208 F.3d 13
United States Court of Appeals,
Second Circuit.

Kevin **SMITH**, Petitioner-Appellant,

v.

Michael **McGINNIS**, Superintendent, Southport Correctional Facility, Respondent-Appellee.

Docket No. 99-2227
|
Argued: Dec. 1, 1999
|
Decided: March **13**, **2000**

Synopsis

Following affirmance of convictions for second-degree murder and criminal possession of weapon, 563 N.Y.S.2d 483, 168 A.D.2d 653, petition for writ of habeas corpus was filed. The United States District Court for the Eastern District of New York, 49 F.Supp.2d 102, Raymond J. Dearie, J., dismissed the petition as untimely pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), and granted a certificate of appealability. The Court of Appeals held that: (1) tolling provision suspended limitations and grace periods while state coram nobis petition was pending, but did not reset the limitations period; (2) courts may equitably toll the limitations period; but (3) petitioner's case did not present extraordinary or exceptional circumstances warranting equitable tolling.

Affirmed.

West Headnotes (5)

[1] Habeas Corpus
Pursuit of other remedies

Where habeas petitioner's state convictions became final prior to the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), so that he obtained the benefit of the one-year grace period and had until April 24, 1997, to file a federal habeas corpus petition, the one-year statute of limitations for filing the petition ran from AEDPA's effective date until petitioner filed a state coram nobis petition 364 days later, was suspended during the time the coram nobis petition was pending, and resumed running when the state petition was denied, so that petitioner had one day left to file his habeas petition; the one-year period did not start to run anew from the date on which the state court denied the coram nobis petition. 28 U.S.C.A. § 2244(d), (d)(1), (d)(1)(A), (d)(2).

246 Cases that cite this headnote

[2] Habeas Corpus
Pursuit of other remedies

In the case of a habeas petitioner whose state convictions became final prior to the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), AEDPA's tolling provision excludes from the grace period and the limitations period the time during which properly filed state relief applications are pending, but does not reset the date from which the one-year statute of limitations begins to run. 28 U.S.C.A. § 2244(d)(1, 2).

761 Cases that cite this headnote

[3] Habeas Corpus
Equitable tolling in general

The one-year period under the Antiterrorism and Effective Death Penalty Act (AEDPA) for filing a habeas corpus petition is a statute of limitations rather than a jurisdictional bar, so that courts may equitably toll the period, but in order to equitably toll the one-year period of limitations, petitioner must show that extraordinary circumstances prevented him from filing his petition on time. 28 U.S.C.A. § 2244(d).

1052 Cases that cite this headnote

[4] Limitation of Actions
Suspension or stay in general;equitable tolling

Equitable tolling of period of limitations applies only in the rare and exceptional circumstance.

548 Cases that cite this headnote

[5] Habeas Corpus
Equitable tolling in general

Habeas petitioner's case did not present extraordinary or exceptional circumstances warranting equitable tolling of limitations period under Antiterrorism and Effective Death Penalty Act (AEDPA) for filing petition; petitioner's delays in seeking collateral review of his conviction did not show reasonable diligence, AEDPA's tolling provision already accommodated exhaustion requirements that prisoners faced, and petitioner's pro se status during most of limitations period did not merit equitable tolling. 28 U.S.C.A. § 2244(d)(1, 2).

1164 Cases that cite this headnote

Attorneys and Law Firms

***14** Robert J. Boyle, New York, NY, for Petitioner-Appellant.

Amy Applebaum, Assistant District Attorney, (Charles J. Hynes, Kings County District Attorney, Roseann B. MacKechnie, Assistant District Attorney) Brooklyn, NY, for Respondent-Appellee.

Before: POOLER, McLAUGHLIN, and SACK, Circuit Judges.

Opinion

PER CURIAM:

Kevin **Smith** appeals from the March 26, 1999, judgment of the United States District Court for the Eastern District of New York (Raymond J. Dearie, *J.*) dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(d).

***15 BACKGROUND**

A Kings County jury convicted **Smith** in 1987 of second-degree murder and second and third-degree criminal possession of a weapon. **Smith** pursued direct appeals, all of which were unsuccessful, and his conviction became final on July 2, 1991.[1] In 1988 and 1992, **Smith** filed motions pursuant to N.Y. Crim. Proc. L. § 440.10 to vacate his judgment of conviction, but state courts denied the relief. On May 1, 1997, **Smith** filed a petition for a writ of error coram nobis in state court. **Smith** served the petition on April 23, 1997. The coram nobis petition contained a claim regarding denial of effective assistance of appellate counsel. The state court denied the petition on November **17**, 1997. Shortly thereafter, on February 12, 1998, **Smith** filed his federal habeas corpus petition raising the same ineffective assistance of appellate counsel claim.

By memorandum and order dated March **17**, 1999, Judge Dearie dismissed the federal petition as untimely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ***Smith** v. **McGinnis***, 49 F.Supp.2d 102 (E.D.N.Y.1999). Judge Dearie rejected **Smith's** argument that the applicable one-year statute of limitations ran from the date the state court denied his coram nobis petition. *See id.* at 104-05. The district court also held that **Smith** "was not diligent in pursuing state remedies." *Id.* at 105. Judge Dearie granted **Smith** a certificate of appealability on May 28, 1999. This appeal presents questions of law that we review *de novo.*

DISCUSSION

I. Calculation of tolling period

[1] Petitioner-appellant presents a question of first impression in this circuit, namely whether the one-year limitations period in the AEDPA began on the date he exhausted state collateral review or merely tolled while his state application was pending. Specifically, **Smith** contends that the ineffective assistance of appellate counsel claim presented in his state coram nobis and federal habeas corpus petitions did not accrue until the state court denied relief on November **17**, 1997. **Smith** therefore argues that the one-year period in which he had to file his federal habeas petition began on November **17**, 1997, and his February 12, 1998, federal petition was timely. The district court correctly rejected **Smith's** effort

to reset the one-year limitations period. In affirming the decision of the district court, we align ourselves with our sister circuits that have addressed this issue.

In general, the AEDPA restricts the ability of prisoners to seek federal review of their state criminal convictions. Section 2244(d) created a new one-year statute of limitations in which state prisoners could file applications for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The one-year period most generally runs from the date on which the state criminal judgment became final. *See* 28 U.S.C. § 2244(d)(1)(A). Prisoners like **Smith**, whose convictions became final prior to the AEDPA's effective date of April 24, 1996, have a one-year grace period in which to file their habeas corpus petitions, or until April 24, 1997. *See Ross,* 150 **F.3d** at 102-03. Section 2244 also has a tolling provision that applies to both the statute of limitations and the one-year grace period. *See Bennett v. Artuz,* 199 **F.3d** 116, 119 (**2d Cir.**1999) (holding that "AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction"), *cert. granted,* 529 U.S. 1065, 120 S.Ct. 1669, 146 L.Ed.2d 479 (**2000**). ***16** Section 2244(d)(2) states: "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 under this subsection." 28 U.S.C. § 2244(d)(2).

Smith's appeal concerns the proper application of the tolling provision and calculation of the one-year grace period. There is no dispute that because **Smith's** conviction became final in July 1991, before the effective date of the AEDPA, he obtained the benefit of the one-year grace period and had until April 24, 1997, to file a federal habeas corpus petition. There also is no dispute that his state coram nobis petition, if pending within that one-year grace period, would trigger Section 2244(d)(2)'s tolling allowance. [2] For the purposes of this appeal, we assume that **Smith** filed his coram nobis petition in time to trigger Section 2244(d)(2)'s tolling provision. The primary issue before us, therefore, is the proper calculation of tolling. **Smith** contends that he should receive one year from the date on which the state court denied his coram nobis petition. Respondent advocates a different calculation: (1) the one-year grace period ran for 364 days, until **Smith** filed the coram nobis petition; (2) the approximately **208**-day period during which the coram nobis petition was pending is excluded; (3) the one-year grace period resumed running on November **17**, 1997, when the state court denied **Smith's** petition; (4) **Smith** therefore had one day remaining in his grace period in which to file the federal habeas petition, or until November 18, 1997. Under this calculation, **Smith's** February 12, 1998, federal habeas petition was approximately 86 days late.

Other circuit courts of appeals considering this issue uniformly have adopted the interpretation that respondent advocates. *See Nino v. Galaza,* 183 **F.3d** 1003, 1006-07 (9th Cir.1999), *cert. denied,* 529 U.S. 1104, 120 S.Ct. 1846, 146 L.Ed.2d 787 (1999); *Gaskins v. Duval,* 183 **F.3d** 8, 9-10 (1st Cir.1999); *Haney v. Addison,* 175 **F.3d** 1217, 1220-21 (10th Cir.1999); *Fisher v. Johnson,* 174 **F.3d** 710, 712 (5th Cir.1999); *Guenther v. Holt,* 173 **F.3d** 1328, 1331 (11th Cir.1999), *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (**2000**). The case upon which **Smith** relies, *Lovasz v. Vaughn,* is consistent with this precedent because it concerns a prisoner who filed state collateral review papers before the grace period even had begun to run, tolling the one-year statute of limitations while the petition was pending rather than resetting the limitations period. *See Lovasz v. Vaughn,* 134 **F.3d** 146, 149 (3d Cir.1998). The Southern District of New York case that **Smith** claims supports his interpretation issued before our decision in *Ross v. Artuz* clarified calculation of the statute of limitations period for prisoners whose convictions became final before the AEDPA became effective. *See Valentine v. Senkowski,* 966 F.Supp. 239, 241 (S.D.N.Y.1997). In any event, even though the opinion itself contains broad language favoring **Smith's** position, the prisoner's habeas petition in *Valentine* would have been timely pursuant to the calculation respondent advocates. *See id.* at 240-41. District courts in this circuit ***17** routinely have adopted respondent's interpretation of tolling calculation. *See Torres v. Miller,* 1999 WL 714349 *3-4 (S.D.N.Y. Aug. 27, 1999); *Lucidore v. New York State Div. of Parole,* 1999 WL 566362 *4 (S.D.N.Y. Aug. 3, 1999); *Irving v. Artuz,* 1999 WL 592665 *3 (E.D.N.Y. July 29, 1999). We find unpersuasive **Smith's** argument that respondent's interpretation would result in premature state applications for relief. The AEDPA takes into consideration circumstances, such as the discovery of new facts, that reset the statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

[2] We therefore hold that proper calculation of Section 2244(d)(2)'s tolling provision excludes time during which

properly filed state relief applications are pending but does not reset the date from which the one-year statute of limitations begins to run. Not only is this interpretation uniformly followed in other circuits, but it also comports with the goal of the AEDPA to prevent undue delays in federal habeas review. If the one-year period began anew when the state court denied collateral relief, then state prisoners could extend or manipulate the deadline for federal habeas review by filing additional petitions in state court. The district court therefore correctly dismissed **Smith's** habeas petition.

II. Equitable tolling

Smith argues in the alternative that we should exercise our equitable powers to excuse his delay in filing his federal habeas petition. The state responds that even assuming equitable tolling applies, **Smith** did not meet the high threshold for obtaining this relief because he did not act diligently to pursue his ineffective assistance of appellate counsel claim in either state or federal court.

[3] We have not determined whether equitable tolling applies to the one-year statute of limitations contained in Section 2244(d) or the grace period announced in *Ross v. Artuz.* However, other circuits considering this issue uniformly have held that the one-year period is a statute of limitations rather than a jurisdictional bar so that courts may equitably toll the period. *See Calderon v. United States Dist. Court (Kelly),* 163 **F.3d** 530, 541 (9th Cir.1998) (*en banc*), *cert. denied,* 525 U.S. 891, 119 S.Ct. 1377, 143 L.Ed.2d 535 (1999); *Davis v. Johnson,* 158 **F.3d** 806, 811 (5th Cir.1998), *cert. denied,* 525 U.S. 891, 119 S.Ct. 1474, 143 L.Ed.2d 558 (1999); *Miller v. New Jersey State Dep't of Corrections,* 145 **F.3d** 616, 618 (3d Cir.1998); *Miller v. Marr,* 141 **F.3d** 976, 978 (10th Cir.), *cert. denied,* 525 U.S. 891, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998). We join our sister circuits and also adopt this rule.

[4] Equitable tolling applies only in the "rare and exceptional circumstance[ ]." *Turner v. Johnson,* 177 **F.3d** 390, 391-92 (5th Cir.), *cert. denied,* 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 389 (1999). In order to equitably toll the one-year period of limitations, **Smith** must show that extraordinary circumstances prevented him from filing his petition on time. *See Johnson v. Nyack Hosp.,* 86 **F.3d** 8, 12 (**2d Cir.**1996) (noting that this court has applied equitable tolling doctrine " 'as a matter of fairness' where a plaintiff has been 'prevented in some extraordinary way from exercising his rights ....' ") (citation omitted). In addition, the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll. *See id.*

[5] **Smith** claims that he is entitled to equitable relief because (1) he could not file his federal petition until he exhausted his state remedies; and (2) he diligently filed his state coram nobis petition and then filed his federal habeas petition only 87 days after the state denied collateral relief. Petitioner-appellant raised both of these arguments in the district court. **Smith's** case does not present extraordinary or exceptional circumstances warranting equitable tolling. **Smith's** delays in seeking collateral review of his conviction ***18** do not show reasonable diligence. In addition, the tolling provision of Section 2244(d)(2) already accommodates the exhaustion requirements that prisoners face, so the mere fact that **Smith** exhausted his claims in the coram nobis petition does not trigger equitable tolling. Finally, **Smith's** *pro se* status until March 1997 does not merit equitable tolling. *See Turner,* 177 **F.3d** at 392. **Smith's** petition therefore was not timely.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court. We have considered all of appellant's remaining arguments and find them without merit.

All Citations

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Footnotes

1 July 2, 1991, was the expiration of the time in which **Smith** could seek a writ of certiorari from the United States Supreme Court. *See Ross v. Artuz,* 150 **F.3d** 97, 98 (**2d Cir.**1998) (holding that petitioner's conviction became final for Antiterrorism and Effective Death Penalty Act ("AEDPA") purposes when his time to seek direct review in the United States Supreme Court expired).

2 Respondent argues that **Smith** does not get the benefit of tolling because he actually filed the coram nobis petition on May 1, 1997, which is after the one-year grace period ended. *See Jackson v. Dormire,* 180 **F.3d** 919, 920 (8th Cir.1999) (*per curiam*) (holding that Section 2244(d)(2) did not apply where petitioner whose conviction became final prior to effective date of AEDPA did not file state motion until May 2, 1997). In support of its argument in favor of the May 1 filing date, respondent relies on Rule 2102 regarding the filing of papers with the clerk of the court. N.Y.C.P.L.R. 2102 (McKinney 1997). **Smith** contends that his petition should be deemed filed on April 23, 1997, the date he served the papers on the district attorney. Judge Dearie noted the discrepancy between the filing and service dates and seemed to adopt **Smith's** date of April 23. *See* ***Smith****,* 49 F.Supp.2d at 103-04. Because **Smith's** federal habeas petition is untimely using either date, resolution of this issue is not necessary.

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