking review in the United States Supreme Court). Therefore, Petitioner's conviction became final on March 15, 2000, ninety days after the Delaware Supreme Court affirmed his sentence.

The Court's docket reflects that the current Petition was filed on June 25, 2001. (D.I. 2.) A pro se prisoner's habeas petition, however, is considered 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). Petitioner has provided the Court with

no documentation establishing the date he delivered the Petition to prison officials for mailing. Moreover, the Petition itself bears no date. The Petition, however, is stamped "Received" by the Clerk on June 8, 2001. Also, Petitioner asserts in a subsequently filed document that he mailed the Petition on June 6, 2001. (D.I. 8.) In the absence of proof respecting the date of delivery, the Court deems the Petition filed on June 6, 2001, the date Petitioner asserts that he mailed it. Cf. Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999) (assuming that petition was filed on the earliest date discernible from the record).

In short, the one-year period of limitation began running when Petitioner's conviction became final on March 15, 2000. His Petition was filed more than one year later on June 6, 2001. The passage of more than one year, however, does not automatically require dismissal of the Petition, because the period of limitation may be statutorily or equitably tolled.¹ See id.

B. Equitable Tolling

The one-year period of limitation is not jurisdictional and is subject to equitable tolling. 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,

¹ The one-year period of limitation is statutorily tolled while a properly filed application for state postconviction relief was pending. See 28 U.S.C. § 2244(d)(2). Because Petitioner filed no motion for postconviction relief in the state courts, the statutory tolling provision does not apply.

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) 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 argues that he did not file a motion for postconviction relief in the Superior Court because postconviction relief was unavailable to him. Petitioner asserts, and correctly so, that a motion for postconviction relief must be presented to the judge who presided at his trial. See Super. Ct. R. Crim. P. 61(d)(1). According to Petitioner, the judge who presided at his trial is prejudiced and would be precluded from considering a motion for postconviction relief. (D.I. 15.) Thus, Petitioner concludes, postconviction relief was unavailable to him.

To the extent that Petitioner's argument is an attempt to invoke equitable tolling, the Court is not persuaded. First,

Petitioner's argument overlooks the fact that if the presiding judge is "unavailable to consider the motion, it shall be presented to another judge." Super. Ct. R. Crim. P. 61(d)(1). Thus, even if the presiding judge would be disqualified from considering Petitioner's motion, it would be assigned to a different judge.

Moreover, Petitioner's argument fails to address why he was prevented from filing his **federal** habeas petition in a timely manner. Even if state postconviction review were unavailable to Petitioner, nothing in the record suggests that he was prevented in any way from complying with the one-year period of limitation in asserting his rights in federal court.

In short, the Court cannot find any extraordinary circumstances that warrant applying equitable tolling. Accordingly, the Court will dismiss the Petition as time barred.

C. 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 denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner 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.

For the reasons discussed above, Petitioner's habeas petition is barred by the one-year period of limitation. The Court cannot conclude that the period should be statutorily or equitably tolled to render the petition timely. The Court is convinced that reasonable jurists would not debate otherwise. Petitioner, therefore, has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

III. CONCLUSION

For the reasons discussed above, the Court will dismiss as untimely the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Herbert Handy. The Court will not issue a certificate of appealability.

An appropriate Order will be entered.

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O R D E R

At Wilmington, this 7th day of May 2002, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Herbert Handy's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2) is DISMISSED, and the relief requested therein is 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).

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE