DLD-107 February 21, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3405**

DEVELL SHORT, Appellant

VS.

SUPERINTENDENT GREENSBURG SCI, ET AL.

(W.D. Pa. Civ. No. 2-10-cv-00219)

Present: JORDAN, GREENAWAY, JR. and NYGAARD, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect; and

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The appeal is dismissed for lack of appellate jurisdiction. A notice of appeal must be filed within thirty days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). The Rules provide for the extension or reopening of that deadline under certain circumstances, such as when the District Court grants a valid motion under Rule 4(a)(6). The District Court granted Appellant two such extensions to appeal the denial of his motion for relief from the judgment under Rule 60(b), but the text of Appellant's notice of appeal and his request for a certificate of appealability suggest that Appellant interpreted the extensions as applying to the 2010 dismissal of his habeas petition. Regardless of which order he is trying to appeal, and leaving aside the fact that he already has appealed that 2010 decision in C.A. No. 10-4395, Appellant's appeal is untimely because the District Court lacked authority to grant Appellant's motions to reopen the time to appeal under Rule 4(a)(6).

A motion to reopen the time for appeal under Rule 4(a)(6) must be filed within 180 days of the entry of judgment or within fourteen days of the party's receipt of notice of entry, whichever is earlier. Appellant's first Rule 4(a)(6) motion was filed sixteen months after the order denying his Rule 60(b) motion and more than seven years after the dismissal of his habeas petition. His second motion seeking additional time was later still. Both motions were untimely under Rule 4(a)(6). As the time limits in Rule 4(a)(6) are jurisdictional, the District Court lacked authority to grant Appellant's motions for equitable or other reasons. See Bowles v. Russell, 551 U.S. 205, 213 (2007). See also Baker v. United States, 670 F.3d 448, 456 (3d Cir. 2012) ("Given Bowles, we cannot extend the 180-day outer limit of Appellate Rule 4(a)(6).").

Because the District Court's extensions of time are invalid, and because there is no other basis in the record for extending or reopening the time to appeal, Appellant's notice of appeal was untimely filed. The thirty-day deadline imposed by Rule 4(a)(1) is jurisdictional, see Bowles, supra, so we dismiss the appeal and we do not reach Appellant's request for a certificate of appealability.

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: March 29, 2019
PDB/cc: Devell Short
Ronald M. Wabby, Jr., Esq.

A True Copy:

Patricia A. Dodszuweit

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

DEVELL SHORT, Appellant VS. SUPERINTENDENT GREENSBURG SCI, ET AL.
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2019 U.S. App. LEXIS 13571
C.A. No. 18-3405
February 21, 2019, Decided

EXHIBIT C.

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}(W.D. Pa. Civ. No. 2-10-cv-00219).

Counsel **DEVELL SHORT** (#BN-6679), Plaintiff - Appellant, Pro se, Mercer, PA.
For SUPERINTENDENT GREENSBURG SCI, ATTORNEY GENERAL PENNSYLVANIA, Defendants - Appellees: Ronald M. Wabby, Jr., Esq., Allegheny County Office of District Attorney, Pittsburgh, PA.

Judges: Present: JORDAN, GREENAWAY, JR. and NYGAARD, Circuit Judges.

Opinion

Opinion by: Joseph A. Greenaway, Jr.

Opinion

ORDER

The appeal is dismissed for lack of appellate jurisdiction. A notice of appeal must be filed within thirty days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). The Rules provide for the extension or reopening of that deadline under certain circumstances, such as when the District Court grants a valid motion under Rule 4(a)(6). The District Court granted Appellant two such extensions to appeal the denial of his motion for relief from the judgment under Rule 60(b), but the text of Appellant's notice of appeal and his request for a certificate of appealability suggest that Appellant interpreted the extensions as applying to the 2010 dismissal of his habeas petition. Regardless of which order he is trying to appeal, and leaving aside the fact that he already has appealed that 2010 decision in C.A. No. 10-4395, Appellant's appeal is untimely because the District Court lacked**{2019 U.S. App. LEXIS 2}** authority to grant Appellant's motions to reopen the time to appeal under Rule 4(a)(6).

A motion to reopen the time for appeal under Rule 4(a)(6) must be filed within 180 days of the entry of judgment or within fourteen days of the party's receipt of notice of entry, whichever is earlier. Appellant's first Rule 4(a)(6) motion was filed sixteen months after the order denying his Rule 60(b) motion and more than seven years after the dismissal of his habeas petition. His second motion seeking additional time was later still. Both motions were untimely under Rule 4(a)(6). As the time limits in Rule 4(a)(6) are jurisdictional, the District Court lacked authority to grant Appellant's motions for equitable or other reasons. See Bowles v. Russell, 551 U.S. 205, 213 (2007). See also Baker v. United States, 670 F.3d 448, 456 (3d Cir. 2012) ("Given Bowles, we cannot extend the 180-day outer limit of Appellate Rule 4(a)(6).").

Because the District Court's extensions of time are invalid, and because there is no other basis in the record for extending or reopening the time to appeal, Appellant's notice of appeal was untimely filed.

The thirty-day deadline imposed by Rule 4(a)(1) is jurisdictional, see Bowles, supra, so we dismiss the appeal and we do not reach Appellant's request for a certificate of appealability.

By the Court,

/s/ Joseph A. Greenaway, Jr.

Circuit Judge

Dated: March 29, 2019

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

DEVELL SHORT, Petitioner, v. JOSEPH MAZURKIEWICZ, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, and THE DISTRICT ATTORNEY OF THE COUNTY OF ALLEGHENY COUNTY, Respondents.	)	Civil Action No. 10-219 Magistrate Judge Lisa Pupo Lenihan ECF No. 29

OPINION AND ORDER

Currently pending before the Court is a "Motion to Amend or Alter Judgment" (the "Rule 60(b) Motion") that Petitioner filed on January 17, 2017, requesting that the Court vacate its Order dated October 19, 2010, which dismissed his Petition for Writ of Habeas Corpus as untimely. (ECF No. 29) Petitioner essentially argues that he is entitled to relief because he was "effectively shut out of federal court without any adjudication of the merits of his claims" and that "contrary to congressional intent" he has been deprived "of his valuable right to one full round of federal habeas review." (ECF No. 29, p.4.) For the following reasons, his Motion will be denied and a certificate of appealability will also be denied.

A. Relevant Procedural History[1]

On June 28, 1991, following a jury trial in the Court of Common Pleas of Allegheny County, Pennsylvania, Petitioner was found guilty of murder in the first degree and related firearm charges and was sentenced to the mandatory term of life imprisonment without parole. Petitioner filed a timely notice of appeal and on October 20, 1994, the Superior Court of Pennsylvania affirmed his judgment of sentence (Commw. Ex. 24). Petitioner filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on March 15, 1995.

On July 9, 1996, Petitioner filed his first *pro se* petition for relief under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9542. On November 24, 1998, the PCRA Court dismissed Petitioner's PCRA Petition on the merits (Commw. Exs. 45 & 47). Petitioner filed a timely Notice of Appeal and on November 9, 1999, the Superior Court of Pennsylvania affirmed the Trial Court's determination denying Petitioner PCRA relief (Commw. Ex. 52). On April 4, 2000, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. (Commw. Ex. 54).

On April 4, 2001, Petitioner, through Chris Rand Eyster, Esquire, filed a second Motion for Post Conviction Collateral Relief claiming that a witness had recanted his testimony. On February 25, 2002, this Petition was dismissed as untimely (Commw. Ex. 60). Petitioner filed a timely Notice of Appeal and on July 3, 2003, the Superior Court of Pennsylvania affirmed the Trial Court's determination denying Petitioner PCRA relief (Commw. Ex. 67). Petitioner did not file a petition for allowance of appeal.

[1] The section is taken from the Court's Memorandum Opinion dated October 29, 2010. (ECF No. 21, pp.1-3.)

On November 26, 2003, Petitioner, through Attorney Eyster, filed a third Motion for Post Conviction Collateral Relief claiming that on October 25, 2003, he was made aware of a new eyewitness. On February 20, 2004, this Petition was dismissed as untimely because Petitioner failed to establish that the evidence could not have been obtained earlier through the exercise of due diligence (Commw. Ex. 72). Petitioner filed a timely Notice of Appeal and on May 18, 2005, the Superior Court of Pennsylvania affirmed the Trial Court's determination (Commw. Ex. 79). Petitioner filed a petition for allowance of appeal, which was denied by the Supreme Court of Pennsylvania on November 1, 2005 (Commw. Ex. 82).

On July 17, 2007, Petitioner, through Attorney Eyster, filed a fourth Motion for Post Conviction Collateral Relief alleging judicial bias due to new information he received from a juror in Petitioner's trial. On November 16, 2007, this Petition was dismissed as untimely because Petitioner failed to establish that the evidence could not have been obtained earlier through the exercise of due diligence (Commw. Ex. 86). Petitioner filed a timely Notice of Appeal and on February 17, 2009, the Superior Court of Pennsylvania affirmed the Trial Court's determination (Commw. Ex. 94). Petitioner did not file a petition for allowance of appeal.

Petitioner's federal Petition for Writ of Habeas Corpus was executed on February 11, 2010. (ECF No. 1.) On October 19, 2010, this Court issued a Memorandum Opinion and Order dismissing the Petition as untimely filed. (ECF Nos. 21, 22.) Petitioner appealed, (ECF No. 23), but the Third Circuit Court of Appeals denied his Certificate of Appealability on March 10, 2011, (ECF No. 27).

Petitioner appears to have filed a fifth Motion for Post Conviction Collateral Relief on June 6, 2011, again alleging that he was entitled to relief because of newly discovered evidence.[2] This Petition was dismissed as untimely on February 11, 2013. The Superior Court of Pennsylvania affirmed the Trial Court's decision on January 28, 2014.

Petitioner also appears to have filed a sixth Motion for Post Conviction Collateral Relief on March 13, 2014, and a seventh Motion for Post Conviction Relief on April 3, 2014. Both of those Petitions were denied and the Trial Court's decisions were affirmed on appeal.

B. FRCP 60(b)

Federal Rule of Civil Procedure 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; (3) fraud or misconduct by an opposing party; (4) because the judgment is void; (5) because the judgment has been satisfied, released or discharged; and (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b). A motion under subsection (b)(6) requires a showing of "extraordinary circumstances," which the Supreme Court has recognized "will rarely occur in the habeas context." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions. In Gonzalez, the Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim on the merits." Id.

[2] These Motions were filed in the Trial Court after this case was closed. However, the Court takes judicial notice of the docket sheet from Petitioner's underlying criminal case at CP-02-CR-0004651-1990, in the Court of Common Pleas of Allegheny County, which reflects these filings.

at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at n.4. The Court further explained that a Rule 60(b) motion does not constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. When "no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." Id. at 533.

C. Discussion

As an initial matter, the Court must first determine whether Petitioner's Rule 60(b) Motion is, in actuality, a second or successive habeas petition. To do this, the Court must look at Petitioner's arguments advanced in his Motion and determine whether he is asserting a new ground for relief that challenges his underlying conviction or whether he is challenging the manner in which his previous habeas petition was procured.

What is interesting about Petitioner's Rule 60(b) Motion is that he appears to neither advance a new claim for relief nor challenge the Court's ruling that his Petition was untimely filed. Instead, he argues that he has been deprived of what Congress intended – "one full round of federal habeas review" – and complains that the state courts have denied review of his claims "[n]o matter how much evidence [he] presented[.]" (ECF No. 29, pp.4-5.) He states that this evidence included an affidavit from a new witness, as well as an affidavit from a juror in his criminal case. Id. at pp.5-7. He argues that the lower courts failed to consider this evidence despite the fact that it had merit and was presented in a timely manner, and as a result he was "kept out of state and federal court." Id. at p.8.

While the Court is unclear as to what Petitioner's basis is for reopening judgment in this case, his arguments (to the extent that they are arguments) do not entitle him to relief. First, Petitioner seems to heavily rely on the dissenting opinion in Gonzalez v. Crosby, 545 U.S. 524 (2005), wherein Justice Stevens stated:

> Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court-without any adjudication on the merits of his claims-because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 325 (1996); *see also* Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights.") When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived-contrary to congressional intent-of his valuable right to one full round of federal habeas review.

Gonzalez, 545 U.S. at 541 (Stevens, J., dissenting). This Court agrees that the importance of a petition for writ of habeas corpus is undeniable; however, the filing of a petition does not come without its restrictions. With the creation of the AEDPA, Congress intentionally created a series of restrictive gate-keeping conditions which must be satisfied for a prisoner to prevail on a petition seeking the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. One such intentionally restricted gate-keeping condition is the strict and short statute of limitations created by 28 U.S.C. § 2244(d).

Petitioner would have this Court ignore the statute of limitations in his case simply because he has been unsuccessful at obtaining relief in the state courts. However, Petitioner has no right to have this Court reopen judgment and review his claims just because the state courts have dismissed his PCRA petitions as untimely after having failed to satisfy the newly discovered facts exception to the PCRA timebar, and, to the extent he tries to challenge the state

courts' decisions regarding the timeliness of his PCRA petitions in an attempt to somehow revive his Habeas Petition and overcome the statute of limitations, he cannot do so here. *See* Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) ("When a postconviction is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2).") (internal quotation omitted).

Finally, the Court notes that in his Rule 60(b) Motion, Petitioner also argues that his attorney "gave him unprofessional advice" that ultimately led to the untimely filing of his Habeas Petition. (ECF No. 29, at p.8.) This argument, however, was already addressed by the Court in its Opinion dated October 19, 2010, when it considered whether the statute of limitations could be equitably tolled in Petitioner's case.

> In the instant action, Petitioner has not carried his burden of showing any extraordinary circumstances beyond his control that accounted for his failure to have filed his habeas petition in a timely manner. Although he tries to blame Attorney Eyster for his failure to file in time, the Court of Appeals for the Third Circuit repeatedly has held that in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes [have] not been found to rise to the extraordinary circumstances required for equitable tolling. *See, e.g.*, LaCava v. Kyler, 398 F.3d 271, 276 (3d Cir. 2005); Schlueter v. Varner, 384 F.3d 69, 76-78 (3d Cir. 2004) (attorney's misconduct did not constitute an extraordinary circumstance where that attorney did not keep his promise to file petitioner's PCRA motion in time and failed to communicate further with petitioner about the status of his petition.); Johnson v. Hendricks, 314 F.3d 159, 162-63 (3d Cir. 2002) (equitable tolling is not warranted where the petitioner relied on erroneous advice from his state public defender that he had one year from the date of denial of post-conviction relief to file his federal habeas petition).

(ECF No. 21, at p.8.) Petitioner has not presented any evidence that equitable tolling should have been applied in his case, and, therefore, there is no basis to disturb this Court's judgment. The Rule 60(b) Motion will thus be denied.

D. Certificate of Appealability

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Because Petitioner has not made such a showing, a certificate of appealability will be denied.

Dated: April 11, 2017

Lisa Pupo Lenihan
United States Magistrate Judge

cc: Devell Short
BN-6679
SCI Greensburg
165 SCI Lane
Greensburg, PA 15601

Counsel of record
(*Via CM/ECF electronic mail*)

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

DEVELL SHORT, Petitioner, v. JOSEPH MAZURKIEWICZ, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, and THE DISTRICT ATTORNEY OF THE COUNTY OF ALLEGHENY COUNTY, Respondents.	)	Civil Action No. 10-219 Magistrate Judge Lisa Pupo Lenihan ECF No. 29

ORDER

AND NOW this 11th day of April, 2017,

IT IS HEREBY ORDERED that the Motion to Amend or Alter Judgment (ECF No. 29) is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

Lisa Pupo Lenihan
United States Magistrate Judge

cc: Devell Short
BN-6679
SCI Greensburg

165 SCI Lane
Greensburg, PA 15601

Counsel of record
(*Via CM/ECF electronic mail*)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EXHIBIT A

No. 18-3405

DEVELL SHORT,

Appellant

v.

SUPERINTENDENT GREENSBURG SCI;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTER DISTRICT OF PENNSYLVANIA
(No. 2-10-cv-00219)
District Judge: Honorable Lisa P. Lenihan

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and NYGAARD*, Circuit Judges

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 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/Josepha A Greenaway, Jr.
Circuit Judge

DATED: November 22, 2019
Lmr/cc: Devell Short
Ronald M. Wabby, Jr.

* As to panel rehearing only.