

BLD-006

October 11, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **18-2412**

ZAAMAR BERSAN STEVENSON, Appellant

v.

PENNSYLVANIA STATE PAROLE BOARD; ET AL.

(W.D. Pa. Civ. No. 2:18-cv-00255)

Present: AMBRO, VANASKIE and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied. For substantially the reasons provided by the Magistrate Judge and adopted by the District Court, reasonable jurists would not debate the District Court's decision to dismiss Claims 1, 3, and 4 from Appellant's habeas petition as time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). As for Claim 2 (the lone remaining claim), reasonable jurists would not debate the conclusion that, regardless of whether this claim is timely, it fails to "state[] a valid claim of the denial of a constitutional right." Id.; see Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976).

By the Court,



Thomas L. Ambro,
Circuit Judge

Dated: October 17, 2018

JK/cc: Zaamar Bersan Stevenson A True Copy:

Gregory J. Simatic, Esq.

Patricia S. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ZAAMAR STEVENSON,)	
)	
Petitioner,)	Civil Action No. 18 – 255
)	
v.)	District Judge Mark R. Hornak
)	Magistrate Judge Lisa Pupo Lenihan
PENNSYLVANIA STATE PAROLE)	
BOARD and THE ATTORNEY)	
GENERAL OF THE STATE OF)	
PENNSYLVANIA,)	
)	
Respondents.)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons that follow, it is respectfully recommended that the Motion to Dismiss the Petition for Writ of Habeas Corpus (ECF No. 4) be granted and that the Petition for Writ of Habeas Corpus (ECF No. 1) be dismissed as untimely. It is further recommended that a Certificate of Appealability be denied.

II. REPORT

A. Procedural Background

Zaamar Stevenson (“Petitioner”) has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) challenging his judgment of sentence entered by the Lawrence County Court of Common Pleas on June 3, 2015 after he was resentenced to an aggregate term of incarceration of 3 to 8 years and a consecutive 1-year term of probation. (ECF Nos. 1, 4-2.)

Petitioner's judgment of sentence stems from his April 20, 2010 conviction for two (2) counts each of possession of a controlled substances, possession of a controlled substance with intent to deliver, and delivery of a controlled substance, and one (1) count of criminal use of communication facility. Commonwealth v. Stevenson, CP-37-CR-0000665-2009 (Lawrence County Com. Pl.).¹ Following his resentencing, Petitioner did not file a direct appeal.

On June 2, 2016, Petitioner filed a petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541, *et seq.*, and it was dismissed by the PCRA court on October 7, 2016. (ECF No. 4-3.) Petitioner appealed the denial of PCRA relief to the Pennsylvania Superior Court at 1797 WDA 2016, and on April 21, 2017, the Superior Court dismissed the appeal due to Petitioner's failure to file a brief. (ECF No. 4-4.)

Pursuant to the prisoner mailbox rule, Petitioner instituted the instant habeas corpus proceedings on February 26, 2018, the date his Petition is postmarked.² Respondents answered by filing a Motion to Dismiss the Petition on April 5, 2018. (ECF No. 4.) Petitioner responded to the Motion to Dismiss on April 20, 2018. (ECF No. 7.) The Motion is now ripe for review.

B. Discussion

AEDPA imposes a one-year limitations period for state prisoners seeking federal habeas review. It is codified at 28 U.S.C. § 2244(d) and it 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 –

¹ The docket sheets for Petitioner's criminal cases are a matter of public record and available for public view at <https://ujsportal.pacourts.us/>

² This is the filing date according to the prisoner mailbox rule. *See Houston v. Lack*, 108 S. Ct. 2379 (1988) (deeming a *pro se* prisoner's notice of appeal filed "at the time petitioner delivered it to the prison authorities for forwarding to the court"). *See also Burns v. Morton*, 134 F.3d 109, 112-13 (3d Cir. 1998).

- (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 that 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 facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) 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 section.

28 U.S.C. § 2244(d).

The statute of limitations set out in § 2244(d)(1) must be applied on a claim-by-claim basis. Fielder v. Varner, 379 F.3d 113 (3d Cir. 2004), *cert denied*, 543 U.S. 1067 (2005). In analyzing whether a petition for writ of habeas corpus has been timely filed under the one-year limitations period, a federal court must undertake a three-part inquiry. First, the court must determine the “trigger date” for the one-year limitations period pursuant to section 2244(d)(1). Second, the court must determine whether any “properly filed” applications for post-conviction or collateral relief were pending during the limitations period that would toll the statute pursuant to section 2244(d)(2). Third, the court must determine whether any of the other statutory exceptions or equitable tolling should be applied on the facts presented.

As to the first inquiry, the vast majority of habeas cases fall within § 2244(d)(1)(A), with AEDPA's limitation period commencing for all claims on the date the state prisoner's judgment of sentence became final by the conclusion of direct review. Such is the case here with respect to all of Petitioner's claims.

In this case, Petitioner was resentenced on June 3, 2015, and he did not file a direct appeal. Therefore, his judgment of sentence became final thirty days later, on July 3, 2015. *See Nara v. Frank*, 264 F.3d 310, 314 (3d Cir. 2001) (holding that, because the petitioner did not file a direct appeal from his guilty plea, his conviction and sentence became "final" upon the expiration of the thirty-day time period during which he could have appealed); *Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir. 2000) (noting that a judgment becomes final at the conclusion of direct review or the expiration of time for seeking such review, including the time limit (90 days) for filing a writ of certiorari in the Supreme Court). Absent any tolling of the statute of limitations, Petitioner had one year from that date, or until July 3, 2016, to file his Petition.

As to the second inquiry, the one-year limitations period was tolled during the pendency of Petitioner's "properly filed" state post-conviction proceedings pursuant to section 2244(d)(2). Petitioner sought collateral relief through a properly filed PCRA petition on June 2, 2016. However, by the time he did so, 334 days of his one-year statute of limitations period had expired (July 4, 2015 to June 1, 2016). The statute of limitations was then tolled until April 21, 2017, when the Superior Court dismissed his PCRA appeal for failure to file a brief. The statute of limitations then started to run again and expired 31 days later, on May 22, 2017. Petitioner, however, did not file his Petition here until February 26, 2018, well past the expiration of the statute of limitations.

Having failed to meet AEDPA's one-year statute of limitations, the Petition can only be saved by application of the doctrine of equitable tolling. The United States Supreme Court has held that AEDPA's statute-of-limitations period "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645 (2010). A petitioner is entitled to equitable tolling only if he shows that: (1) he has been pursuing his rights diligently,³ and (2) some extraordinary circumstance stood in his way and prevented timely filing. Id. at 649. *See also* Ross, 712 F.3d at 798-804; United States v. Thomas, 713 F.3d 165, 174 (3d Cir. 2013); Munchinski v. Wilson, 694 F.3d 308, 329-32 (3d Cir. 2012). "This conjunctive standard requires showing *both* elements before we will permit tolling." Sistrunk v. Rozum, 674 F.3d 181, 190 (3d Cir. 2012) (emphasis in original).

While Petitioner acknowledges that his Petition was untimely filed, he does not allege any facts or circumstances to establish that some "extraordinary circumstance" stood in the way of his timely filing of the instant Petition.

³ The United States Court of Appeals for the Third Circuit has explained:

The diligence required for equitable tolling purposes is reasonable diligence, not maximum, extreme, or exceptional diligence. Holland, 130 S.Ct. at 2565.... A determination of whether a petitioner has exercised reasonable diligence is made under a subjective test: it must be considered in light of the particular circumstances of the case. *See* Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004) ("Due diligence does not require the maximum feasible diligence, but it does require diligence *in the circumstances*." (emphasis added) (internal quotation marks and citation omitted); *see also* Doe v. Busby, 661 F.3d 1001, 1013 (9th Cir. 2011) ("To determine if a petitioner has been diligent in pursuing his petition, courts consider the petitioner's overall level of care and caution *in light of his or her particular circumstances*." (emphasis added)).

Ross v. Varano, 712 F.3d 784, 799 (3d Cir. 2013).

In sum, the Petition should be dismissed as untimely because it was filed after the one-year statute of limitations expired and because Petitioner has not shown entitlement to any equitable tolling.

C. Certificate of Appealability

A Certificate of Appealability should be denied because Petitioner has not made a substantial showing of the denial of a constitutional right or shown that jurists of reason would disagree that his habeas petition was untimely filed. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000) (explaining standard for grant of a certificate of appealability where court does not address petition on the merits but on some procedural ground); *Walker v. Government of the Virgin Islands*, 230 F.3d 82, 89-90 (3d Cir. 2000).

III. CONCLUSION

For the aforementioned reasons, it is respectfully recommended that the Motion to Dismiss the Petition for Writ of Habeas Corpus (ECF No. 4) be granted and that the Petition for Writ of Habeas Corpus (ECF No. 1) be dismissed as untimely. It is further recommended that a Certificate of Appealability be denied.

In accordance with the applicable provisions of the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B)&(C), and Rule 72.D.2 of the Local Rules of Court, the parties shall have fourteen (14) days from the date of the service of this report and recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date on which the objections are served to file its response. A party's failure to file timely objections will constitute a waiver of that party's appellate rights.

Dated: May 23, 2018.

A handwritten signature in black ink, appearing to read 'Lisa P. Lenihan', written over a horizontal line.

Lisa Pupo Lenihan
United States Magistrate Judge

cc: Zaamar Stevenson
38168068
NOCC
2240 Hubbard Road
Youngstown, OH 44505

Counsel for Respondents
(Via CM/ECF Electronic Mail)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2412

ZAAMAR BERSAN STEVENSON, Appellant

v.

PENNSYLVANIA STATE PAROLE BOARD; ET AL.

(W.D. Pa. Civ. No. 2-18-cv-00255)

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE,
RESTREPO, BIBAS, and PORTER, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: November 15, 2018
Lmr/cc: Zaamar Bersan Stevenson
Gregory J. Simatic



A True Copy:

Patricia A. Dodge, Clerk