

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-6811

GAETAN H. LECOMPT,

Petitioner - Appellant,

v.

FRANK L. PERRY

Respondent - Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:17-cv-00068-CCE-JLW)

Submitted: September 28, 2017

Decided: October 3, 2017

Before WILKINSON, MOTZ, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Gaetan H. Lecompt, Appellant Pro Se. Clarence Joe DelForge, III, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gaetan H. Lecompt seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely his 28 U.S.C. § 2254 (2012) petition. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded 30 days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on May 11, 2017. The notice of appeal was filed on June 22, 2017.* Because Lecompt failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we deny leave to proceed in forma pauperis and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* For the purpose of this appeal, we assume that the date appearing on the notice of appeal is the earliest date it could have been properly delivered to prison officials for mailing to the court. Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266 (1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GAETAN H. LECOMPT,

Petitioner,

v.

FRANK L. PERRY,

Respondent.

1:17CV68

ORDER AND JUDGMENT

The Recommendation of the United States Magistrate Judge was filed with the court in accordance with 28 U.S.C. § 636(b) and, on April 13, 2017, was served on the parties in this action. Doc. 9. The petitioner timely objected to the Recommendation, asserting that his plea agreement plainly called for him to be sentenced in the middle of the presumptive range and instead he was given a life sentence, so that denial of the petition would be a miscarriage of justice. Doc. 11.

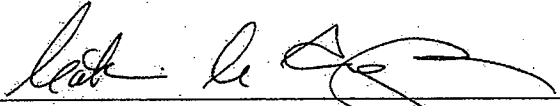
As to the part of the Magistrate Judge's report to which objection was made, the Court has made a de novo determination which is in accord with the Magistrate Judge's report. As the Magistrate Judge correctly found, Doc. 9 at 5, the merits of a time-barred claim are not relevant to the equitable tolling analysis. *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir. 2003). The petitioner knew he had received a life sentence on the day he was sentenced in 2011, yet he took no action to challenge that sentence until 2015. He has not shown that he was pursuing his rights diligently. *See Holland v. Florida*, 560 U.S. 631, 648 (2010).

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The Court has otherwise reviewed the Magistrate Judge's findings and conclusions. The findings about the adequacy of the North Carolina Prisoner Legal Services program are unnecessary to a decision, and the Court expresses no views as to those findings. Otherwise, the Court adopts the Magistrate Judge's findings and conclusions in full.

IT IS THEREFORE ORDERED AND ADJUDGED that Respondent's motion to dismiss, Doc. 5, is **GRANTED**, and the Petition, Doc. 1, is **DISMISSED**. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 11th day of May, 2017.


UNITED STATES DISTRICT JUDGE

GAETAN H. LECOMPT,

V.

Respondent.

1:17CV68

On August 1, 2011, in the Superior Court of Forsyth County, Petitioner pled guilty to five counts of statutory rape/sex offense with a child greater than six years old; nine counts of first-degree sex offense; thirteen counts of taking indecent liberties with a child; and two counts of dissemination to a minor less than 16 years old. (Docket Entry 1, §§ 1-6; Docket Entry 6, Ex. 2.) Petitioner was sentenced to life imprisonment. (*Id.*) Petitioner did not appeal. (Docket Entry 1, § 8.)

Petitioner next dated a motion for appropriate relief (“MAR”) on December 20, 2015 and filed it in Superior Court, Forsyth County on January 4, 2016. (*Id.* at PDF Pages 16-50.) It was denied on June 15, 2016. (*Id.* at 50-51.) On December 9, 2016, Petitioner filed a petition for a writ of certiorari in the North Carolina Court of Appeals (Docket Entry 6, Ex. 2) and it was denied on December 29, 2016 (Docket Entry 1 at PDF Page 52). Petitioner filed his Petition on January 26, 2017; it was executed on January 16, 2017. (Docket Entry 1 at 1, 15.)

Petitioner’s Claims

Petitioner contends: (1) his guilty plea was not knowingly, intelligently, and understandingly made, because his lawyer promised him a sentence in the middle of the presumptive range around 216 months, and showed him a sentencing chart, and when Petitioner accepted the plea he received a life sentence instead; (2) his life sentence is cruel and unusual in violation of the Eighth Amendment because he was led to believe his sentence would be in the middle of the presumptive range around 216 months, and the plea did not say anything about a life sentence, whereas the plea specifically said he would be sentenced in the middle of the presumptive range, and he was not sentenced in accordance with the plea; and (3) he received ineffective assistance of counsel because his lawyer showed him a sentencing chart and told him he would be sentenced in the middle of the presumptive range, and he was sentenced to life imprisonment instead. (*See id.* § 12.)

Discussion

Respondent requests dismissal on the ground that the Petition was filed beyond the one-year limitation period imposed by 28 U.S.C. § 2244(d)(1). (Docket Entry 5.) In order to assess this argument, the Court first must determine when Petitioner’s one-year period to file

his § 2254 petition commenced. In this regard, the United States Court of Appeals for the Fourth Circuit has explained that:

Under § 2244(d)(1)(A)-(D), the one-year limitation period *begins to run from* the latest of several potential starting 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

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Green v. Johnson, 515 F.3d 290, 303-04 (4th Cir. 2008) (emphasis added). The record does not reveal any basis for concluding that subparagraphs (B)-(D) of § 2244(d)(1) apply here.

Under subparagraph (A), Petitioner's one-year limitation period commenced on "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). The Court must therefore ascertain when direct review (or the time for seeking direct review) of Petitioner's underlying conviction(s) ended.

Here, Petitioner's judgment was entered on August 1, 2011. (Docket Entry 6, Ex. 1.) Petitioner did not pursue a direct appeal with the North Carolina Court of Appeals. Petitioner's conviction thus became final fourteen days later on August 15, 2011. *See* 28 U.S.C.

2244(d)(1)(A) (providing that a conviction is final “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”); *see also* N.C. R.App. P. 4(a)(2) (stating that criminal defendants have fourteen days to appeal). Therefore, Petitioner’s one-year period of limitation under 28 U.S.C. § 2244(d)(1) commenced on August 15, 2011, and expired 365 days later in mid-August of 2012. Petitioner dated the instant Petition January 16, 2017 and filed it in this Court on January 26, 2017. It is more than four years late.

It is true that the instant action would have been subject to statutory tolling if Petitioner had a properly filed post-conviction petition pending in state court during the one-year limitations period. 28 U.S.C. § 2244(d)(2); *see Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999) (state collateral filings generally toll the federal habeas deadline for “the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review)”). However, statutory tolling does not apply here because none of Petitioner’s state post-conviction proceedings were pending during the limitations period. In other words, Petitioner’s time to file in this Court expired before he made any state court filings. Filings made after the limitations period has ended do not revive or restart it. *Minter v. Beck*, 230 F.3d 663, 665 (4th Cir. 2000).

Here, Petitioner did not pursue any state post-conviction efforts until December of 2015, more than three years after his time to file the instant action had expired in mid-August of 2012. Thus, all of Petitioner’s state post-conviction efforts were filed years *after* the federal habeas deadline had expired in mid-August of 2012.

Petitioner does not dispute the foregoing time-line. Instead, he is apparently asserting that he is entitled to equitable tolling, a doctrine the Supreme Court has ruled theoretically applicable in this context. *See Holland v. Florida*, 560 U.S. 631, 648 (2010). Equitable tolling may apply 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.” *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Here, in his Petition, Petitioner is at most arguing that he is entitled to equitable tolling because he is not trained in the law, because in § 18 of his Petition, he states,

Petitioner contends he is no attorney and no one ever explained to him that he only had a (1) year statute of limitations, so that should not be held against Petitioner. And as you can see I have maintained steady flow ever since I started filing my post conviction motions. The State of North Carolina prison system does not have a law library, so Petitioner had no way of finding out about this (1) year statute of limitations, so this rule needs to be disregarded on this case due to Petitioner was not sentenced according to his plea.

(Docket Entry 1, § 18.)

These allegations do not render the Petition timely. First, ignorance of the law is not a basis for equitable tolling. *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Petitioner could also be arguing that the merits of his claims justify the late filing of his federal habeas petition. However, this argument is unpersuasive. The potential merits of a claim do not impact the timeliness analysis. *See Rouse v. Lee*, 339 F.3d 238, 251-52 (4th Cir. 2003). And, as mentioned previously, filings made after the limitations period has ended do not revive or restart it. *Minter*, 230 F.3d at 665. Petitioner’s purported “steady flow” of state post-convictions motions do not impact the limitations analysis.

Second, and likewise, if Petitioner is pleading his indigence, this does not entitle him to equitable tolling. *See Bryant v. Beck*, No. 1:08CV181, 2008 WL 2949247, at *2-3 (M.D.N.C. July 30, 2008) (unpublished) *recommendation adopted* Slip Op. (M.D.N.C. Feb. 5, 2009) (unpublished). Third, there is no constitutional right to appointed counsel in a habeas case. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013). Consequently, the fact that Petitioner does not have counsel to pursue his federal habeas claim does not warrant equitable tolling.

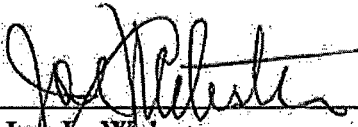
Fourth, the state is not required to provide prison libraries, but rather has satisfied its legal obligations in this regard through North Carolina Prisoner Legal Services (“NCPLS”). *See Burgess v. Herron*, No. 1:11CV420, 2011 WL 5289769, at *2 (M.D.N.C. Nov. 2, 2011) (unpublished). Petitioner does not state that he submitted his case to NCPLS. But even if he had, and even if NCPLS had determined that his claims lacked merit and therefore declined to represent him, this would not change the fact that the state has met its obligation to provide inmates adequate access to the courts. *See, e.g., Hood v. Jackson*, No. 5:10-HC2008-FL, 2010 WL 4974550, at *2 (E.D.N.C. Dec. 1, 2010) (unpublished) (citing cases); *Dockery v. Beck*, No. 1:02CV00070, 2002 WL 32813704, at *2 (M.D.N.C. August 1, 2002) (unpublished).

Fifth, even granting Petitioner the dubious assumption that he is entitled to some degree of equitable tolling, which is not the case for the reasons set forth above, Petitioner certainly would not be entitled to more than four years of such relief. For all these reasons, Petitioner is not entitled to equitable tolling.

Finally, to the extent Petitioner asserts he is actually innocent of the crimes for which he was convicted, that claim would also fail to render his Petition timely. The Supreme Court

recognized in *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013), an actual innocence exception to the one year deadline. To establish actual innocence, “a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995); see *McQuiggin*, 133 S.Ct. at 1935. “To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324. Here, Petitioner has, at most, done no more than assert in a conclusory fashion that he is actually innocent. Mere conclusory statements are insufficient to toll the federal habeas deadline. For all these reasons, the Petition is time-barred.

IT IS THEREFORE RECOMMENDED that Respondent’s Motion to Dismiss (Docket Entry 5) be **GRANTED**, that the Petition (Docket Entry 1) be **DISMISSED**, and that Judgment be entered dismissing this action.



Joe L. Webster
United States Magistrate Judge

April 13, 2017

**Additional material
from this filing is
available in the
Clerk's Office.**