

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LARRY W. AUSTIN,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 03-854-JJF
	:	
THOMAS CARROLL,	:	
Warden, and M. JANE	:	
BRADY, Attorney General	:	
of the State of	:	
Delaware,	:	
	:	
Respondents.	:	

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Larry W. Austin. Pro Se Petitioner.

Elizabeth McFarlan, Deputy Attorney General, Delaware Department  
of Justice, Wilmington, Delaware. Counsel for Respondents.

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**MEMORANDUM OPINION**

August 26, 2004  
Wilmington, Delaware

Farnan, District Judge

**I. INTRODUCTION**

Petitioner Larry Austin is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Petitioner filed with the Court an Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 ("Petition"). (D.I. 1.) In a Memorandum Opinion dated June 23, 2004, this Court concluded that Petitioner's § 2254 Application was time-barred by AEDPA's one-year limitations period. (D.I. 12; D.I. 13.) However, the Court ordered Petitioner to file a Supplemental Memorandum addressing whether the one-year period of limitations should be equitably tolled because his alleged inability to obtain records to properly pursue his appeal prevented him from timely filing his habeas petition. The Court also ordered Respondents to file a Response to Petitioner's Supplemental Memorandum.

Both parties have filed their Supplemental Memoranda addressing the issue of equitable tolling. (D.I. 15; D.I. 16.) Petitioner's Supplemental Memorandum asserts that his trial counsel and "agents of the respondents" failed to provide him with transcripts of his preliminary hearing, the trial scheduling, and his final case review. (D.I. 15 at 2.) He claims that he could not research and prepare his federal habeas petition in a timely manner without these transcripts. Id.

Respondents detail the sequence of events with respect to

Petitioner's requests for trial transcripts, as well as his failure to request certain transcripts in the appropriate manner. (D.I. 16 at ¶ 4.) They also assert that Petitioner has not explained how the lack of the three transcripts impacted his ability to prepare his Rule 61 motion or his habeas petition. (D.I. 16 at ¶4.)

For the reasons that follow, the Court concludes that Petitioner's Petition is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1), and that equitable tolling of the limitations period is not warranted.

## **II. BACKGROUND**

The Court has already related the facts in its Memorandum Opinion dated June 23, 2004. (D.I. 12.) The Court will now consider the Supplemental Memoranda in reviewing Petitioner's § 2254 petition.

## **III. DISCUSSION**

It is well-settled that 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). Equitable tolling only applies in very limited circumstances, See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999), and the petitioner

must also 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).

As an initial matter, a habeas petitioner is not required to file a state court record or trial transcript when filing a habeas petition. Pliler v. Ford, 124 S.Ct. 2441, 2446 (2004). Likewise, the inability to obtain a free trial transcript, standing alone, does not constitute an extraordinary circumstance warranting equitable tolling. See Harris v. Snyder, 2002 WL 47895, at \*4 (D. Del. Jan. 11, 2002); Holmes v. Vaughn, 2003 WL 23112383, at \*6 (E.D.Pa. Nov. 25, 2003) (collecting cases); Fadayiro v. U.S., 30 F. Supp. 2d 772, 780 (D.N.J. 1998) (a habeas petitioner's difficulty in obtaining transcripts does not warrant equitable tolling of the limitations period for a § 2255 motion).

Having reviewed the record and the parties' supplemental memoranda, the Court concludes that Petitioner's inability to obtain the three designated transcripts does not constitute an extraordinary circumstance triggering equitable tolling. After filing a Notice of Appeal, Petitioner requested that his attorney be dismissed and that he be permitted to represent himself on appeal. The Delaware Superior Court held an evidentiary hearing, and granted his request to proceed pro se. On direct appeal, Petitioner argued that his defense counsel had failed to provide him with a transcript of his request for a continuance so that he

could engage a private attorney. Austin v. State, 782 A.2d 262 (Del. 2001). However, the Delaware Supreme Court noted that portions of the trial and sentencing transcripts were included in Petitioner's appendix, indicating that he had access to the necessary transcripts. Id. The Delaware Supreme Court also noted that there was no indication that Petitioner had ever requested a continuance, thus, there was no such transcript. Id.

Petitioner filed a Rule 61 motion in September 2002, this time asserting that his counsel had not provided him with a complete set of transcripts for all proceedings, and that counsel had only given him the trial sentencing transcripts. The Superior Court denied the Rule 61 motion, and concluded that Petitioner was "provided the full file well in advance of the deadline for his appellate brief to the Delaware Supreme Court." Austin v. State, 2002 WL 32071647, at \*4 (Del. Super. Ct. Dec. 20, 2002). Petitioner appealed this decision, and during the appeal, he filed a motion asking the Superior Court to supply him with copies of his trial and preliminary hearing transcripts. The Superior Court denied this request. Although the Delaware Supreme Court granted Petitioner leave to file a supplemental brief addressing the Superior Court's denial of his request for a transcript, Petitioner did not. Austin v. State, 827 A.2d 30, at \*\*1 n.5 (Del. 2003) The Delaware Supreme Court ultimately affirmed the Superior Court's denial of the Rule 61 motion. Id.

While this review of the facts indicates that Petitioner consistently asserted his inability to obtain certain transcripts as an argument in his appeal and Rule 61 motion, it also reveals that Petitioner did not diligently attempt to obtain the various assorted transcripts. For example, after Petitioner successfully petitioned the Superior Court to proceed pro se on December 19, 2000, State v. Austin, Cr. ID # 9903005366, Order (Del. Super. Ct. Jan. 9, 2001), the record indicates that he did not file any motion for transcripts prior to his appeal (i.e., between December 19, 2000 and the filing of his opening brief on February 14, 2001). (See generally Super. Ct. Dkt. for State v. Austin, ID # 9903005366.) Although Petitioner did file two letters requesting all documentation from his former counsel, it appears that these letters were not directed to the Superior Court as requests for transcripts.<sup>1</sup> (Id. at Item Nos. 66 and 68.) Indeed, Petitioner did not file any motion to obtain transcripts until May 2, 2003.<sup>2</sup> (Id. at Item No. 80.)

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<sup>1</sup>The proper procedure for obtaining free transcripts is to first file an affidavit to proceed in forma pauperis, and then file a motion for transcript demonstrating a particularized need for the transcript. In re Walker, 817 A.2d 805, at \*\*1 (Del. 2002); Robinson v. State, 822 A.2d 397, at \*\*2 (Del. 2003) ("absent a showing that there is some legal or factual basis for relief and that there is a particularized need for a transcript on appeal, the Superior Court is within its discretion to deny a transcript at State expense").

<sup>2</sup>It appears that Petitioner mistakenly filed his Motion for Transcripts, captioned for the Delaware Superior Court, in the Delaware Supreme Court on March 14, 2003. The Motion was

Further, Petitioner has failed to demonstrate how his inability to obtain the three designated transcripts prevented him from filing a timely habeas petition. For example, he does not identify any particular claims he could not present due to the lack of these transcripts. Harris v. Snyder, 2002 WL 47895, \*4 (D. Del. Jan. 11, 2002). Considering the fact that Petitioner's § 2254 petition asserts the same claims he raised in his direct appeal, as well as in his Rule 61 motion for post-conviction relief,<sup>3</sup> it appears that he did not need the transcripts to prepare his § 2254 petition.

Perhaps in an attempt to explain this incongruous situation, Petitioner asserts that he was not aware of the Delaware Supreme Court's decision with respect to his Rule 61 motion until July

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forwarded to the Superior Court on May 2, 2003, and denied on May 7, 2003. State v. Austin, ID 9903005366, Order (Del. Super. Ct. May 7, 2003).

<sup>3</sup>Petitioner's pro se petition for federal habeas relief asserts the following claims: (1) trial counsel provided ineffective assistance because he failed to provide Petitioner with requested trial transcripts for his pro se direct appeal; (2) trial counsel was ineffective because there was a conflict between counsel and Petitioner; (3) the trial court erred in failing to inquire into Petitioner's request for a continuance to retain new counsel; and (4) the trial court erred by allowing an expert witness to testify when the prosecution had failed to disclose such witness in discovery. (D.I. 1 at 5-6.) In his direct appeal, Petitioner raised the same four claims, as well as two additional claims. Finally, in his Rule 61 motion, Petitioner alleged ineffective assistance of counsel, including a claim that his counsel had failed to provide necessary transcripts. Austin v. State, 2002 WL 32071647 (Del. Super. Ct. Dec. 20, 2002).

12, 2003. He states that "it would be unreasonable for the Court to believe that the petitioner could have researched and prepared his habeas corpus petitioner [sic] any sooner than what was done as a pro se litigant." (D.I. 15 at 4.) Yet, only having 41 days to prepare a pro se habeas petition does not constitute an extraordinary circumstance justifying equitable tolling. To the extent Petitioner made a mistake or miscalculation regarding the one-year period, such mistakes also do not justify equitable tolling. See Simpson v. Snyder, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002).

In short, the Court concludes that Petitioner has not alleged any extraordinary circumstances to warrant equitably tolling the one-year limitations period. Petitioner's Supplemental Memorandum still fails to explain how his inability to obtain transcripts of his preliminary hearing, the trial scheduling, and his final case review prevented him from timely filing his § 2254 petition. (D.I. 15 at 2.) Thus, the Court will dismiss Petitioner's habeas petition as time-barred.

#### **IV. CERTIFICATE OF APPEALABILITY**

Finally, the Court 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." 28 U.S.C. § 2253(c)(2). This showing is satisfied when the petitioner demonstrates "that reasonable



jurists would find the district court's assessment of the denial of a constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

For the reasons stated above, the Court concludes Petitioner's § 2254 petition is time-barred, and equitable tolling is not warranted. Reasonable jurists would not find this conclusion unreasonable. Consequently, Petitioner has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will be denied.

#### **V. CONCLUSION**

The Court will dismiss Petitioner's Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 as time-barred.

(D.I. 1.) An appropriate Order will be entered.

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 THOMAS CARROLL, :  
 Warden, and M. JANE :  
 BRADY, Attorney General :  
 of the State of :  
 Delaware, :  
 :  
 Respondents. :

**ORDER**

At Wilmington, this 26th day of August, 2004,  
consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Larry W. Austin's Application For A Writ  
of Habeas Corpus Pursuant To 28 U.S.C. § 2254 is DISMISSED, and  
the relief requested therein is DENIED. (D.I. 1.)

2. The Court declines to issue a certificate of  
appealability.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE