No. 18-4228

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVEN L. RACKLEY,

Petitioner-Appellant,

v.

BRIGHAM SLOAN, Warden,

Respondent-Appellee.

ORDER

Steven L. Rackley, an Ohio prisoner proceeding pro se, appeals a district court judgment dismissing as untimely his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Rackley requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

Rackley pleaded guilty to involuntary manslaughter and aggravated robbery. He was sentenced to serve ten years of imprisonment for the manslaughter conviction and nine years of imprisonment for the robbery conviction, to run consecutively. The judgment was entered on April 24, 2013. Rackley did not file a timely appeal.

On January 13, 2014, Rackley filed a motion "for a final appealable order." The trial court denied the motion on January 22, 2014. On February 20, 2014, Rackley filed a motion for documents related to his criminal case. The trial court denied the motion on February 25, 2014. Rackley did not appeal. Rackley filed a motion to withdraw his guilty plea on March 14, 2014. The trial court denied Rackley's motion on March 27, 2014.

On June 10, 2014, Rackley filed a notice of appeal in the Ohio Court of Appeals, purporting to appeal the criminal judgment, the denial of his motion for a final appealable order, and the denial of his motion to withdraw his plea. The Ohio Court of Appeals denied Rackley's motion for leave

to file a delayed appeal and dismissed the appeal on June 27, 2014. The Ohio Supreme Court declined to accept jurisdiction of the appeal on February 18, 2015.

On July 15, 2014, Rackley filed a motion to vacate or set aside his criminal judgment. The trial court denied the motion on July 22, 2014. Rackley did not appeal.

Rackley filed a petition to vacate or set aside his criminal judgment on March 17, 2015. The trial court denied the petition on April 1, 2015. On April 23 and 24, 2015, Rackley filed a "motion to leave" and "requests for findings of fact and conclusions of law," both of which pertained to his petition for post-conviction relief. On June 16, 2015, the trial court entered an order notifying Rackley that it lacked jurisdiction to consider these motions because his case was pending appellate review. The Ohio Court of Appeals affirmed the denial of post-conviction relief on October 29, 2015. Rackley did not pursue an appeal to the Ohio Supreme Court.

On March 27, 2015, Rackley filed a state application for a writ of habeas corpus. The Ohio Court of Appeals dismissed Rackley's petition, and the Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals on June 16, 2016.

Rackley mailed this habeas corpus petition from prison on July 19, 2016, and it is considered filed on that date. *See Houston v. Lack*, 487 U.S. 266, 276 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Rackley's petition raised seven grounds for relief. On the recommendation of a magistrate judge and over Rackley's objections, the district court dismissed Rackley's habeas corpus petition as time-barred and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a habeas corpus petition is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A federal habeas corpus petition is subject to a one-year statute of limitations that begins to run from the latest of four possible circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D). Most of the time, the statute of limitations begins to run from "the date on which the [state court] 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). Here, Rackley argued that the statute of limitations began to run on a later date—"the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *See* 28 U.S.C. § 2244(d)(1)(D). The remaining circumstances do not apply in this case. *See* 28 U.S.C. § 2244(d)(1)(B)-(C). The limitations period is tolled by the amount of time that "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

Rackley's convictions became final on May 24, 2013, on expiration of the thirty-day period during which he could have filed an appeal to the Ohio Court of Appeals from the April 24, 2013 entry of his judgment of conviction and sentence. *See* Ohio R. App. P. 4(A)(1). Absent tolling, Rackley had one year from May 25, 2013, to file his habeas corpus petition. *See* Fed. R. Civ. P. 6(a)(1)(A).

The statute of limitations ran for 233 days, from May 25, 2013 to January 13, 2014, when Rackley filed a motion "for a final appealable order." The limitations period remained tolled until January 22, 2014, when the trial court denied the motion. The statute of limitations ran again for 28 days, from January 23, 2014 until February 20, 2014, when Rackley filed a motion for court documents. After the trial court denied the document motion on February 25, 2014, the limitations period ran from February 26, 2014 to March 14, 2014—16 days—until Rackley filed a motion to withdraw his guilty plea. Following the trial court's denial of the motion to withdraw on March 27, 2014, the statute of limitations ran again for 74 days, from March 28, 2014 to June 10, 2014, when Rackley filed a notice of appeal in the Ohio Court of Appeals. The statute of limitations remained

tolled until February 18, 2015, when the Ohio Supreme Court declined to accept jurisdiction of Rackley's appeal. At that time, 351 days of Rackley's one-year statute of limitations had expired. On February 19, 2015, the statute of limitations began to run again, and it ran uninterrupted until its expiration fourteen days later, on March 4, 2015.

Although Rackley filed a motion to vacate or set aside his criminal judgment, that motion does not affect the time calculation because it was filed during the pendency of his appeals to the Ohio courts when the statute of limitations was already tolled. Moreover, Rackley's petition to vacate or set aside his criminal judgment, "motion to leave," "requests for findings of fact and conclusions of law," state application for a writ of habeas corpus, and related appeals do not toll the statute of limitations because they were filed after the statute of limitations had expired. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Because Rackley's habeas corpus petition was filed on July 19, 2016, more than sixteen months after the one-year statute of limitations expired on March 4, 2015, it is time-barred under § 2244(d)(1)(A).

Rackley argued that he was entitled to a later start date of the statute of limitations under § 2244(d)(1)(D) because he did not know that he had a right to appeal his judgment of conviction and sentence. Rackley does not repeat that argument in his application for a certificate of appealability and has therefore abandoned it. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002). Nevertheless, as discussed by the district court, Rackley is not entitled to a later start date under § 2244(d)(1)(D) because he did not indicate "when he learned of his right to appeal" or "demonstrate that he was diligent in his efforts to discover and present the right" to appeal.

The one-year statute of limitations set forth in § 2244(d) "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 '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The district court concluded that

Rackley failed to show a diligent pursuit of his rights and an extraordinary circumstance preventing timely filing of his habeas corpus petition that would support equitable tolling. *See id.*

Moreover, Rackley did not make a credible showing of actual innocence that would allow his habeas corpus petition to proceed despite its untimeliness. *See Schlup v. Delo*, 513 U.S. 298, 327 (1995). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass" when his habeas corpus petition is time-barred. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence "gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* at 401 (quoting *Schlup*, 513 U.S. at 316). The district court found that Rackley presented no new, reliable evidence demonstrating his innocence of the crimes for which he was convicted. The magistrate judge also noted Rackley's failure to address "the admission of guilt arising from his guilty plea."

Reasonable jurists would not debate "whether the district court was correct in its procedural ruling" dismissing Rackley's habeas corpus petition as time-barred. *See Slack*, 529 U.S. at 484. Accordingly, the application for a certificate of appealability is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEVEN L. RACKLEY,	)	CASE NO.: 1:16CV1845
	)	
Petitioner,	)	JUDGE JOHN ADAMS
	)	
	)	
	)	
BRIGHAM SLOAN,	)	**ORDER AND DECISION**
	)	
Defendant.	)	
	)	

This matter appears before the Court on objections to the Report and Recommendation of the Magistrate Judge filed by Petitioner Steven J. Rackley. Upon due consideration, the Court overrules the objections and adopts the Report and recommended findings and conclusions of the Magistrate Judge and incorporates them herein. Therefore, it is ordered that the petition is hereby DISMISSED.

Where objections are made to a magistrate judge's R&R this Court must:

> must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

The R&R in this matter concluded that Rackley's petition was barred by the one-year statute of limitations contained in the AEDPA. Rackley has objected to numerous aspects of the R&R analysis of the statute of limitations.

In finding that Rackley was outside the one-year statute of limitations, the R&R initially noted that 233 days passed between Rackley's conviction and his motion for a final appealable order. In evaluating each step of the R&R's statutory tolling review, there is no question that Rackley's petition was filed well beyond the one-year mark. Rackley has raised no objection to the R&R's review of the statutory tolling provisions of the AEDPA.

Rackley, however, contends that the R&R erred in its review of his arguments for statutory tolling. In rejecting Rackley's argument, the R&R made note of the fact that Rackley had made no effort to demonstrate when he learned of his right to appeal. Moreover, Rackley did nothing to demonstrate that he was diligent in his efforts to discover and present the right. Instead, the R&R properly concluded that Rackley was not diligent when it took him 233 days to file his first motion with the trial court. In his objections, Rackley gives an extensive review of Ohio law and filing requirements – none of which have any applicability to the review conducted by the R&R. Moreover, none of Rackley's assertions cast any doubt on the conclusion that he did not diligently act to discovery his right to appeal. As such, he has shown no error in the R&R's conclusion that equitable tolling is not warranted.

Finally, Rackley contends that the R&R erred in review of his arguments surrounding tolling related to his claim of actual innocence. However, Rackley's objections do nothing more than reiterate the same alleged evidence that the R&R reviewed and found lacking. Once again, Rackley asserts that cell tower records in some manner establish his innocence. Like the R&R, this Court finds Rackley "has produced no new evidence. And he has offered no evidence or

argument to support the threshold requirement that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Doc. 32 at 31. Accordingly, Rackley has shown no error in the R&R's review of his assertions surrounding actual innocence.

I. Conclusion

Having found no merit to the objections raised by Rackley, the Court ADOPTS the Magistrate Judge's Report in its entirety. The Petition is DISMISSED in its entirety as barred by the statute of limitations.

The Court certifies, pursuant to 28 U.S.C. §1915(A)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability.

This Order is entered pursuant to Federal Rule of Civil Procedure 58.

So ordered.

October 23, 2018

/s/ John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

The Supreme Court of Ohio

State of Ohio ex rel. Steven L. Rackley

v.

Brigham Sloan, Warden

Case No. 2015-1364

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Ashtabula County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed, consistent with the opinion rendered herein.

Upon consideration of the appellant's amended motion for evidentiary hearing and motion to suspend bail and the execution of sentence, it is ordered by the court that the motions are denied as moot.

It is further ordered that a mandate be sent to and filed with the clerk of the Court of Appeals for Ashtabula County.

(Ashtabula County Court of Appeals; No. 2015-A-0021)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

EXHIBIT 67

Relevant Background

{¶ 2} In April 2013, Rackley pleaded guilty to involuntary manslaughter and aggravated robbery and the trial court sentenced him to 19 years in prison. *State v. Rackley*, 8th Dist. Cuyahoga No. 102962, 2015-Ohio-4504. He is currently serving his prison sentence at the Lake Erie Correctional Institution.

{¶ 3} In March 2015, Rackley filed a petition for a writ of habeas corpus in the Eleventh District Court of Appeals. He argued that he did not receive adequate notice of the charges against him, the municipal court failed to advise him of his constitutional rights, no proper arrest warrant had been issued and his case was improperly bound over to the common pleas court, and his indictment was improperly amended. He further claimed that he was deprived of his right to counsel at the indictment stage, his guilty plea was involuntary and not supported by sufficient evidence, a written plea agreement was never executed, his right to a speedy trial was violated, and his trial attorney was ineffective for various failures. The court of appeals dismissed the petition because he had an adequate remedy "in the form of an appeal and a postconviction motion for relief to raise such alleged errors." 2015-Ohio-2984, ¶ 7.

{¶ 4} In this appeal of right, Rackley challenges the appellate court's judgment and reasserts his habeas claims. He also requests that this court hold an evidentiary hearing on his claims and has filed a motion requesting that this court suspend bail and the execution of his sentence. In addition to responding to Rackley's substantive claims, appellee, Warden Brigham Sloan, argues that we should order Rackley to pay any filing fees associated with this appeal.

Analysis

{¶ 5} We affirm the appellate court's judgment dismissing Rackley's habeas petition. The claims for which he seeks relief are not cognizable in habeas corpus, and he possessed an alternative remedy at law to assert those claims.

{¶ 9} Habeas corpus is also not available to challenge the validity or sufficiency of an indictment, as such a claim is "nonjurisdictional in nature, and should [be] raised in an appeal of [a] criminal conviction rather than in habeas corpus." *State ex rel. Raglin v. Brigano*, 82 Ohio St.3d 410, 696 N.E.2d 585 (1998). The initial indictment charged Rackley with aggravated murder, and he entered a guilty plea to a reduced charge of involuntary manslaughter, *State v. Rackley* at ¶ 3-4, which is a lesser-included offense, *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph one of the syllabus. "An accused can properly plead guilty to a lesser included offense of the charge for which he was indicted, and habeas corpus will not lie to challenge a conviction on this plea." *Gunnell v. Lazaroff*, 90 Ohio St.3d 76, 77, 734 N.E.2d 829 (2000). And finally, "[a] claimed violation of a criminal defendant's right to a speedy trial is not cognizable in habeas corpus." *Travis v. Bagley*, 92 Ohio St.3d 322, 323, 750 N.E.2d 166 (2001).

{¶ 10} Moreover, the court of appeals correctly determined that Rackley has or had an adequate remedy at law in the form of direct appeal and postconviction relief to raise his alleged trial-level errors. 2015-Ohio-2984, at ¶ 7. Rackley has acknowledged that since his convictions, he has filed "a delayed appeal in the Eighth District Court of Appeals; an App.R. 26(A) motion for reconsideration in the Eighth District Court of Appeals; an appeal to the Supreme Court of Ohio; and a petition for postconviction relief in the Cuyahoga County Court of Common Pleas." *Id.* at ¶ 4. The availability of alternative remedies at law, even if those remedies were not sought or were unsuccessful, precludes a writ of habeas corpus. *State ex rel. O'Neal v. Bunting*, 140 Ohio St.3d 339, 2014-Ohio-4037, 18 N.E.3d 430, ¶ 15.

{¶ 11} Finally, since Rackley filed a notarized affidavit of indigence contemporaneously with his notice of appeal to this court, pursuant to S.Ct.Prac.R. 3.06, his indigence is a matter of record and we will not tax the costs of this appeal to him.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 06, 2019

Steven L. Rackley
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, OH 44030

Re: Case No. 18-4228, *Steven Rackley v. Brigham Sloan*
Originating Case No.: 1:16-cv-01845

Dear Mr. Rackley,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jerri L. Fosnaught

Enclosure

No. 18-4228

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 06, 2019
DEBORAH S. HUNT, Clerk

STEVEN L. RACKLEY,

Petitioner-Appellant,

v.

BRIGHAM SLOAN, Warden,

Respondent-Appellee.

ORDER

Upon consideration of the untimely petition for rehearing en banc from the appellant,

It is ORDERED that the petition not be accepted for fling.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Exh. (A)

THE CUYAHOGA COUNTY SHERIFF'S DEPARTMENT

SHERIFF CLIFFORD PINKNEY

THE JUSTICE CENTER 1215 West 3rd Street, Cleveland, Ohio 44113

December 10, 2015

Steven L. Rackley
Inmate #641-397
P.O. Box 8000
Conneaut, OH 44030

Dear Mr. Rackley,

The Cuyahoga County Sheriff's Department has received your public records requested. In your letter, you requested all booking and jacket information regarding your case# CR-12-593655-A. Further, you requested any and all arrest reports in connection with this case. Your name is not associated with the case number you provided for your public records request to the Sheriff's Department. However, case # CR-12-593955-A has been found as responsive to your request.

The arresting agency for this case is the Shaker Heights Police Department. You would need to contact this agency for the arrest reports in connection with this case. The rest of your request has been denied based upon the statutory authority of ORC 149.43(B)(8):

> A public Office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

THE CUYAHOGA COUNTY SHERIFF'S DEPARTMENT

SHERIFF CLIFFORD PINKNEY

THE JUSTICE CENTER 1215 West 3rd Street, Cleveland, Ohio 44113

This concludes our response to your request. Should you have any questions or need further assistance, please do not hesitate to contact me at (216) 443-6130 or jblatnik@cuyahogacounty.us.

Sincerely,

Judith A. Blatnik

Judith A. Blatnik
Public Records Manager

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

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Filed: June 20, 2019

Mr. Steven L. Rackley
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, OH 44030

Re: Case No. 18-4228, *Steven Rackley v. Brigham Sloan*
Originating Case No. 1:16-cv-01845

Dear Mr. Rackley:

Enclosed please find, unfiled, your documents addressed to the U.S. Supreme Court. Please be advised that you will need to send these documents directly to that Court. The address is listed below:

Clerk, Supreme Court of the United States
Washington, DC 20543

No further correspondence will be forthcoming from this Court.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Ms. Jerri L. Fosnaught