

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FREDERICK W. SMITH,)
)
 Petitioner,)
)
 v.) Civ. A. No. 02-309-KAJ
)
 THOMAS L. CARROLL, Warden,)
)
 Respondent.)

MEMORANDUM OPINION

Frederick W. Smith. *Pro se* Petitioner.

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

July 12, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Petitioner Frederick W. Smith is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Smith's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2; D.I. 3; D.I. 9.) For the reasons that follow, the Court concludes that Smith's application is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1). Accordingly, the Court will dismiss the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In November 1993, a Delaware Superior Court jury found Smith guilty of two counts of second degree unlawful sexual intercourse and one count each of third degree unlawful sexual penetration and third degree assault. Smith was sentenced to a total of 32 years imprisonment, to be followed by a period of probation.

The Delaware Supreme Court affirmed Smith's convictions on direct appeal. *Smith v. State*, 669 A.2d 1 (Del. 1995). On June 20, 1996, Smith applied for state post-conviction relief pursuant to Superior Court Criminal Rule 61. The Superior Court denied the Rule 61 motion on July 18, 1996, and Smith did not appeal.

On September 5, 1996, Smith filed a second Rule 61 motion, which the Superior Court denied on October 2, 1996. The Superior Court's denial was affirmed on post-conviction appeal. See *Smith v. State*, 1997 WL 328626 (Del. June 4, 1997).

Smith filed a third Rule 61 motion on July 17, 2000, which the Superior Court denied on July 20, 2000. He did not appeal this decision.

On September 27, 2001, Smith filed a fourth Rule 61 motion, which was denied in November 2001. The Delaware Supreme Court affirmed its denial on March 22, 2002. *Smith v. State*, 2002 WL 451827 (Del. Mar. 22, 2002).

Presently before the Court is Smith's *pro se* petition for federal habeas relief.¹ (D.I. 2; D.I. 3.; D.I. 9.) His petition asserts seven reasons for granting him relief: (1) the grand jury did not have jurisdiction to indict him because the charges were invalid; (2) the court did not have jurisdiction and/or authority to allow his conviction on invalid charges; (3) he is the victim of vindictive prosecution; (4) he is the victim of judicial misconduct; (5) he is the victim of "bastardized" justice; (6) he

¹Smith filed his petition and supporting memorandum on April 29, 2002. (D.I. 2; D.I. 3.) Then, before the Court sent him an ADEPA Election Form, Smith filed a motion to amend along with the proposed amendment. (D.I. 8; D.I. 9.) The petition therefore was automatically amended, and the State was served with copies of all of Smith's submissions. (D.I. 11.)

is the victim of ineffective assistance of counsel; and (7) his sentence and confinement are illegal. (D.I. 3; D.I. 9.)

The State correctly acknowledges that Smith has exhausted state remedies.² However, the State contends that the petition is time-barred and asks the Court to dismiss the petition as untimely. (D.I. 15.)

Smith's habeas petition is now ready for review.

III. DISCUSSION

A. One-Year Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") prescribes a one-year period of limitations for the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). 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

²Smith presented Claims One and Two the Delaware Supreme Court in his 1996 appeal, and he presented the remaining claims to the state supreme court in his 2001 appeal.

(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).

However, when a state prisoner's conviction became final prior to the enactment of AEDPA, applying the one-year period would have an impermissible retroactive effect. See *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). To avoid this situation, federal courts have provided a one-year grace period for filing a habeas petition, beginning from the enactment date of AEDPA. *Id.* Thus, in order to timely file a habeas petition, such petitioners must have filed their petitions on or before April 23, 1997, absent any additional tolling.³ *Id.*; *Douglas v. Horn*, 359 F.3d 257, 261 (3d Cir. 2004).

Smith does not allege, nor can I discern, any facts triggering the application of § 2244(d)(1)(B), (C), or (D). Accordingly, the one-year period of limitations began to run when his conviction became final under § 2244(d)(1)(A), and he benefits from the grace period.

³Many federal circuit courts have held that the grace period ends on April 24, 1997, not April 23, 1997. See *Patterson v. Stewart*, 251 F.2d 1243, 1246 (9th Cir. 2001) (collecting cases). Although the Third Circuit has noted that "[a]rguably we should have used April 24, 1997, rather than April 23, 1997, as the cut-off date," *Douglas*, 359 F.3d at 261 n.5 (citing Fed.R.Civ.P. 6(d)), it appears that April 23, 1997 is still the relevant cut-off date in this circuit. In the present situation, however, Smith filed his petition well-past either cut-off date, rendering the one-day difference immaterial.

Pursuant to § 2244(d)(1)(A), when a state prisoner appeals a state court judgment, the state court criminal judgment becomes "final," and the statute of limitations begins to run, "at the conclusion of review in the United States Supreme Court or when the [90-day time-period] for seeking certiorari review expires." See *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999); *Jones v. Morton*, 195 F.3d 153, 157 (3d Cir. 1999). Here, the Delaware Supreme Court affirmed Smith's conviction and sentence on October 5, 1995. *Smith*, 669 A.2d 1 (Del. 1995). Thus, Smith's conviction became final on January 3, 1996, prior to the enactment of AEDPA. Accordingly, to timely seek habeas relief with this Court, Smith needed to file his § 2254 habeas application no later than April 23, 1997.

A *pro se* prisoner's habeas application 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); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Smith's application is dated April 11, 2002, and presumably, he could not have delivered it to prison officials for mailing any earlier than that date. Therefore, I adopt April 11, 2002 as the filing date. See *Woods v. Kearney*, 215 F. Supp. 2d 458, 460 (D. Del. 2002).

Smith's April 11, 2002 filing date is, obviously, well past the April 23, 1997 cut-off date. As such, his habeas petition is

time-barred and should be dismissed, unless the time-period can be statutorily or equitably tolled. See *Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

Section 2244(d) (2) of AEDPA specifically permits the statutory tolling of the one-year period of limitations:

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.

28 U.S.C. § 2244(d) (2). The Third Circuit views a properly filed application for state post-conviction review as “one submitted according to the state’s procedural requirements, such as the rules governing the time and place of filing.” *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

A properly filed state post-conviction motion tolls AEDPA’s limitations period during the time a petitioner pursues his state post-conviction remedies, including any post-conviction appeals.⁴ *Swartz v. Meyers*, 204 F.3d 417, 424-25 (3d Cir. 2000). If a timely post-conviction appeal is not filed, then the limitations period is only tolled until the time to appeal expires under state law. *Id.* Further, a properly filed state post-conviction

⁴However, the 90-day period during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his post-conviction motion does not toll AEDPA’s limitations period. *Stokes v. Dist. Att’y of the County of Philadelphia*, 247 F.3d 539, 543 (3d Cir. 2001).

motion can only toll the federal habeas limitations period if the post-conviction motion itself is filed within the federal one-year limitations period. See *Price v. Taylor*, 2002 WL 31107363, at *2 (D. Del. Sept. 23, 2002); *Gholdson*, 2001 WL 657722, at *3.

Here, Smith filed his first Rule 61 motion on June 20, 1996. At this point, 57 days of the limitations period had already lapsed. The Superior Court denied the motion on July 18, 1996. Although Smith did not appeal, his motion must be considered as having been pending until August 19, 1996, the date on which the 30-day period to file an appeal expired. See *Stokes v. District Attorney*, 247 F.3d 539 (3d Cir. 2001); *Swartz*, 204 F.3d 417; see generally *Carey v. Saffold*, 536 U.S. 214 (2002); Del. Supr. Ct. R. 6(a) (a notice of appeal must be filed within 30 days after the entry of post-conviction judgment). Thus, when the limitations period resumed, Smith had 308 days in which to file his petition.

Smith filed his second Rule 61 motion on September 5, 1996, the Superior Court denied it on October 2, 1996, and the Delaware Supreme Court affirmed this decision on June 4, 1997. Therefore, the limitations period was tolled from September 5, 1996 through June 4, 1997. However, when Smith filed the Rule 61 motion, another 16 days of the limitations period had run.⁵ Accordingly, when the limitations period started again on June 5, 1997, there were 292 days left in the limitations period.

⁵The State asserts that only 15 days had run.

The one-year limitations period continued to run without interruption until its expiration on March 23, 1998.⁶ Although Smith filed two more post-conviction motions - one on July 17, 2000 and the other on September 27, 2001 - they were filed more than 2 years after the limitations period expired. Thus, these last motions do not statutorily toll the limitations period.

In short, even though statutory tolling extends the limitations period to March 23, 1998, Smith still filed his habeas petition too late.

C. Equitable Tolling

A court, in its discretion, may equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." *Miller v. New Jersey State Dep't of Corrs.*, 145 F.3d 616 (3d Cir. 1998) (internal citations omitted). Federal courts invoke the doctrine of equitable tolling "only sparingly," *See United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998), and the Third Circuit has specifically limited equitable tolling of AEDPA's limitations period to the following circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights;

⁶The State asserts that the limitations period expired on March 24, 1998, not March 23, 1998. However, this one-day difference does not affect the statutory tolling analysis or my final determination that Smith's petition is time-barred.

(3) where the plaintiff timely asserted his rights mistakenly in the wrong forum; or

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Id.* (quoting *Midgley*, 142 F.3d at 179). In order to trigger equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims"; mere excusable neglect is insufficient. *Miller*, 145 F.3d at 618-19 (citations omitted).

Smith asserts that his inability to obtain a "complete set" of trial transcripts until September 2001 made it "impossible [for him] to submit an Appeal,⁷ years ago, to the Honorable District Court." (D.I. 3 at 2.) However, Smith's alleged inability to obtain a complete trial transcript does not constitute an "extraordinary circumstance" for equitable tolling. He has not demonstrated which claims, if any, he could not present without a complete transcript. See *Collingwood v. Snyder*, 2002 WL 1446702, at*4 (D. Del. June 28, 2002); see also *Brown v. Shannon*, 322 F.3d 768 (3d Cir.), cert. denied, - U.S. - , 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003) (holding that there were

⁷Although Smith refers to an appeal, when read in the context of his memorandum, it is clear that he is referring to his habeas petition.

no extraordinary circumstances to equitably toll the limitations period even though petitioner's attorney could not obtain the trial transcript, because petitioner could still file a basic habeas petition). Indeed, the factual predicate for all of Smith's habeas claims is that the victim did not review, initial, or sign her statement to police, which is the identical issue he raised in his 1996 post-conviction appeal. See *Smith*, 1997 WL 328626, at ¶ 2; D.I. 3, at 4. Smith has not demonstrated how a complete trial transcript was necessary for him to file a habeas petition based on facts he already knew. Thus, I conclude that equitable tolling is not warranted on this ground.

To the extent Smith's "miscarriage of justice" argument regarding his procedurally barred claims can be interpreted as presenting his "actual innocence" as a ground for equitably tolling the statute of limitations,⁸ this argument fails. (D.I. 3, at 2; D.I. 9.) Neither the Third Circuit Court of Appeals, nor the United States Supreme Court, has addressed whether a petitioner's "actual innocence" qualifies as an exception to AEDPA's statute of limitations. *Morales v. Carroll*, 2004 WL

⁸Smith's Amendment appears to assert the miscarriage of justice exception as a way to avoid an alleged procedural default of his claims at the state level. (D.I. 9.) However, his original Memorandum discusses the miscarriage of justice exception in the same paragraph as his statute of limitations argument. (D.I. 3, at 2.) Thus, liberally construing Smith's submissions, I conclude that he is attempting to assert his actual innocence as a way to excuse his failure to timely file his petition.

1043723, at *3 (D. Del. Apr. 28, 2004); *Devine v. Diguglielmo*, 2004 WL 945156, at *3 & n.4 (E.D. Pa. Apr. 30, 2004) (collecting cases). Even if, *arguendo*, such an exception did exist, Smith's assertion that a guilty man would not have rejected a plea agreement promising one year of probation and taken the chance of receiving a 32 year sentence at trial does not persuade me that he is actually innocent. See *Morales*, 2004 WL 1043723, at *3 (discussing how a petitioner proves actual innocence). Thus, I find that Smith's assertion of actual innocence does not equitably toll the limitations period.

In short, the doctrine of equitable tolling is not available to Smith on the facts he has presented, and his § 2254 petition must be dismissed as untimely.

IV. CERTIFICATE OF APPEALABILITY

Finally, I must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued 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).

When 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.* “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.*

I conclude that Smith’s habeas petition must be dismissed as untimely. Reasonable jurists would not find this conclusion to be unreasonable. Thus, I will not issue a certificate of appealability.

V. CONCLUSION

For the reasons stated, Smith’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**

FREDERICK W. SMITH,)	
)	
Petitioner,)	
)	
v.)	Civ. A. No. 02-309-KAJ
)	
THOMAS L. CARROLL, Warden,)	
)	
Respondent.)	

ORDER

At Wilmington, this 12th day of July, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Frederick W. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED. (D.I. 2; D.I. 3; D.I. 9.)

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).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE