

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LAMONT K. HARRIGAN,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 02-197-GMS
)	
TOM CARROLL, Warden,)	
and ATTORNEY GENERAL OF)	
THE STATE OF DELAWARE,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

Following a jury trial in the Delaware Superior Court, Lamont K. Harrigan was convicted of possession of heroin with intent to deliver and possession of heroin within 300 feet of a park. He is presently incarcerated at the Delaware Correctional Center in Smyrna, Delaware, serving a sentence of sixteen years. Harrigan has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As explained below, the court will dismiss Harrigan’s petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

I. BACKGROUND

On February 14, 1996, a jury in the Delaware Superior Court found Lamont K. Harrigan guilty of possession of heroin with intent to deliver and possession of heroin within 300 feet of a park. The Superior Court sentenced Harrigan on April 19, 1996, to sixteen years imprisonment followed by six years of decreasing levels of supervision. The Delaware Supreme Court affirmed Harrigan’s conviction and sentence. *Harrigan v. State*, No. 188, 1996, 1997 WL 45084

(Del. Jan. 29, 1997).

On February 24, 1999, Harrigan filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. The Superior Court denied the motion on May 24, 2000. *State v. Harrigan*, Crim. A. No. IN95-10-1127 (Del. Super. Ct. May 24, 2000). The Delaware Supreme Court affirmed. *Harrigan v. State*, No. 323, 2000, 2001 WL 213394 (Del. Feb. 26, 2001).

Harrigan has now filed the current petition for federal habeas corpus relief. In his petition, Harrigan alleges that: (1) the prosecutor failed to establish a chain of custody of the drugs introduced into evidence; (2) the arresting officer lacked probable cause to arrest or detain him; (3) the trial court wrongly denied the jury's request during deliberation to review the officers' testimonies; (4) the prosecutor's closing statements deprived him of a fair trial; (5) the evidence was insufficient to support a conviction; and (6) counsel rendered ineffective assistance in several respects. (D.I. 2, 5.) The respondents argue that the petition is subject to a one-year period of limitation that expired before Harrigan filed it, and ask the court to dismiss it.

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 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).

Harrigan was convicted on February 14, 1996, and was sentenced on April 19, 1996. The Delaware Supreme Court affirmed his conviction and sentence on January 29, 1997. Harrigan was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. *See* Supreme Court Rule 13.1. Although Harrigan did not seek review from 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 conclusion of direct review or the expiration of the time for seeking such review,” as set forth 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 of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the United States Supreme Court). Harrigan’s conviction, therefore, became final on April 29, 1997, ninety days after the Delaware Supreme Court affirmed his conviction.

The court’s docket reflects that Harrigan’s petition was filed on March 15, 2002. (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 court docketed it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Harrigan has not provided the court with any documentation establishing the date he submitted his petition to prison officials for mailing. The petition itself, however, is dated February 8, 2002. (D.I. 2.) In the absence of proof respecting the date of delivery, the court deems Harrigan’s habeas petition filed on February 8, 2002.

Notwithstanding, Harrigan's habeas petition was filed well after the one-year period of limitation expired. That, however, does not necessarily require dismissal of the petition as untimely, because the one-year period of limitation may be either statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides for statutory tolling of the one-year period of limitation as follows:

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 limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Here, Harrigan filed a motion for postconviction relief in the Superior Court on February 24, 1999. The one-year period of limitation, however, expired on April 29, 1998. Harrigan's motion for postconviction relief, filed nearly ten months after the one-year period expired, has no tolling effect in this matter. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001) (stating that application for postconviction relief filed after the expiration of the one-year period has no tolling effect), *cert. denied*, 122 S. Ct. 1789 (2002); *Simpson v. Snyder*, Civ. A. No. 00-737-GMS, 2002 WL 1000094, *3 (D. Del. May 14, 2002)(same).

In sum, Harrigan filed his application for postconviction relief after the one-year period of limitation had expired. Accordingly, the statutory tolling provision does not apply.

C. Equitable Tolling

The one-year period of limitation is not jurisdictional and 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)).

The court has searched the record in an effort to discern why Harrigan failed to pursue postconviction remedies within the one-year period of limitation. Despite the respondents’ request to dismiss the petition as untimely, Harrigan has not explained why he waited until February 24, 1999, to file a motion for postconviction relief. Nor has he explained why he waited until February 8, 2002, to file his federal habeas petition.

In short, the court can find no extraordinary circumstances that warrant applying the doctrine of equitable tolling. Harrigan’s habeas petition will be dismissed as untimely.

D. Motion for Appointment of Counsel and for a Hearing

In a letter dated May 13, 2002, Harrigan asks the court to appoint counsel to represent him and to conduct an evidentiary hearing. (D.I. 9.) Because the petition will be dismissed as untimely, Harrigan’s request for appointment of counsel will be denied as moot.

Respecting Harrigan’s request for a hearing, the AEDPA grants district courts the discretion to conduct evidentiary hearings on habeas review, but only in limited circumstances.

See 28 U.S.C. § 2254(e); *Campbell v. Vaughn*, 209 F.3d 280, 286-87 (3d Cir. 2000), *cert. denied*, 531 U.S. 1084 (2001). The court **may**, for example, conduct an evidentiary hearing if the petitioner “has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court.” *Campbell*, 208 F.3d at 287 (quoting *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998)). In exercising its discretion, the court should focus “on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner’s claim.” *Campbell*, 208 F.3d at 287. The court properly refuses a request to conduct an evidentiary hearing where the petitioner fails “‘to forecast any evidence beyond that already contained in the record’ that would help his cause, ‘or otherwise to explain how his claim would be advanced by an evidentiary hearing.’” *Id.* at 287 (quoting *Cardwell*, 152 F.3d at 338).

Here, the court is persuaded that Harrigan’s petition is time barred. He has failed to identify any evidence that might be adduced at a hearing that could alter the court’s decision. Accordingly, the court will deny his request for an evidentiary hearing.

III. 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 the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

When the court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, 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, Harrigan’s habeas petition is barred by the one-year period of limitation. Neither the statutory tolling provision nor the doctrine of equitable tolling applies. The court is convinced that reasonable jurists would not find these conclusions debatable. Harrigan has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Lamont K. Harrigan’s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DISMISSED, and the relief requested therein is DENIED.
2. Harrigan’s motion for appointment of counsel and for an evidentiary hearing (D.I. 9) is DENIED.
3. 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).

IT IS SO ORDERED.

Dated: July 1, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE