

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

BOBBY K. PRICE, JR.,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 02-70-GMS
)	
STANLEY TAYLOR and)	
ATTORNEY GENERAL OF)	
THE STATE OF DELAWARE,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

Following a jury trial in the Delaware Superior Court, Bobby K. Price, Jr., was convicted of felony theft. He is presently incarcerated at the Sussex Correctional Institution in Georgetown, Delaware, serving a sentence of thirty-five years. Price 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 Price’s petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

I. BACKGROUND

On May 11, 1995, a jury in the Delaware Superior Court found Price guilty of felony theft. The Superior Court sentenced Price on August 18, 1995, as a habitual offender to thirty-five years in prison. The Delaware Supreme Court affirmed Price’s conviction and sentence. *Price v. State*, No. 367, 1995, 1996 WL 526013 (Del. Aug. 19, 1996). The United States Supreme Court denied Price’s petition for a writ of certiorari on February 18, 1997. *Price v.*

Delaware, 519 U.S. 1130 (1997).

On August 16, 1999, Price 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 February 25, 2000. *State v. Price*, No. 9403015006, 2000 WL 303454 (Del. Super. Ct. Feb. 25, 2000). The Delaware Supreme Court affirmed, *Price v. State*, No. 105, 2000, 2001 WL 58818 (Del. Jan. 18, 2001), and denied his motion for reargument, *Price v. State*, No. 105, 2000, 2001 WL 760858 (Del. May 21, 2001). The Delaware Supreme Court subsequently affirmed the Superior Court's order denying Price's motion to correct an illegal sentence. *Price v. State*, No. 555, 2001, 2002 WL 549403 (Del. Apr. 10, 2002).

Price has now filed the current petition for federal habeas corpus relief. In his petition, Price alleges that: (1) trial counsel rendered ineffective assistance in several respects; (2) the Delaware Supreme Court erred by affirming inconsistent verdicts; and (3) the Delaware Supreme Court erred by finding claims procedurally barred on postconviction appeal. (D.I. 2.) The respondents argue that the petition is subject to a one-year period of limitation that expired before Price 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).

Price's conviction became final on February 18, 1997, the date the United States Supreme Court denied his petition for a writ of certiorari. *See Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999)(holding that a state conviction becomes final for purposes of § 2244(d)(1)(A) at the conclusion of review in the United States Supreme Court). The court's docket reflects that his current habeas petition was filed on January 29, 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 docket it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Price 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 January 7, 2002. (D.I. 2.) In the absence of proof respecting the date of delivery, the court deems Price's habeas petition filed on January 7, 2002.

Notwithstanding, Price's habeas petition was filed nearly five years after his conviction became final. 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, Price filed a motion for postconviction relief in the Superior Court on August 16, 1999. The one-year period of limitation, however, expired on February 18, 1998. Price's motion for postconviction relief, filed one and one-half years 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, Price 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 Price failed to pursue postconviction remedies within the one-year period of limitation. Notwithstanding the respondents' request to dismiss the petition as untimely, Price has not explained why he waited until August 16, 1999, to file a motion for postconviction relief. Nor has he explained why he waited until January 7, 2002, to file his federal habeas petition.

In short, the court can find no extraordinary circumstances that warrant applying the doctrine of equitable tolling.¹ Price's habeas petition will be dismissed as untimely.

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).

¹ The court is aware that Price filed two other federal habeas petitions in July 1997 and September 1999. *Price v. Brewington-Carr*, Civ. A. No. 97-448-LON (D. Del. Dec. 12, 1997); *Price v. Brewington-Carr*, Civ. A. No. 99-623-GMS (D. Del. Jan. 30, 2002). In his 1997 and 1999 petitions, Price sought to challenge the loss of good time credits, not his underlying conviction or sentence. Because Price's 1997 and 1999 petitions are not related to the current petition, the court will not equitably toll the periods of time during which those petitions were pending. *See Duncan v. Walker*, 533 U.S. 167, 183 (2001)(discussing equitable tolling while a prior federal habeas petition was pending)(Stevens, J., concurring). Moreover, even if the court were inclined to apply equitable tolling, more than one year lapsed during which no proceedings of any kind were pending in any court before Price filed the current petition.

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, Price’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 debate the correctness of these conclusions. Price 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. Bobby K. Price, Jr.’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. 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).

Dated: September 23, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE