UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6176

LARRY R. TART,

Petitioner - Appellant,

v.

ERIC A. HOOKS, Secretary of Public Safety,

Respondent - Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:17-cv-00260-WO-JLW)

Submitted: August 23, 2018 Decided: August 28, 2018

Before DUNCAN and FLOYD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Larry R. Tart, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

FILED: August 28, 2018

UNITED STATES COURT OF APPEALS
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No. 18-6176
(1:17-cv-00260-WO-JLW)

LARRY R. TART

Petitioner - Appellant

v.

ERIC A. HOOKS, Secretary of Public Safety

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PER CURIAM:

Larry R. Tart seeks to appeal the district court's order accepting the recommendation of the magistrate judge and 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 Tart 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

FILED: October 1, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6176
(1:17-cv-00260-WO-JLW)

LARRY R. TART

Petitioner - Appellant

v.

ERIC A. HOOKS, Secretary of Public Safety

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Duncan, Judge Floyd, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LARRY RICARDO TART,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:17CV260
	)	
ERIK A. HOOKS, Secretary of Public Safety,	)	
	)	
Respondent.	)	

JUDGMENT

For the reasons set forth in the Order filed contemporaneously with this Judgment,

IT IS THEREFORE ORDERED AND ADJUDGED that Respondent's Motion for Summary Judgment (Doc. 8) is **GRANTED**, that Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 2) and Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents (Doc. 10) are **DENIED**, and that this action is **DISMISSED** as time-barred. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 7th day of February, 2018.

William L. Osteen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LARRY RICARDO TART,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:17CV260
	)	
ERIK A. HOOKS[1],	)	
Secretary of Public Safety,	)	
	)	
Respondent.	)	

ORDER

This matter is before this court for review of the Recommendation filed on November 30, 2017, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). (Doc. 14.) In the Recommendation, the Magistrate Judge recommends that Respondent's Motion for Summary Judgment (Doc. 8) be granted, that Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 2) and Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents (Doc. 10) be denied, and that this action be dismissed. The Recommendation was served on the parties to this action on November 30, 2017 (Doc. 15). Petitioner timely filed objections

[1]The case caption is hereby amended to reflect the correct spelling of Respondent's name.

(Doc. 16) to the Recommendation. Petitioner also filed a motion entitled "Motion to Alter: Adding Inmate Remedy of 7-15-09 Hospitalization for Heart Attack," which contains more argumentation in support of Petitioner's federal habeas petition. (Doc. 18.)

This court is required to "make a de novo determination of those portions of the [Magistrate Judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the [M]agistrate [J]udge. . . . [O]r recommit the matter to the [M]agistrate [J]udge with instructions." Id.

This court has taken all these pleadings into consideration, concludes that they warrant no relief, and has made a de novo determination which is in accord with the Magistrate Judge's Recommendation. This court therefore adopts the Recommendation.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation (Doc. 14) is **ADOPTED. IT IS FURTHER ORDERED** that Respondent's Motion for Summary Judgment (Doc. 8) is **GRANTED**, that Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 2) and Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt

of Court: Default Barring Amendment by Respondents (Doc. 10) are **DENIED**, and that this action is **DISMISSED** as time-barred.

A Judgment dismissing this action will be entered contemporaneously with this Order. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 7th day of February, 2018.

William L. Osteen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LARRY RICARDO TART,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:17CV260
	)	
ERIC A. HOOKS,	)	
Secretary of Public Safety.	)	
	)	
	)	
Respondent.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket Entry 2.) Respondent has filed a motion for summary judgment (Docket Entry 8), a brief (Docket Entry 9), and an answer (Docket Entry 7). Petitioner, in turn, filed a response (Docket Entry 12) and a memorandum in support of his response (Docket Entry 13). Petitioner has also filed a pleading entitled "Amendment Motion in Naming of Respondent" (Docket Entry 4) and "Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents." (Docket Entry 10.) This matter is now prepared for a ruling.

Background

On March 11, 2009, in the Superior Court of Forsyth County, Petitioner pled guilty to second-degree murder. (Docket Entry 2, §§ 1-6.) Petitioner was sentenced to 175-219 months of imprisonment. (*Id.*) Petitioner filed an appeal, which he withdrew on or about August 6,

2009. (Docket Entry 2 at § 9(d) and Attach. 1 at 1.) Petitioner next filed a Motion for Appropriate Relief ("MAR") in the Superior Court of Forsyth County on January 19, 2011. (Docket Entry 9, Ex. 3.) On January 31, 2011, the clerk's office informed Petitioner by letter that the MAR did not comply with state statutes and notified him that the MAR was not reviewed by a Superior Court Judge. (*Id.*, Ex. 4.)

Petitioner then filed a second MAR in the same court on August 14, 2012. (*Id.*, Ex. 5.) On August 20, 2012, the clerk's office sent Petitioner a second letter informing him that his MAR did not comply with the required statutes and that therefore it would not be reviewed by a district court judge.[1] (*Id.*, Ex. 6.) On August 23, 2012, Petitioner filed a letter with the same court. (*Id.*, Ex. 7.) On September 12, 2012, the trial court administrator wrote a letter to Petitioner explaining to him that his MAR did not comply with statutory requirements and that he should contact prisoner legal services or a private attorney. (*Id.*, Ex. 8.) Although not entirely clear, Petitioner may also have filed a notice of appeal in Superior Court of Forsyth County in either January or June of 2013. (Docket Entry 2, Attach. 1 at 18.)

Petitioner filed a third MAR on October 1, 2015 in the Superior Court of Forsyth County (Docket Entry 9, Ex. 9), which was denied on October 5, 2015 (*id.*, Ex. 10.) Petitioner then moved to file an amended MAR on October 19, 2015 (*id.*, Ex. 11), which was denied on November 18, 2015 (*id.*, Ex. 12). On December 7, 2015, Petitioner filed a notice of appeal in the North Carolina Supreme Court (Docket Entry 2, Attach. 1 at 28), which was dismissed on March 17, 2016 (Docket Entry 9, Ex. 13). On May 16, 2016, Petitioner filed another notice

[1] It appears that Petitioner's MARs failed to include certificates of service to the opposing party. (Docket Entry 9, Exs. 3 and 5.)

of appeal and a request for a certificate of appealability in the North Carolina Supreme Court (*id.*, Ex. 14), which was denied on August 18, 2016 (Docket Entry 2, Attach. 1 at 32).

Petitioner has also attached to his Petition correspondence from the United States Court of Appeals for the Fourth Circuit, dated May 19, 2016. It acknowledges receipt of a filing related to Petitioner's state criminal conviction, but explains that the Fourth Circuit lacked jurisdiction over the matter and directs any federal habeas petition to the federal district court. (*Id.* at 31.) Petitioner filed his federal habeas petition in this court on March 23, 2017. (Docket Entry 2.)

Petitioner's Claims

Petitioner contends: (1) due process post-conviction violations by prosecution and by defense counsel, who was grossly ineffective, by withholding exculpatory information regarding Petitioner's initial claim of not guilty on the grounds of self-defense, because two people were there when Petitioner was defending the victim, and the prosecutor and defense attorney suppressed this evidence before Petitioner accepted the guilty plea; (2) psychological coercion, and threats from the prosecutor and defense counsel while under the influence of psychotic medications; (3) the prosecutor improperly used at sentencing the state's medical examiner's report (autopsy) and jail mental intake medical report; and (4) violation of the Eighth Amendment right to be free from cruel and unusual punishment and violations of equal protection of the Fourteenth Amendment. (*See id.* § 12, Grounds One through Four.)

Discussion

Respondent requests dismissal on the ground that the Petition was filed beyond the one-year limitation period imposed by 28 U.S.C. § 2244(d)(1). (Docket Entry 9 at 3-12.) In

order to assess this argument, the Court first must determine when Petitioner's one-year period to file his § 2254 petition commenced. In this regard, the United States Court of Appeals for the Fourth Circuit has explained that:

> Under § 2244(d)(1)(A)-(D), the one-year limitation period *begins to run from* the latest of several potential starting dates:
>
> (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
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Green v. Johnson, 515 F.3d 290, 303-04 (4th Cir. 2008) (emphasis added). The record does not reveal any meaningful basis for addressing subparagraphs (B) or (C) of § 2244(d)(1).

A. Subparagraph (A) Triggers the Onset of the Limitations Period.

Under Subparagraph (A), Petitioner's one-year limitation period began on "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)(A). The Court must therefore ascertain when direct review (or the time for seeking direct review) of Petitioner's underlying conviction(s) ended.

Here, Petitioner's judgment was entered on March 11, 2009. (Docket Entry 9, Ex. 2.) Petitioner appealed; however, that appeal was withdrawn—in a document containing both the signature of Petitioner and his counsel—on August 6, 2009. (Docket Entry 2, Attach. 1 at 1.) *See* N.C. Gen.Stat. § 15A-1450 (permitting withdrawal of criminal appeal by filing signed written notice with superior court clerk). The withdrawal of Petitioner's appeal was the day on which the judgment became final and therefore triggered the onset of the one-year limitations deadline under subparagraph (A). *See Yow v. Hayes*, No. 1:13-CV-283, 2013 WL 3353951, at *1 (M.D.N.C. July 3, 2013) (unpublished), *appeal dismissed*, 543 Fed. App'x 309 (4th Cir. 2013) (unpublished); *Turner v. Dir., Virginia Dep't of Corr.*, No. 1:13CV998 TSE/JFA, 2013 WL 6506179, at *1 (E.D. Va. Dec. 6, 2013). Therefore, Petitioner's one-year period of limitation under 28 U.S.C. § 2244(d)(1) commenced no later than early August of 2009, and expired no later than early August of 2010. Petitioner filed his Petition in March of 2017. (Docket Entry 2 at 1.) It is more than six years late.

Petitioner contends that his federal habeas petition is timely because he filed it within one year of the exhaustion of his state remedies in the form of the North Carolina Supreme Court's dismissal of his petitions in March and August of 2016. (Docket Entry 2, § 18.) It is true that the instant action would have been subject to statutory tolling if Petitioner had a properly filed post-conviction petition pending in state court during the one-year limitations period. 28 U.S.C. § 2244(d)(2); *see Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999) (state collateral filings generally toll the federal habeas deadline for "the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further

appellate review)"). However, statutory tolling does not apply here because none of Petitioner's state post-conviction proceedings were pending during the limitations period. In other words, Petitioner's time to file in this Court expired before he made any state court filings. Filings made after the limitations period has ended do not revive or restart it. *Minter v. Beck*, 230 F.3d 663, 665 (4th Cir. 2000). Here, Petitioner did not pursue any state post-conviction efforts until January 19, 2011, when he initiated his MAR, which was more than five months after his federal habeas deadline expired in early August of 2010. (Docket Entry 9, Ex. 3.) Beyond this, Petitioner's defective MARs, to the extent they were found to be deficient, are themselves insufficient to warrant statutory tolling. *See, e.g., McPhaul v. Hooks*, No. 3:17-CV-00333-FDW, 2017 WL 4978129, at *2 (W.D.N.C. Nov. 1, 2017) (unpublished) ("Petitioner failed to follow the statutory requirements governing filing and service of process. Accordingly, his first two MARs did not toll the statute of limitations.").[2] Unless another subparagraph applies, Petitioner's grounds for relief are all time-barred.

B. Subparagraph (D) Does Not Trigger the Onset of the Limitations Period.

Subparagraph (D) provides that a petitioner may file an application for a writ of habeas corpus within one year of "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)(D). Petitioner's first ground for relief asserts the suppression of favorable and exculpatory evidence. (Docket Entry 2, Ground One.) To the extent this ground for relief is

[2] Even if Petitioner's post-conviction pleadings entitled him to some degree of statutory tolling, which they do not for the reasons set forth above, his claims would still be time-barred. This is because any amount of statutory tolling to which Petitioner could theoretically be afforded by virtue of his post-conviction pleadings would not account for the six years it took for him to file his federal habeas petition.

based on the October 22, 2008 letter from counsel contained in the record, it fails. That letter, marked "CONFIDENTIAL," explains to Petitioner about potentially exculpatory information and further explains that the information in question later proved baseless. (*Id.*, Attach. 1 at 20.) This letter demonstrates, if anything, that Petitioner *was* aware of the predicate of this claim prior to his guilty plea in March of 2009. (*Id.*) Therefore, it cannot serve as a trigger for a later starting date of the limitations period. (*Id.*)

If, on the other hand, Petitioner is referencing the February 12, 2008 letter from counsel contained in the record, it also fails to warrant a later starting date. (Docket Entry 10 at 4.) The letter mentions a potentially helpful written statement from a witness (Harris) and efforts by counsel to find an individual (Holmes) Petitioner had identified. (*Id.*) Petitioner was therefore aware of this evidence, revealed in February of 2008, more than a year before he pled guilty in March of 2009. Consequently, Petitioner was aware of the factual predicate of the constitutional violation he now alleges by the time of his March 2009 guilty plea. Beyond this, nothing in Petitioner's remaining grounds for relief, or in any of his supporting documents, is sufficient to warrant a later starting date under this subparagraph. [3]

[3] It is conceivable that Petitioner is attempting to invoke subparagraph (D) of § 2244(d)(1) by contending there were constitutional errors in the way the state court handled his post-conviction pleadings and that those errors could only be discovered subsequent to the denial of post-conviction relief. However, even giving Petitioner the benefit of the doubt here, and assuming Petitioner is raising this issue, it necessarily fails as a matter of law because it is a non-cognizable claim in a federal habeas proceeding. *See Lawrence v. Branker*, 517 F.3d 700, 717 (4th Cir. 2008) ("[E]ven where there is some error in state post-conviction proceedings, a petitioner is not entitled to federal habeas relief because the assignment of error relating to those post-conviction proceedings represents an attack on a proceeding collateral to detention and not to the detention itself."); *Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir.1998) (same); *Boiant v. Magland*, 848 F.2d 492, 493 (4th Cir.1988) (same).

C. Petitioner Is Not Entitled to Equitable Tolling.

Petitioner may also be asserting that he is entitled to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 648 (2010). Equitable tolling may apply when a petitioner "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Petitioner fails to satisfy either of these prongs. First, to the extent Petitioner pleads ignorance of the one-year deadline, this is not a basis for equitable tolling. *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Second, the potential merits of a claim do not impact the timeliness analysis, so any argument along these lines must also fail. *See Rouse v. Lee*, 339 F.3d 238, 251-52 (4th Cir. 2003). Third, equitable tolling due to a petitioner's mental capacity is available "only in cases of profound mental incapacity." *Sosa*, 364 F.3d at 513. This Court finds that Petitioner's assertion of a mental illness, and his related pleadings addressing the medication he took to control it, do not demonstrate the sort of extraordinary case of "profound mental incapacity" that would justify equitable tolling. (Docket Entry 13 at 3-4; Docket Entry 2, Attach. 1 at 7-8, 10-13.) And, as is evinced above, Petitioner was able to file numerous post-conviction pleadings. Consequently, there is no reason to believe that his medication or any mental illness prevented him from filing a timely federal habeas petition.

Fourth, to the extent Petitioner asserts he is actually innocent of the crimes for which he was convicted, that claim would also fail to render his Petition timely. The Supreme Court recognized in *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013), an actual innocence exception to the one-year deadline. To establish actual innocence, "a petitioner must show that it is

more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see McQuiggin*, 133 S.Ct. at 1935. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Here, Petitioner has, at most, done no more than assert in a conclusory fashion that he is actually innocent. Mere conclusory statements are insufficient to toll the federal habeas deadline. For all these reasons, the Petition is time-barred.[4]

"Amendment Motion in Naming of Respondent"

As noted, Petitioner has filed an "Amendment Motion in Naming of Respondent." (Docket Entry 4.) In it, he seeks to have the name of the respondent in the caption of this matter reflect Eric A. Hooks, the Secretary of the North Carolina Department of Public Safety. (*Id.*) The caption already indicates that Hooks is the respondent and so this request is moot.

"Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents"

As further noted, Petitioner has also filed a pleading entitled "Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents." (Docket Entry 10.) This motion does not justify a later starting date of the one-year statute of limitations. (*Id.*) It should be dismissed along with the Petition.

[4] Even if the Petition were not time-barred, and it is time-barred for the reasons set forth above, it would still be denied for the reasons articulated in Respondent's motion for summary judgment. (Docket Entry 9 at 12-22.)

CONCLUSION

Petitioner's grounds are time-barred. Neither a hearing, nor discovery, nor the appointment of counsel are warranted.

IT IS THEREFORE ORDERED THAT Petitioner's "Amendment Motion in Naming of Respondent" (Docket Entry 4) be **DENIED** as moot.

IT IS THEREFORE RECOMMENDED that Respondent's motion for summary judgment (Docket Entry 8) be **GRANTED**, that the Petition (Docket Entry 10) and "Motion to Grant Petitioner's Habeas Corpus Petition: Plain Error: Contempt of Court: Default Barring Amendment by Respondents" be **DISMISSED**, and that Judgment be entered dismissing this action.

Joe L. Webster
United States Magistrate Judge

November 30 2017