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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2548

James S. Harris

Petitioner - Appellant

v.

Sherie Korneman, Warden, Western Missouri Correctional Center

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - St. Joseph
(5:17-cv-06003-GAF)

JUDGMENT

Before LOKEN, SHEPHERD, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's motion for leave to proceed on appeal in forma pauperis is denied as moot.

The appeal is dismissed.

January 07, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

JAMES HARRIS,)
Petitioner,)
vs.)
SHERIE KORNEMAN,)
Respondent.)
Case No. 17-06003-CV-SJ-GAF

ORDER

Now before the Court is Petitioner James Harris's ("Petitioner") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, requesting the Court grant him relief for violations of his Fourteenth Amendment Due Process rights. (Doc. # 1). Respondent Sherie Korneman ("Respondent") opposes. (Doc. # 9). For the reasons set forth below, Petitioner's Petition is DENIED.

DISCUSSION

I. FACTS

Petitioner was convicted by a jury on May 4, 2010 of one count of assault in the first degree (Count 1), armed criminal action (Count 2), and assault in the third degree (Count 3). (Record on Appeal, 337:25-338:20). Prior to trial, Petitioner entered a guilty plea to a misdemeanor for stealing less than \$500.00 (Count 4). (*Id.* at 1:21-4:8). On August 26, 2010, the trial court sentenced Petitioner to twelve years imprisonment on Count 1 and four years imprisonment on Count 2 to run consecutively for a sixteen-year aggregate sentence. (*Id.* at 364:23-366:4). Petitioner was sentenced to 180 days in county jail on the remaining misdemeanor convictions, sentences to run concurrently, with credit for time served. (*Id.*). On August 9, 2011, Petitioner's

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convictions and sentences were affirmed on direct appeal. *State v. Harris*, 344 S.W.3d 301 (Mo. Ct. App. 2011) (mem.). Petitioner did not seek rehearing and transfer to the Missouri Supreme Court. (Doc. # 1, p. 6). In Missouri, direct review of a conviction ends fifteen days without action from a petitioner after the most recent ruling. Mo. Sup. Ct. R. 84.17(b). As such, Petitioner's direct appeal became final by the expiration of time seeking further review on August 24, 2011.

Petitioner filed a post-conviction relief motion on November 7, 2011. (29.15 Appeal Legal File, p. 7). After an evidentiary hearing, the trial court denied the amended post-conviction relief motion on December 9, 2013. (*Id.* at p. 141). Petitioner then had forty days after judgment to file his notice of appeal. Mo. Sup. Ct. R. 75.01, 81.04(a). Petitioner did not file a timely notice of appeal within that time period. The forty-day period expired on January 18, 2014. Petitioner filed a motion to file a late notice of appeal on October 24, 2014. (Doc. # 9-13). The Missouri Court of Appeals granted this motion on November 5, 2014. (*Id.*). On April 20, 2016, the Missouri Court of Appeals issued a mandate upholding the trial court's denial of post-conviction relief, which ended Petitioner's state post-conviction review. *Harris v. State*, 484 S.W.3d 830 (Mo. Ct. App. 2016) (mem.). Petitioner filed his federal writ of habeas corpus on January 19, 2017. (Doc. # 1).

II. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal writ of habeas corpus must be filed within one year from "the date on which the judgment became final by conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "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 . . ." 28 U.S.C. § 2244(d)(2). "[A]n application [of post-

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conviction review] is pending so long as the ordinary state collateral review process is in continuance—*i.e.*, until the completion of that process.” *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (internal quotation marks omitted). Once a petitioner’s deadline for filing a notice of appeal passes without action by the petitioner, the state post-conviction application ceases to be pending. *Streu v. Dormire*, 557 F.3d 960, 967 (8th Cir. 2009). The one-year statute of limitations may be equitably tolled “only if the movant shows: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Both elements must be independently satisfied to equitably toll the statute of limitations. *Menominee Indian Tribe of Wisc. v. United States*, -- U.S. --, 136 S. Ct. 750, 756 (2016).

III. ANALYSIS

Respondent contends that Petitioner’s writ of habeas corpus is barred by the statute of limitations. (Doc. # 9, pp. 3-5). The Court agrees. The statute of limitations first began to run on April 24, 2011, when the time to seek direct review ended on Petitioner’s case. 28 U.S.C. § 2244(d)(1)(A). Seventy-five days passed from this date to November 7, 2011, when Petitioner filed his motion for post-conviction relief. The statute of limitations was tolled from that date to January 18, 2014, the date which the time ran out for Petitioner to file a timely notice of appeal of the trial court’s denial of his post-conviction motion. 28 U.S.C. § 2244 (d)(2); *see Streu*, 557 F.3d at 967 (holding that a petitioner’s post-conviction application ceases to be pending when the deadline for filing a timely notice of appeal passes without action). The one-year statute of limitations was again tolled on November 5, 2014, when the Missouri Court of Appeals granted the motion for a late notice of appeal. *See Carey*, 536 U.S. at 219-20 (explaining that a state post-conviction remains pending until a final resolution in the proceeding has occurred). Tolling ceased

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on April 20, 2016, and the statute of limitations ran for 274 days until January 19, 2017, when the pending writ was filed in this Court. From the date to seek direct appeal ceased on August 24, 2011, to the date the writ was filed, January 19, 2017, 640 untolled days passed. Based on this timeframe, the writ is untimely, thus barred by the statute of limitations.

Petitioner does not dispute that the time elapsed between the expiration of the time to take a timely appeal, January 18, 2014, and the date the court of appeals granted his motion to file a late notice of appeal, November 5, 2014, does not constitute statutorily tolled time under AEDPA's statute of limitations. (Doc. # 16, p. 2). Rather, Petitioner asks the Court to equitably toll the statute of limitations during that time pursuant to *Holland*. (*Id.* at pp. 2-10). Petitioner does not seek to have the other time periods tolled. (*Id.*).

For his state post-conviction proceeding, Petitioner was first represented by state-appointed counsel. Petitioner subsequently hired private counsel Dan Ross and co-counsel Bryan Woehlecke. (Doc. # 16-1, p. 1). Retained counsel did not schedule an evidentiary hearing until one year and four months after making their entries of appearance when the case was placed on the dismissal list for lack of prosecution. (Doc. # 9-7, p. 4). An evidentiary hearing was held on September 12, 2013. (*Id.* at p. 5). The trial court denied the post-conviction relief motion on December 9, 2013. (*Id.* at p. 141). Neither Mr. Ross nor Mr. Woehlecke advised Petitioner that his post-conviction motion had been denied or that he had 30 days to file a timely motion for appeal. (Doc. # 16-1, p. 1). Petitioner states that the earliest he learned of the denial of his motion was in June 2014. (*Id.*). Petitioner states that once he learned of the dismissal, he contacted his family, who began looking for new counsel. (*Id.*). Petitioner retained Kent Gipson to file his motion for late notice of appeal. (*Id.*). Petitioner asserts that the failure of Mr. Ross and Mr. Woehlecke to inform him that his motion was denied and that there was a 30 day deadline to file

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a timely notice of appeal amounted to attorney abandonment and but for these actions, a timely notice of appeal would have been filed but-for this failure to communicate. (Doc. # 16, pp. 5-6).

The Supreme Court in *Holland* instructed that equitable powers of a court should be applied on case-by-case basis rather than pursuant to a bright-line rule. *Holland*, 560 U.S. at 649-50. Additionally, courts are to look to similar cases and draw upon existing precedent when evaluating cases concerning a court's equitable powers. *Id.* at 650. Eighth Circuit precedent provides that the use of equitable tolling should be "guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Earl v. Fabian*, 556 F.3d 717, 722 (8th Cir. 2009) (citing *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2002)).

"The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted). "Equitable tolling should only apply where the petitioner or movant has demonstrated diligence in pursuing the matter." *United States v. Martin*, 408 F.3d 1089, 1095 (8th Cir. 2005) (citation omitted). Petitioner asserts he diligently pursued his rights in this case because filed his initial state post-conviction relief petition *pro se*. (Doc. # 16, p. 5). Additionally, Petitioner contends that he contacted his family as soon as he found out his state post-conviction petition had been dismissed. (*Id.* at 5-6). Petitioner also states that Mr. Gipson filed a late notice of appeal and asserted in that notice that but-for the delay in finding out about the dismissal of his case, Petitioner would have filed a timely notice of appeal. (*Id.* at 6).

Petitioner cites *Holland*, where the Supreme Court found that the petitioner acted with reasonable diligence when he wrote his attorney numerous letters requesting information and providing direction; contacted state courts, state court clerks, and the state bar association repeatedly in an attempt to have his attorney removed from the case; and prepared his own habeas

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petition and filed it on the very day he discovered he was out of time. (*Id.* at 4); *Holland*, 560 U.S. at 653. Petitioner also cites *Martin*, where the Eighth Circuit found that the petitioner diligently pursued his rights where he “hired counsel well ahead of the deadline, ‘did everything in [his] power to stay abreast of the status of his case,’ provided original documents to his attorney to assist with the motion, filed a complaint with the state bar, and filed motions with the district court seeking an extension of time and the return of documents submitted to the attorney.” *Martin*, 408 F.3d at 1095.

The evidence presented by Petitioner fails to display that he pursued his rights with reasonable diligence. Unlike the petitioners in *Holland* and *Martin*, Petitioner does not show that he attempted to contact his attorneys during the time he did not hear from them. Nor did Petitioner attempt to contact the trial court, any court clerk, or the state bar association. Petitioner did not prepare his own habeas petition or make any filings immediately after learning his state post-conviction motion was dismissed. In fact, no filing was made until November 5, 2014, approximately five months after Petitioner learned his case had been dismissed by the trial court. *See Earl*, 556 F.3d at 724 (explaining that even with delayed notice of a judgment, a petitioner did not pursue his rights diligently when he had approximately eight months to file within the statute of limitations to file a petition). *But see, Holland*, 560 U.S. at 653 (finding that petitioner acted with reasonable diligence, in part, because he filed his federal habeas corpus petition the day he learned his state post-conviction proceeding had been final). While Petitioner asserts that it would have been impossible to file a timely federal writ of habeas corpus because the one-year statute of limitations had run by the time his state post-conviction proceeding ended on April 20, 2016, he cites no act that illustrates he pursued his rights with reasonable diligence before filing a late notice of appeal before November 5, 2014 apart from contacting his family in June 2014. As such, there

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is insufficient support for the proposition that Petitioner pursued his rights with reasonable diligence in this matter. *See Muhammad v. United States*, 735 F.3d 812, 817 (8th Cir. 2013) (providing that a petitioner did not reasonably pursue his rights despite a delay in notice when he did not file the applicable post-conviction motion immediately and “the time for filing the motion may have expired in the interim between his learning of the deadline and his submission of the motion”).

Petitioner has failed to show he pursued his rights with reasonable diligence. Because Petitioner did not pursue his rights with reasonable diligence, the second element of *Holland* is unsatisfied. Because the second *Holland* element was not met, the court need not address Petitioner’s arguments regarding the first *Holland* element. *See Menominee Indian Tribe of Wisc.*, 136 S. Ct. at 756 (providing that a petitioner must satisfy both elements of equitable tolling to allow a court to toll the statute of limitations); *Muhammad*, 735 F.3d at 816 (explaining that even if a petitioner could show extraordinary circumstances under *Holland*, a failure to act with reasonable diligence prevents a court from equitably tolling the statute of limitations). As the reasonable-diligence element is unsatisfied, the Court will not equitably toll the one-year statute of limitations provided by AEDPA. 28 U.S.C. § 2244(d).

IV. EVIDENTIARY HEARING AND CERTIFICATE OF APPEALABILITY

“Evidentiary hearings in habeas proceedings are barred unless the petitioner ‘was unable to develop his claim in state court despite diligent effort.’” *Wright v. Bowersox*, 720 F.3d 979, 987 (8th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S., 420, 437 (2000)). In fact, the district court can only review the record developed in the state courts except when the petitioner “shows that his claim relies upon a new, retroactive law, or due diligence could not have previously discovered the facts.” *Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005) (citing 28 U.S.C. § 2254(e)(2)).

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“[I]f the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.” *Schrivo v. Landrigan*, 550 U.S. 465, 474 (2007). “[T]he decision to grant such a hearing rests in the discretion of the district court.” *Williams v. Norris*, 576 F.3d 850, 860 (8th Cir. 2009) (quoting *Schrivo*, 550 U.S. at 468). Here, Petitioner fully developed his claims in the state courts. Petitioner also does not rely on a new, retroactive law, and he does not allege any newly discovered facts. Thus, the Court is barred from holding an evidentiary hearing in this matter.

“To grant a certificate of appealability, [Petitioner must make] a substantial showing of the denial of a federal constitutional right.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). To make a substantial showing, the petitioner must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted). Here, Petitioner has not established that reasonable jurists could debate whether his petition should have been resolved differently based upon the law of equitable tolling in the Eighth Circuit and the facts of this case. Further, Petitioner has not established that the issues he raised deserve encouragement to proceed further.

CONCLUSION

Petitioner’s writ of habeas corpus is time-barred by the statute of limitations established in AEDPA. Petitioner has failed to demonstrate he has pursued his rights diligently in this matter, thus preventing the Court from equitably tolling the statute of limitations pursuant to *Holland*. Accordingly, for these reasons and the reasons stated above, Petitioner’s Petition for Writ of Habeas Corpus is DENIED, an evidentiary hearing is barred, and no certificate of appealability

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shall be issued.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: December 4, 2018