No. 20-1454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 01, 2020
DEBORAH S. HUNT, Clerk

KEVIN SUTHERBY,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL, Warden,

Respondent-Appellee.

ORDER

Before: GUY, Circuit Judge.

Kevin Sutherby, a Michigan prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Sutherby has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also filed motions in support of his habeas claims, as well as a motion for bond pending adjudication of his habeas proceedings.

After Sutherby's first trial ended in a hung jury, a second jury convicted Sutherby in 2009 of first-degree criminal sexual conduct involving a victim under the age of thirteen, in violation of Michigan Compiled Laws § 750.520b(2)(b). The trial court sentenced Sutherby to twenty-five to fifty years in prison and the Michigan Court of Appeals affirmed his conviction on direct appeal. *People v. Sutherby*, No. 293826, 2010 WL 5383353, at *6 (Mich. Ct. App. Dec. 28, 2010) (per curiam). Sutherby did not seek review from the Michigan Supreme Court.

In October 2012, Sutherby filed a motion for a new trial based on newly discovered evidence, namely that the washing machine that the victim said she had used to wash the bloody "bed sheets upon which [the] attack was to have occurred" was broken during that time period. He also argued, among other things, that had trial counsel conducted a proper investigation, he

would have discovered this information about the washing machine and used that information to undermine the victim's credibility at trial. The trial court summarily denied the motion for a new trial in November 2012, and Sutherby did not appeal.

In May 2016, Sutherby filed a motion for relief from judgment, in which he argued that trial counsel rendered ineffective assistance by not undermining the victim's credibility with evidence of the broken washing machine. He also argued that appellate counsel rendered ineffective assistance by neither raising the issue of trial counsel's ineffectiveness on direct appeal, nor appealing the Michigan Court of Appeals' December 28, 2010, decision to the Michigan Supreme Court. The trial court denied Sutherby's motion, and the Michigan Court of Appeals and Michigan Supreme Court both denied Sutherby leave to appeal. *People v. Sutherby*, No. 334983 (Mich. Ct. App. Nov. 4, 2016); *People v. Sutherby*, 901 N.W.2d 594 (Mich. 2017) (mem.).

In October 2018, Sutherby, acting through counsel, filed a § 2254 petition, in which he raised several of the claims that he had advanced on direct appeal and in his motion for relief from judgment. The respondent moved to dismiss Sutherby's habeas petition on the basis that it was barred by the one-year statute of limitations contained in 28 U.S.C. § 2244(d), and that Sutherby was not entitled to tolling of the limitations period. Sutherby responded, arguing that his habeas petition was timely filed. He alternatively argued that he was entitled to equitable tolling of the limitations period and that failure to consider his claims would result in a fundamental miscarriage of justice. The district court found the respondent's motion well-taken, dismissed Sutherby's habeas petition as time-barred, and declined to issue a COA.

Sutherby now seeks a COA from this court as to each of his substantive claims. He does not challenge the district court's statue-of-limitations ruling. To the extent that Sutherby advances new claims or arguments on appeal that he did not raise in the district court—such as his claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963)—they are not properly before this court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

When the district court denies a habeas petition on procedural grounds, a COA should issue "when the prisoner shows, at least, 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).

Reasonable jurists could not debate the district court's procedural ruling that Sutherby's habeas petition is time-barred. The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations for filing a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1). Generally, the limitations period runs from "the date on which the judgment became final by . . . the expiration of the time for seeking [direct] review." *See* 28 U.S.C. § 2244(d)(1)(A). Here, Sutherby had fifty-six days after the Michigan Court of Appeals issued its decision on December 28, 2010, to perfect an appeal to the Michigan Supreme Court, *see* Mich. Ct. R. 7.305(C)(2), but he did not do so. Therefore, for purposes of § 2244(d)(1)(A), the Michigan Court of Appeals' decision became the final judgment at the expiration of that fifty-six day period, on February 22, 2011. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). The one-year limitations period commenced the following day and expired one year later, on February 23, 2012. Sutherby did not file his habeas petition until October 2018, over six and a half years after the statute of limitations had expired.

Sutherby argued in the district court that his habeas petition was timely filed pursuant to 28 U.S.C. § 2244(d)(1)(D) because he did not discover the factual predicate of his ineffective-assistance-of-trial-counsel claim until his motion for a new trial was denied in November 2012. Section 2244(d)(1)(D) provides that the one-year statute of limitations begins running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Sutherby's ineffective-assistance-of-trial-counsel claim concerned counsel's failure to call certain members of his family to testify that the washing machine was not operational on the day in question. But the record reflects that Sutherby was aware of the factual predicate of this claim prior to his trial. Section 2244(d)(1)(D) is therefore inapplicable.

Although 28 U.S.C. § 2244(d)(2) provides that the one-year statute of limitations is tolled while a properly-filed petition for state collateral review is pending, the tolling provision does not "revive" the limitations period (i.e., restart the clock); it can only serve to pause a clock that has not yet fully run. *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001). Once the limitations period is expired, collateral petitions can no longer serve to avoid the statute of limitations. *Id.*; *McClendon v. Sherman*, 329 F.3d 490, 493 (6th Cir. 2003). Even where the post-conviction motion raises a claim of ineffective assistance of appellate counsel, the filing of the motion for relief from judgment does not revive the statute of limitations. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (citing *McClendon*, 329 F.3d at 490). Because the one-year limitations period expired in February 2012, Sutherby's collateral motions for a new trial and relief from judgment—filed in October 2012 and May 2016, respectively—did not revive the limitations period.

Sutherby also argued that he was entitled to equitable tolling. The limitations period set forth in § 2244(d) is subject to equitable tolling 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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418). "The party seeking equitable tolling bears the burden of proving he is entitled to it." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010) (citing *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002)).

Sutherby argued that he was entitled to equitable tolling due to ineffective assistance of counsel. But neglect or mistake on the part of counsel is generally not a basis for equitable tolling. *See Jurado v. Burt*, 337 F.3d 638, 644 (6th Cir. 2003); *Elliott v. Dewitt*, 10 F. App'x 311, 313 (6th Cir. 2001). Attorney error or misconduct warrants equitable tolling only in extraordinary circumstances. *Holland*, 560 U.S. at 652; *cf. Robertson*, 624 F.3d at 784. Sutherby's assertions of ineffective assistance are conclusory and do not set forth an extraordinary circumstance surrounding counsel's performance that would warrant equitable tolling. Reasonable jurists could not debate the district court's rejection of Sutherby's equitable-tolling arguments.

Finally, a petitioner can overcome a time-bar by showing "that failure to consider [his] claims will result in a fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), but this requires a petitioner to make a "convincing showing" of actual innocence, *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To show actual innocence based upon new evidence, a petitioner must establish that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

Sutherby's claim of actual innocence was premised on affidavits submitted by his family members, who all attested that the washing machine was broken on the day that the victim said that she washed the bloody sheets. Sutherby has not shown that a reasonable jury would not have convicted him in light of this evidence, *see id.*, especially considering the other evidence that was presented at trial, including an audio recording of Sutherby implicitly admitting that he had sexually penetrated the victim. *See Sutherby*, 2010 WL 5383353, at *2-3. Reasonable jurists would not debate the district court's determination that Sutherby did not make a sufficient showing of actual innocence.

Accordingly, Sutherby's COA application and miscellaneous motions are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN SUTHERBY,

Petitioner,

v.

SHERMAN CAMPBELL,[1]

Respondent.
_____/

Case No. 2:18-cv-13097

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS [4] AND DENYING A CERTIFICATE OF APPEALABILITY

On October 3, 2018, Petitioner Kevin Sutherby filed a habeas corpus petition under 28 U.S.C. § 2254. ECF 1. Petitioner is challenging his Wayne County conviction for first-degree criminal sexual conduct, in violation of Mich. Comp. Laws § 750.520b(1)(a). *Id.* at 2. On May 30, 2019, Respondent filed a motion to dismiss, arguing that the petition is untimely. ECF 4. For the following reasons, the Court will grant Respondent's motion to dismiss.

BACKGROUND

Petitioner's conviction arose from the sexual assault of a twelve-year-old victim, J. S., in July 2008. The assault occurred after the victim passed out after drinking at Petitioner's bachelor party. *People v. Sutherby*, No. 293826, 2010 WL

[1] The proper respondent in a habeas case is the state officer having custody of the petitioner. *See* Rule 2, Rules Governing Section 2254 Cases. Petitioner is currently housed at the Gus Harrison Correctional Facility. The warden of that facility is Sherman Campbell. The Court amends the case caption to reflect Sherman Campbell as the respondent.

5383353, at *2 (Mich. Ct. App. Dec. 28, 2010). The victim awoke the next morning next to Petitioner and was naked and had blood between her legs. *Id.* The victim could not remember what had happened the night before, and when she confronted Petitioner that she might be pregnant, Petitioner "implicitly admitted that he sexually penetrated the victim by telling her that she could not be pregnant because he had undergone a vasectomy and that he would die if the victim told her family what happened." *Id.*

Petitioner was convicted by a jury in Wayne County Circuit Court and, on August 13, 2009, sentenced to twenty-five to fifty years' imprisonment. *Id.* The Michigan Court of Appeals affirmed Petitioner's convictions. *Id.* Petitioner did not seek leave to appeal to the Michigan Supreme Court. *See* ECF 5-24 (Affidavit of Larry Royster, Clerk, Michigan Supreme Court).

On October 12, 2012, Petitioner filed a motion for a new trial. ECF 5-17. On November 30, 2012, the trial court denied the motion. ECF 5-18. On May 23, 2016, Petitioner filed a motion for relief from judgment in the trial court. ECF 5-19. On September 7, 2016, the trial court denied the motion. ECF 5-20. The Michigan Court of Appeals denied leave to appeal. *See People v. Sutherby*, No. 334983 (Mich. Ct. App. Nov. 4, 2016). On October 3, 2017, the Michigan Supreme Court also denied leave to appeal. *See People v. Sutherby*, 501 Mich. 878 (Mich. 2017).

On October 3, 2018, Petitioner filed his habeas corpus petition, through counsel. ECF 1. On March 30, 2019, Respondent filed a motion to dismiss the petition on the ground that it was not timely filed. ECF 4. On July 2, 2019, the Court issued

a stipulated order extending the time for Petitioner to file a response to the motion to dismiss to July 18, 2019. ECF 6. Petitioner did not file a response by that date. Instead, on July 21, 2019, the Court issued a second stipulated order extending the time to respond to August 8, 2019. ECF 7. Petitioner again failed to file a response by the new deadline. On August 14, 2019, the Court issued a third stipulated order and established a new response date of September 10, 2019. ECF 8. Petitioner failed to meet that deadline, and the Court issued a fourth stipulated order extending the time to file a response to September 24, 2019. ECF 9. Petitioner again failed to file a response. On October 1, 2019, a week past the deadline to file, the Court received a proposed fifth stipulated order that it did not enter. Petitioner had more than sufficient time to respond to the motion to dismiss. He failed to do so and failed to provide any justification for his failure to comply with the Court-mandated deadlines. On October 8, 2019, Petitioner filed an untimely response to the motion to dismiss.[2]

LEGAL STANDARD

A prisoner must file a federal habeas corpus petition within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . or 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)(A), (D).

[2] Although the Court is under no obligation to consider Petitioner's response to the motion to dismiss because it was filed two weeks after the Court-imposed deadline, the Court did consider it in issuing the present order.

Equitable tolling is available to toll a statute of limitations when "'a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010) (citing *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir. 2000)). In the habeas context, to be entitled to equitable tolling, a petitioner must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). A claim of actual innocence may also justify equitable tolling in certain circumstances. *Souter v. Jones*, 395 F.3d 577, 588 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. *Robertson*, 624 F.3d at 784.

DISCUSSION

Respondent argues that the petition is time-barred by the one-year statute of limitations period under 28 U.S.C. § 2244(d)(1). Petitioner appealed his conviction to the Michigan Court of Appeals, but not to the Michigan Supreme Court. *See* ECF 5-24. A defendant has fifty-six days from the date of the Michigan Court of Appeals' decision to file a delayed application for leave to appeal to the Michigan Supreme Court. Michigan Court Rule 7.302(C)(3). The Michigan Court of Appeals affirmed Petitioner's conviction on December 28, 2010. *See Sutherby*, 2010 WL 5383353, at *2. Petitioner's conviction became final when the time for seeking review to the Michigan Supreme Court expired—February 22, 2011. *See Gonzalez v. Thaler*, 565 U.S. 134,

150 (2012). The one-year limitations period commenced the following day, on February 23, 2011, and expired one year later on February 23, 2012.

Petitioner argues that the limitations period did not commence until November 30, 2012, when the trial court denied his motion for new trial, because it was not until that point in time that he discovered the factual predicate for his ineffective assistance of counsel claim. ECF 10, PgID 1172. Petitioner's ineffective assistance of counsel claim concerns defense counsel's failure to call three witnesses—Petitioner's father and two brothers—to testify at trial. ECF 1, PgID 16. Petitioner alleges that these witnesses would have impeached the victim's credibility. ECF 10, PgID 1171.

The victim testified at trial that when she awakened naked beside Petitioner, she noticed blood stains on the sheets. ECF 1, PgID 9. She testified that she placed the sheets in the washing machine and started the machine. *Id.* Petitioner argues that counsel was ineffective in failing to call his father and brothers to testify that the washing machine was broken at that time. *Id.* at 16. The claim that the washing machine was broken was known to Petitioner *at the time of trial.* In fact, he claims repeatedly that defense counsel was ineffective because Petitioner told counsel about the broken washing machine prior to trial yet counsel failed to call his proposed witnesses. *Id.*; ECF 5-17, PgID 900; ECF 5-19, PgID 922. And the affidavit of one of his brothers was executed on August 8, 2011, more than a year *before* Petitioner filed a motion for a new trial. *See* ECF 5-17, PgID 906. The factual predicate for Petitioner's claim was clearly known before trial, and § 2244(d)(1)(D) therefore does not apply.

And Petitioner's motion for a new trial—filed on October 12, 2012—did not statutorily toll the limitations period because it was filed over seven months after the limitations period expired. The filing of a collateral petition after the limitations period expires does not restart the limitations period. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (holding that the filing of a motion for collateral review in state court serves to "pause" the clock, not restart it). Absent equitable tolling, the petition is therefore time barred.

Petitioner failed to meet his burden to show that he is entitled to equitable tolling. First, Petitioner did not pursue his rights diligently. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 463 (6th Cir. 2012) ("this Court has never granted equitable tolling to a petitioner who sat on his rights for a year and a half") (citing *Robinson v. Easterling*, 424 F. App'x 439, 443 (6th Cir. 2011)). Petitioner waited over seven months after the limitations period expired to file a motion for a new trial. After the motion was denied, Petitioner then waited over three years before taking further action to challenge his conviction. His state collateral review proceedings concluded on October 3, 2017, and yet he waited another year to file the present habeas petition. The many and lengthy delays evidence an absence of diligence.

Second, even if Petitioner had diligently pursued his rights, no extraordinary circumstance prevented Petitioner from timely filing a petition. Petitioner argues that he failed to timely file his habeas because his counsel was ineffective. ECF 10, PgID 1175–77. He does not, however, even attempt to explain how his prior counsel's

representation—that ended in 2016—prevented him from filing a habeas petition until 2018.

Finally, Petitioner fails to present a credible claim of actual innocence. A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence—that was not presented at trial." *Schlup v. Delo,* 513 U.S. 298, 324 (1995). Petitioner states that he has affidavits from his father and two brothers that, had they been called to testify at trial, "their testimony would have so undermined the credibility of the complainant as to make it impossible for the jury to find him guilty beyond a reasonable doubt, and he would necessarily have been acquitted." ECF 10, PgID 1177. But the affidavits are not sufficient to meet the burden "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. And the affidavits are not new evidence—the affiants were available to testify as to the alleged information at trial and Petitioner attached their affidavits to his motion for a new trial. ECF 4, PgID 60. Equitable tolling is therefore unwarranted. The Court will grant Respondent's motion to dismiss and dismiss the petition for habeas corpus.

ORDER

WHEREFORE, it is hereby **ORDERED** that Respondent's motion to dismiss [4] is **GRANTED.**

IT IS FURTHER ORDERED that Petitioner's habeas corpus petition [1] is **DISMISSED.**

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** because reasonable jurists could not find the Court's procedural ruling that the petition is untimely debatable. *See* 28 U.S.C. § 2253(c)(1)(a), (2); Fed. R. App. P. 22(b).

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: October 21, 2019

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on October 21, 2019, by electronic and/or ordinary mail.

s/ Kristen MacKay
Case Manager Generalist

No. 20-1454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 14, 2020
DEBORAH S. HUNT, Clerk

KEVIN SUTHERBY,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL, Warden,

Respondent-Appellee.

ORDER

Before: SILER, CLAY, and THAPAR, Circuit Judges.

Kevin Sutherby, a Michigan prisoner proceeding pro se, petitions for panel rehearing of this court's order of October 1, 2020, denying his application for a certificate of appealability. Sutherby's application for a certificate of appealability arose from the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in Sutherby's application for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** the petition for panel rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECEIVED
JAN 13 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PLEASE
ATTN;

I SENT MY TRIAL TRANSCRIPTS
to my case worker, as he
requested, and the panel
NEVER LOOKED AT THEM?

WHY?

THE Proof of Illegal
Wrongful conviction is, in
THE TRIAL TRANSCRIPTS!

Police Reports - prove
Illegal arrest
charge/conviction?
SEE
PLEASE!