UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6015

JOHN K.D. WATSON,

Petitioner - Appellant,

v.

COMMONWEALTH OF VA,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-00711-AJT-TCB)

Submitted: March 29, 2018 Decided: April 3, 2018

Before AGEE and DIAZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

John K.D. Watson, Appellant Pro Se.

PER CURIAM:

John K.D. Watson seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Watson has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

John K. D. Watson,	)	
Petitioner,	)	
	)	
v.	)	**1:17cv711 (AJT/TCB)**
	)	
Commonwealth of Virginia,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

John K. D. Watson, a Virginia inmate proceeding pro se, has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, seeking relief from his conviction of second degree murder and a firearms offense entered in the Richmond City Circuit Court. Watson initiated the action with a pleading captioned as "Appeal State Post-Conviction Petition," and by an Order dated June 29, 2017 he was directed to particularize and amend his petition by completing a standardized § 2254 form application. [Dkt. No. 2] Watson complied with those instructions, and after review of the form petition a second Order was entered, informing him that his claims appeared to be time-barred and allowing him thirty (30) days within which to contest the application of the statute of limitations or to establish his entitlement to equitable tolling. [Dkt. No. 5] Watson filed his response in a pleading captioned as an Affidavit on September 12, 2017.[1] [Dkt. No. 6] After careful consideration, this petition for § 2254 relief must be dismissed, as time-barred.

A petition for a writ of habeas corpus pursuant to § 2254 must be dismissed if it was filed later than one year after (1) the judgment at issue became final; (2) any state-created impediment

[1]While it is not dispositive, the Court notes that petitioner's "Affidavit" is neither notarized nor signed under the penalty of perjury.

to filing a petition was removed; (3) the United States Supreme Court recognized the constitutional right asserted; or (4) the factual predicate of the claim could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). In the instant case, Watson was sentenced on December 17, 2002 to serve 88 years in prison after he pleaded guilty to a reduced charge of second degree murder and a related firearms offense. Pet. at 1-2. The Virginia Courts' Case Status and Information website confirms that he took no direct appeal. Accordingly, Watson's convictions became final and the AEDPA limitations period began to run on or about January 16, 2003, when the time expired during which he could have filed such an appeal. See United States v. Williams, 139 F.3d 896 (table), 1998 WL 120116 at *2 (4th Cir. Mar. 5, 1998) ("Under Virginia law, a conviction is final thirty days after the entry of the judgment of conviction.")

In calculating the one-year limitations period, the Court generally must exclude the time during which properly-filed state collateral proceedings pursued by a petitioner were pending. See 28 U.S.C. § 2244(d)(2). Here, however, Watson did not commence his first postconviction proceeding until December, 2015, when he filed a Motion to Vacate his convictions in the trial court. Pet. at 4. He subsequently appealed the denial of that Motion to the Supreme Court of Virginia, and the appeal was dismissed on May 6, 2016. Watson v. Commonwealth, R. No. 160702. Since over twelve years elapsed between the date Watson's conviction became final and the date he filed his state postconviction proceeding, the federal statute of limitations had expired, and the pendency of the state proceeding could no longer toll the limitations period. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (holding that a state

postconviction motion filed after expiration of the limitations period cannot toll the period, because there is no period remaining to be tolled); Rashid v. Khulmann, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."). Accordingly, this petition is untimely under § 2244(d), unless petitioner can establish that the statute of limitations does not apply or should otherwise be tolled.

In his Affidavit, Watson argues that the limitations period should be equitably tolled in his case. The United States Supreme Court has established that equitable tolling is applicable to the § 2244(d)(2) limitations period. See Holland v. Florida, 560 U.S. 631 (2010). To qualify for equitable tolling, a petitioner must demonstrate both that (1) he had been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing. Id. at 649, citing Pace, 544 at 418. The petitioner is obliged to specify the steps he took in diligently pursuing his federal claim, and a lack of diligence generally acts to negate the application of equitable tolling. Spencer v. Sutton, 239 F.3d 626, 630 (4th Cir. 2001). In addition, the petitioner must "demonstrate a causal relationship between the extraordinary circumstance on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the circumstances." Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000). It is widely recognized that equitable tolling is to be applied only very infrequently. Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) ("We believe, therefore, that any resort to equity must be reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against the party and

gross injustice would result.")

Watson contends in his Affidavit is that he is entitled to equitable tolling because he received ineffective assistance of counsel and for other reasons. He alleges that "[o]n or about Dec. 20th 2002 in an interview room at the Richmond Virginia City Jail [his] lawyer Matthew P. Meary obstructed any attempt [he] had in filing a habeas corpus (ineffective assistance of counsel) in a timely manner." [Dkt. No. 6, Watson Aff. at 1] A second lawyer, Cary Bowen, also allegedly misinformed Watson regarding the availability of habeas corpus relief, and as a result he was "persuaded and led to believe a habeas corpus was not entitled to [him]." Id. Watson alleges further that his "learning disability (slow in comprehension)" was known to both attorneys, and they took advantage of that condition as well as his mother's multiple sclerosis to coerce and manipulate him into accepting a guilty plea mid-trial. In addition, counsel "provided false information that a habeas corpus wasn't available and any other attempt in other legal process after judgment was futile." Id. at 2. Watson claims entitlement to equitable tolling on the basis of his "lack of understanding, and lack of knowing the precedural [sic] process coupled with involuntarily relinquishing the use of further state process," and concludes: "I did not realize this error until the statute of limitations was well beyond its expiration. I did not understand the process, I did not know the consequences, I did not make the decision and was also deprived of legal material that would have given me proper legal options." Id. at 1.

Petitioner has also submitted the Affidavit of his mother, who explains her belief that attorney Bowen did not take her illness into consideration when he "put [her] in a serious situation where a decision had to be made" during Watson's trial, and failed "to let the Judge know [she] was incapable of making that decision for" him. [Dkt. No. 6, Deborah [Illegible]

Aff. at 2] The affiant states that counsel put her in an "awkward" situation, failed to put Watson's best interest "in the forefront," and had his paralegal speak to her when she went to see him after the trial. Id.

The extraordinary remedy of equitable tolling is not warranted in this case for the following reasons. First, to the extent that Watson and his mother allege that Watson received ineffective assistance during his trial, their arguments are irrelevant to the issue of whether his ability to file a federal habeas corpus petition in a timely manner was thwarted by counsel. Second, to the extent that Watson does attempt to justify the lateness of this petition with assertions that counsel "misinformed" him as to the availability of habeas corpus relief, his statements are entirely conclusory, and he offers no specific facts whatever to support his generalized contention that his counsel provided him with "false information." In the utter absence of a showing of specific facts to demonstrate that counsel's efforts were causally related to and prevented petitioner's timely filing of this petition, equitable tolling is not warranted.

Watson's argument that the limitations period should be equitably tolled based on his lawyer's assertedly ineffective assistance fails for a third reason. "[A] claim of ineffective assistance [generally must] ... be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Edwards v. Carpenter, 529 U.S. 446, 452 (2000), quoting Murray v. Carrier, 477 U.S. 478, 489 (1986). In this case, Watson failed to argue that he received ineffective assistance in a timely state postconviction proceeding, and it thus is apparent that no claim of ineffective assistance was considered on the merits as an independent claim by the Virginia courts. Lastly, even were that not so, ineffective assistance even if shown rarely provides a basis for equitable tolling. See Rouse, 339 F.3d at 248 (quoting

Beery v. Ault, 312 F.3d 948, 951 (8th Cir. 2002) for the proposition that "[i]neffective assistance of counsel generally does not warrant equitable tolling"); see also, Harris, 209 F.3d at 330-31; Broadnax v. Angelone, No. 2:02cv158, 2002 WL 32392670, at * 1 (E.D.Va. Sept. 19, 2002) ("[Petitioner's] failure to direct his attorney to file an appeal for him does not give him a basis upon which he may come into federal court after the statute of limitations has run .... [and] [a]ssuming, *arguendo*, that petitioner's attorney had erroneously advised him in connection with his collateral appeal, that failure would be insufficient to warrant equitable tolling of a statute of limitations.").

Lastly, to the extent that Watson claims entitlement to equitable tolling based on his lack of comprehension of "the process," he argues essentially that the limitations period should be extended because he is a laymen at law. That argument has been uniformly rejected not only by the Fourth Circuit, United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) ("[E]ven in the case of an unrepresented prisoner, ignorance of the law is not a basis for equitable tolling."), but also by virtually every court that has considered it. See, e.g., Cross-Bey v. Gammon, 322 F.3d 1012, 1015 (8th Cir. 2003) ("[E]ven in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted."); United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002) ("[A] petitioner's own ignorance or mistake does not warrant equitable tolling ...."); Delaney v. Matesanz, 264 F.3d 7, 15 (1st Cir. 2001) (rejecting the argument that a pro se prisoner's ignorance of the law warranted equitable tolling); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) (same). Further, Watson has failed to demonstrate that it "would be unconscionable to enforce the limitation period against [him or that] gross injustice would result." Rouse, 339 F.3d at 246. Accordingly, this petition is time-

barred from federal consideration.

Accordingly, it is

ORDERED that this petition be and is DISMISSED, WITH PREJUDICE, AS TIME-BARRED.

To appeal this decision, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the Court. Failure to timely file a notice of appeal waives the right to appeal this decision. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to petitioner, and to close this civil action.

Entered this 4th day of December 2017.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia

Additional material from this filing is available in the Clerk's Office.