

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Don Edward Carter,

Petitioner,

v.

Shawn Phillips, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

APPENDIX FOR
PETITION FOR WRIT OF CERTIORARI

Submitted by
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WESTLAW**Carter v. Phillips**

United States District Court, W.D. Tennessee, Eastern Division. | July 29, 2020 | Slip Copy | 2020 WL 4352753 (Approx. 5 pages)

2020 WL 4352753

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United States District Court, W.D. Tennessee, Eastern Division.

Don Edward CARTER, Petitioner,

v.

Shawn PHILLIPS, Respondent.

Case No. 1:19-cv-01100-STA-jay

Signed 07/29/2020

Attorneys and Law Firms

Don Edward Carter, Pikeville, TN, pro se.

John H. Bledsoe, Zachary Lewis Barker, Office of the Tennessee Attorney General and Reporter, Nashville, TN, for Respondent.

ORDER DIRECTING CLERK TO MODIFY DOCKET, GRANTING MOTION TO DISMISS,
DENYING MOTION FOR PRODUCTION OF STATE COURT RECORDS AS MOOT,
DENYING CERTIFICATE OF APPEALABILITY, AND DENYING LEAVE TO APPEAL *IN FORMA PAUPERIS*

S. THOMAS ANDERSON, CHIEF UNITED STATES DISTRICT JUDGE

*1 Petitioner Don Edward Carter has filed a *pro se* habeas corpus petition (the "Petition"), pursuant to 28 U.S.C. § 2254 (ECF No. 1), as well as a document styled "Motion for Production of Relevant Parts of the Record" (ECF No. 15). By his motion, he seeks an order directing Respondent Shawn Phillips ¹ to file additional records from his state criminal trial. Respondent has moved to dismiss the Petition as untimely (ECF No. 10) and has not responded to the motion for production of records. For the following reasons, the motion to dismiss is **GRANTED** and the motion for production of records is **DENIED** as moot.

BACKGROUND

On June 10, 1996, the McNairy County, Tennessee, Grand Jury returned an indictment charging Carter with two counts of first-degree premeditated murder for the fatal shooting of his father and aunt. (ECF No. 9-1 at 13-14.) He was convicted as charged following a jury trial and was sentenced to concurrent terms of life imprisonment. *State v. Carter*, 16 S.W.3d 762, 764 (Tenn. 2000). The Tennessee Court of Criminal Appeals (the "TCCA") affirmed the convictions (ECF No. 9-12), and Carter unsuccessfully appealed that decision to the Tennessee Supreme Court. See *Carter*, 16 S.W.3d at 770.

Nearly eighteen years later, on January 18, 2018, Petitioner filed a state petition for post-conviction relief. (ECF No. 9-18 at 3-50.) The petition was dismissed as untimely. (*Id.* at 58.) Carter appealed, arguing that he was entitled to equitable tolling. (ECF No. 9-20 at 5.) The TCCA affirmed, and the Tennessee Supreme Court denied permission to appeal. *Carter v. State*, No. W2018-00285-CCA-R3-PC, 2018 WL 6266166, at *5 (Tenn. Crim. App. Nov. 30, 2018), *appeal denied* (Mar. 28, 2019).

DISCUSSION

On May 20, 2019, Carter placed his Petition into the prison mailing system for filing with the Court. (ECF No. 1 at 14.) He asserts that his due process rights were violated when the state courts determined that he was not entitled to equitable tolling of the state post-conviction limitations period, that his attorney rendered ineffective assistance at trial, and that the prosecution engaged in misconduct. On February 11, 2020, Respondent moved to dismiss the Petition as untimely. (ECF No. 10.) Carter filed a response in opposition to the motion, arguing that he is entitled to equitable tolling of the limitations period. (ECF No. 14.)

A § 2254 petition is subject to a one-year limitations period, commencing from four possible dates:

- (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 the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

*2 (D) 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).

The one-year limitations period is tolled during the time "a properly filed application for State post-conviction or other collateral review ... is pending[.]" 28 U.S.C. § 2244(d)(2). The time bar is also subject to equitable tolling where the petitioner demonstrates "(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)) (internal quotation marks omitted).²

In this matter, § 2244(d)(1)(A) applies, which means the federal limitations period was triggered when Petitioner's convictions became final. Because Carter did not appeal his convictions to the United States Supreme Court, they became final on July 16, 2000, which was ninety days after the Tennessee Supreme Court affirmed them. See *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000) ("[T]he one-year statute of limitations does not begin to run until the time for filing a petition for a writ of certiorari for direct review in the United States Supreme Court has expired," which is "ninety days following the entry of judgment by the 'state court of last resort[.]"') (quoting Sup. Ct. R. 13)). The limitations "clock" began to run the next day, *see id.* at 285, and it expired 365 days later, on July 16, 2001. When Carter placed his Petition in the prison mail system on May 20, 2019, he was late by nearly eighteen years.³

As previously indicated, Petitioner does not deny that he initiated his federal habeas proceeding well-beyond the expiration of the limitations period. He argues, however, that he is entitled to equitable tolling on three grounds: his "[d]irect [a]ppeal counsel did not advise him of the post-conviction avenue upon completion of his representation," he was erroneously advised by "a prison approved legal-a[ide] ... that he could not file[] a post-conviction [petition] because he was time-barred," and he "was mentally incompetent during the applicable time and thereafter[.]" (ECF No. 14-2 at 22-23.) Respondent argues that the first two reasons are inadequate grounds for equitable tolling and that Petitioner has not established that mental illness caused his untimely filing.

A. Direct Appeal Counsel's Failure to Advise

*3 Petitioner's argument that he is entitled to equitable tolling because his direct appeal counsel failed to tell him that he could pursue state post-conviction remedies is unavailing. Most obviously, Petitioner does not explain how his ignorance of state post-conviction remedies caused his failure to timely initiate his *federal* case. What is more, "[i]nsufficient legal advice is not enough to support equitable tolling in the Sixth Circuit." *Steward v. Moore*, 555 F. Supp. 2d 858, 872 (N.D. Ohio 2008) (citing *Jurado v. Burt*, 337 F.3d 638, 644-45 (6th Cir. 2003)). Finally, "[t]he law is clear that a prisoner's lack of actual knowledge about available legal remedies ... is not a sufficient basis for equitable tolling." *Dorantes v. Genovese*, No. 3:19-CV-00543, 2019 WL 6524888, at *2 (M.D. Tenn. Dec. 3, 2019) (petitioner not entitled to equitable tolling on the ground that he was ignorant of state post-conviction remedies) (citing *Clinton v. Bauman*, No. 10-11528, 2011 WL 282384 (E.D. Mich. Jan. 25, 2011) (ignorance of state post-conviction remedies did not warrant tolling)).

B. Prison Legal Assistant's Incorrect Advice

Petitioner's argument that he is entitled to equitable tolling because a prison legal assistant incorrectly informed him that a state post-conviction petition would be time-barred is also not well-taken. As an initial matter, Petitioner does not explain how the allegedly erroneous advice about the state statute of limitations affected his ability to file a timely petition for federal relief. In addition, even if he could show that his reliance on the advice caused his delay in filing his Petition, "reliance on ... unreasonable and incorrect [legal] advice ... is not

a ground for equitable tolling." *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (citing *Jurado v. Burt*, 337 F.3d 638, 644-45 (6th Cir. 2003)).

C. Mental Illness

Under Sixth Circuit case law, "a petitioner's mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA's one-year statute of limitations." *Afa v. Scott*, 662 F.3d 736, 742 (6th Cir. 2011). A petitioner seeking equitable tolling for mental incompetence bears the burden of demonstrating "that (1) he is mentally incompetent and (2) his mental incompetence caused his failure to comply with AEDPA's statute of limitations." *Id.* "In short, a blanket assertion of mental incompetence is insufficient to toll the statute of limitations. Rather, a causal link between the mental condition and untimely filing is required." *Id.* (citing *McSwain*, 287 F. App'x. 450, 456 (6th Cir. 2008)). "[A]n evidentiary hearing is required when sufficiently specific allegations would entitle the petitioner to equitable tolling on the basis of mental incompetence which caused the failure to timely file." *Id.* (citing *McSwain*, 287 F. App'x at 457-58; *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009) (per curiam)). In assessing the need for a hearing, a district court must "determine if the factual allegations are sufficient to support equitable tolling and [must] review the state court record in order to establish whether petitioner's assertions are refuted by the record or otherwise without merit." *Id.*

In support of his allegation that mental illness prevented a timely filing, Carter has submitted documents prepared in 1996 by his attorney and mental health professionals stating that he was being treated with psychotropic medications and that he suffered from post-traumatic stress disorder, severe depression, and bi-polar disorder. (ECF Nos. 1-1 at 14-16.) As Respondent points out, however, Petitioner does not present specific factual allegations or documentary evidence to support his general allegation that he was mentally incompetent through July 2001, when the federal limitations period expired.

*4 Petitioner counters that he could prove that his mental illness persisted beyond 1996 if he were allowed access to his prison mental health records. He asserts, however, that a Tennessee Department of Corrections regulation prohibits him from doing so. The argument is not well-taken.

It is true that the regulation, which Respondent submitted as an exhibit, tightly controls the dissemination of an inmate's mental health records, even to the inmate himself. (See ECF No. 10-2 at 2-3.) However, the regulation does allow an inmate to examine his records in person in "consultation with the treating (or a knowledgeable) psychiatric/psychological professional," as long as the professional does not "believe[] that the content of the psychological records should not be released to the inmate (or that they should be released only in part or under special conditions due to the anticipated impact upon the inmate)." (*Id.* at 3.) Therefore, had Petitioner reviewed his records in person he presumably could have presented specific factual allegations in this case to support his general allegation that his mental illness persisted after 1996. As Respondent correctly points out, however, Carter has not alleged that he requested a review of his records. Accordingly, the Court rejects his argument that, if not for the regulation, he could support his claim of mental incompetence.⁴

But even assuming Petitioner could show that his mental health issues were severe enough to render him incapable of filing his federal Petition during the limitations period and for some time thereafter, the state court record shows that he was able to overcome the impediment by January 18, 2018, at the latest. As noted above, Carter filed a state post-conviction petition on that date. After the post-conviction court summarily dismissed the petition as untimely, Petitioner actively pursued an appeal. See *Carter*, 2018 WL 6266166, at *1. A search of the Tennessee Appellate Court website shows that Carter, proceeding *pro se*, filed the following documents in his post-conviction appeal: notice of appeal, motion to proceed *in forma pauperis*, motion for permission to check-out the appellate record, motion to correct or modify the record, brief in support of his appeal, motion for status update, and reply brief.⁵ After the appellate court denied relief, Petitioner filed a timely APA to the Tennessee Supreme Court. (ECF No. 9-25.) Petitioner then waited nearly two months after his APA was denied on March 28, 2019, to file his Petition with this Court.

Accordingly, on this record, Carter cannot show that his mental health issues prevented him from filing the Petition earlier than May 2019, or that he diligently pursued his federal rights once the impediment abated. See *Pace*, 544 U.S. at 419 (petitioner not entitled to equitable tolling because, among other things, he "sat on" his federal rights "for five months

5 <https://www2.tncourts.gov/PublicCaseHistory/CaseDetails.aspx?id=72678&Party=True> (last accessed July 2, 2020).

6 An evidentiary hearing on equitable tolling is not necessary in light of the state court record.

7 If Petitioner files a notice of appeal, he must also pay the full \$505.00 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

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WESTLAW**Carter v. Phillips**

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Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.**Don Edward CARTER, Petitioner-Appellant,**

v.

Shawn PHILLIPS, Warden, Respondent-Appellee.

No. 20-6038

FILED March 04, 2021

Attorneys and Law Firms**Don Edward Carter**, Pikeville, TN, pro se.

Zachary Lewis Barker, Assistant Attorney General, Office of the Attorney General, Nashville, TN, for Respondent-Appellee.

Before: READLER, Circuit Judge.

ORDER

*1 **Don Edward Carter**, a pro se Tennessee prisoner, appeals a district court judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. He has applied for a certificate of appealability ("COA") and has moved to proceed in forma pauperis ("IFP") on appeal. See Fed. R. App. P. 22(b), 24(a)(5).

In 1997, a jury convicted Carter of two counts of murder in the shooting deaths of his father and aunt. The trial court sentenced him to life in prison with the possibility of parole. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment. *State v. Carter*, No. 02C01-9711-CC-00424, 1998 WL 460326 (Tenn. Crim. App. Aug. 10, 1998). On April 17, 2000, the Tennessee Supreme Court affirmed the appeals court's decision. *State v. Carter*, 16 S.W.3d 762 (Tenn. 2000).

On January 18, 2018, Carter filed a post-conviction petition in state trial court, arguing in part that the one-year statute of limitations should be tolled due to his mental illness. Finding insufficient evidence to support the tolling claim, the trial court dismissed the petition. The Tennessee Court of Criminal Appeals affirmed, reasoning that Carter had not provided documentation to support his allegation that mental incompetence had prevented him from filing his post-conviction petition for almost eighteen years. *Carter v. State*, No. W2018-00285-CCAR3-PC, 2018 WL 6266166 (Tenn. Crim. App. Nov. 30, 2018). On March 28, 2019, the Tennessee Supreme Court denied leave to appeal.

In his § 2254 petition, placed in the prison mailing system on May 20, 2019, Carter asserted that: (1) his due-process rights were violated when the state courts declined to equitably toll the statute of limitations for filing his post-conviction petition; (2) he received ineffective assistance of counsel at trial and on appeal; and (3) the prosecutor committed misconduct. The State filed a response in opposition on the ground that the petition was time-barred.

After concluding that Carter was not entitled to equitable tolling, the district court denied Carter's § 2254 petition as untimely. The court declined to issue a COA.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. See 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 the appeal concerns a district court's procedural ruling, a COA should issue when the petitioner demonstrates "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 § 2254 petition must be filed within one year after the latest of certain events, including "the date on which the 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). A prisoner may toll the limitations period by properly filing an application for post-conviction review in state court, 28 U.S.C. § 2244(d)(2), but a post-conviction petition filed after the lapse of the limitations period does not revive it, see *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003).

*2 If a prisoner fails to file a timely § 2254 petition, the prisoner is entitled to equitable tolling of the limitations period upon a showing that he was diligently pursuing his rights but was prevented from timely filing the petition by an extraordinary circumstance. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Jones v. United States*, 689 F.3d 621, 627 (6th Cir. 2012). Alternatively, the untimeliness of a petition may be excused on the ground of actual innocence where a petitioner "show[s] that it is more likely than not that no reasonable juror would have convicted him in the light of [] new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Carter concedes that his § 2254 petition is untimely, but he argues that he is entitled to equitable tolling because: (1) appellate counsel failed to advise him that he could file a post-conviction petition despite knowing of his mental health history and colorable post-conviction claims; (2) his mental incompetence prevented him from pursuing a collateral challenge to his convictions until the time of his post-conviction petition; and (3) a prison legal aide incorrectly advised him a few years after the conclusion of his direct appeal that he could not timely file a post-conviction petition. Carter alleges that a different legal aide explained equitable tolling to him and helped prepare his post-conviction petition. He does not contend that he is actually innocent.

Jurists of reason would agree that Carter is not entitled to equitable tolling. First, his ignorance of the law, including on matters such as the availability of state post-conviction remedies and the related statute of limitations, does not entitle him to equitable tolling. See *Ata v. Scutt*, 662 F.3d 736, 743 n.7 (6th Cir. 2011); *Reed v. United States*, 13 F. App'x 311, 313 (6th Cir. 2001) (holding that ignorance about filing a 28 U.S.C. § 2255 motion did not toll the one-year limitations period). And inadequate advice from counsel or a prison legal aide cannot support equitable tolling. See *Jurado v. Burt*, 337 F.3d 638, 644 (6th Cir. 2003) ("Generally, a lawyer's mistake is not a valid basis for equitable tolling.") (citations and quotations omitted) see also *United States v. Robinson*, 762 F. App'x 571, 577-78 (10th Cir. 2019) (holding that misinformation from an inmate legal assistance was not grounds for equitable tolling);

Second, mental incompetence will equitably toll the limitations period only if the mental incompetence caused the defendant's inability to comply with § 2244(d). See *Ata*, 662 F.3d at 742. Carter, however, has failed to make sufficiently specific allegations to support causation. See *id.* While Carter has presented evidence of his mental disorders and treatment around the time of his offense and convictions, he has failed to present evidence of subsequent mental incompetence that prevented him from pursuing post-conviction remedies. Although he argues that he cannot obtain his mental health records from the prison system, prison regulations do permit a prisoner to examine the records in certain situations. See Tenn. Dep't of Corr. Policy 113.52(VI)(B)(3)(d). Carter does not allege that he requested to examine his records, he does not attempt to present his own detailed recollection regarding his mental health after the conclusion of his direct appeal, and he does not provide any information on his mental health or behavior from anyone who was around him during this time. Thus, he has not made a substantial showing that he is entitled to equitable tolling.

*3 Accordingly, the court DENIES Carter's COA application and DENIES his IFP motion as moot.

All Citations

Not Reported in Fed. Rptr., 2021 WL 867105

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON EDWARD CARTER,

Petitioner-Appellant,

v.

SHAWN PHILLIPS, WARDEN,

Respondent-Appellee.

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FILED
May 24, 2021
DEBORAH S. HUNT, Clerk

O R D E R

Before: SUTTON, Chief Judge; CLAY and NALBANDIAN, Circuit Judges.

Don Edward Carter petitions for rehearing en banc of this court's order entered on March 4, 2021, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk