

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TERRELL WEST,)	
)	CASE NO. 1:14cv316
Petitioner,)	
)	
v.)	JUDGE BENITA Y. PEARSON
)	
CHRISTOPHER LAROSE,)	
)	<u>MEMORANDUM OF OPINION AND</u>
Respondent.)	<u>ORDER</u> [Resolving ECF No. 23]

Pending before the Court is *pro se* Petitioner Terrell West's Petition for a Writ of Habeas Corpus pursuant to [28 U.S.C. § 2254](#), [ECF No. 1](#). United States Magistrate James R. Knepp II prepared a report in accordance with [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) and recommended that the habeas petition be denied. [ECF No. 20](#). Petitioner timely filed an Objection to the report and its recommendations. [ECF No. 23](#). The Court has reviewed the above filings, the relevant portions of the record, and the governing law. For the reasons provided below, the Court overrules Petitioner's Objection, adopts the report and its recommendation, and denies the habeas petition.

I. Factual and Procedural History

On August 28, 2006, a Cuyahoga County Grand Jury indicted Petitioner with five counts of rape, five counts of kidnapping, one count of felonious assault, and one count of gross sexual imposition. [ECF No. 6-1 at 4-16](#). Petitioner pleaded not guilty and proceeded to trial. At the conclusion of the prosecution's case-in-chief, Petitioner successfully moved to dismiss the

(1:14cv316)

felonious assault charge. [Id. at 21](#). The trial court denied Petitioner's motion as to all other charges. [ECF No. 6-1 at 21](#). A jury returned a guilty verdict on all remaining counts, and Petitioner was sentenced to five consecutive life sentences. [Id. at 22–23](#).

Petitioner timely appealed the trial court's decision. [Id. at 24](#). The state appellate court sustained one of Petitioner's twenty assignments of error and remanded the case for a new trial. [Id. at 150](#). During Petitioner's second trial, the jury was unable to reach a verdict. [Id. at 179](#).

On March 30, 2010, the prosecution amended the indictment to narrow the time in which Petitioner had committed the charged offenses. [Id. at 180](#). Petitioner, now represented by Attorney Carolyn Kaye Ranke, proceeded to trial a third time. On April 21, 2010, the jury found Petitioner guilty of rape, kidnapping, and gross sexual imposition. [Id. at 182](#). The trial court sentenced Petitioner to five consecutive life sentences on May 28, 2010. [Id. at 183](#).

Petitioner filed a timely notice of appeal on June 25, 2010. [Id. at 185](#). Petitioner's attorney then filed a series of motions seeking to extend the time in which to file assignments of error. *See* [id. at 338–39](#) (granting extensions on August 31st, October 1st, November 4th, and December 8th, 2010). Counsel requested the leave in connection with her treatment for cancer. Although counsel had informed Petitioner of the diagnosis, she did not request leave for withdrawal from representing Petitioner. [ECF No. 23-1 at 2](#). Counsel did not comply with the appellate court's final extension, and the appeal was dismissed *sua sponte* on December 17, 2010 for failure to file an appellate brief. [ECF No. 6-1 at 338](#). Ranke was later suspended from practice in the state of Ohio for similar misconduct on September 22, 2011. [Disciplinary Counsel v. Ranke, 956 N.E.2d 288, 292 \(Ohio 2011\)](#) (suspending Ranke's license indefinitely

(1:14cv316)

because attorney misused client trust account, failed to file appellate brief in [an unrelated] criminal appeal, and failed to cooperate in disciplinary investigation).

On January 26, 2012, Attorney Tyresha Brown-O'Neal entered an appearance on behalf of Petitioner and moved the state appellate court to reconsider its *sua sponte* dismissal. [ECF No. 6-1 at 338](#). The appellate court granted Petitioner's motion to reconsider, but ultimately affirmed Petitioner's conviction and sentence on July 12, 2012. [Id. at 260](#). Petitioner did not file a discretionary appeal with the Ohio Supreme Court at this time; therefore, Petitioner's conviction became final for AEDPA purposes on August 26, 2012 when Petitioner failed to file an appeal within forty-five days of the appellate court's entry of judgment. [Sup. Ct. Prac. R. 7.01\(A\)\(1\)\(a\)](#).

Petitioner, proceeding *pro se*, filed a delayed notice of appeal with the Ohio Supreme Court on December 5, 2012. [ECF No. 6-1 at 278](#). The Ohio Supreme Court denied Petitioner's motion on January 23, 2013. [Id. at 305](#). Over one year later, on February 13, 2014, Petitioner, proceeding *pro se*, filed the present federal habeas petition. [ECF No. 1](#). Respondent filed a motion to dismiss. [ECF No. 6](#). Petitioner opposed. [ECF No. 19](#). United States Magistrate Judge James R. Knepp II issued a report and recommendation in accordance with [28 U.S.C. § 636\(b\)\(1\)\(B\)](#), in which he recommended that the Court grant Respondent's motion to dismiss, as the petition is time-barred. [ECF No. 20 at 10](#). Specifically, the magistrate judge found that Petitioner had failed to file a petition before the expiration of the one-year statute of limitations, and that Petitioner had failed to demonstrate either an extraordinary circumstance or actual innocence justifying equitable tolling. Petitioner timely filed an objection. [ECF No. 23](#).

(1:14cv316)

II. Standard of Review for a Magistrate Judge's Report and Recommendation

When objections have been made to a magistrate judge's Report and Recommendation, the district court's standard of review is *de novo*. [Fed. R. Civ. 72\(b\)\(3\)](#). A district judge:

must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id. Near verbatim regurgitation of the arguments made in earlier filings are not true objections.

When an "objection" merely states disagreement with the magistrate judge's suggested resolution, it is not an objection for the purposes of this review. [Cvijetinovic v. Eberlin, 617 F.Supp. 2d 620, 632 \(N.D. Ohio 2008\)](#), *rev'd on other grounds*, [617 F.3d 833 \(6th Cir. 2010\)](#).

Such "general objections" do not serve the purposes of [Fed. R. Civ. P. 72\(b\)](#). See [Jones v. Moore, No. 3:04CV7584, 2006 WL 903199, at *7 \(N.D. Ohio April 7, 2006\)](#). "A party who files objections to a magistrate [judge]'s report in order to preserve the right to appeal must be mindful of the purpose of such objections: to provide the district court 'with the opportunity to consider the specific contentions of the parties and to correct any errors immediately.'" *Id.* (citing [U.S. v. Walters, 638 F.2d 947, 949-50 \(6th Cir. 1981\)](#)). The Supreme Court upheld this rule in [Thomas v. Arn, 474 U.S. 140, 144 \(1985\)](#), a habeas corpus case.

III. Law and Analysis

"Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." [Daniels v. United States, 532 U.S. 374, 381 \(2001\)](#); see also [United States v. Olano, 507 U.S. 725, 731 \(1993\)](#) (observing that constitutional rights may be forfeited by the

(1:14cv316)

failure to make a timely assertion of the right). In general, a state prisoner seeking habeas corpus relief pursuant to [28 U.S.C. § 2254](#) must comply with the statute of limitations period set forth in [28 U.S.C. § 2244](#), which provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(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 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.

(d)(2) 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\(d\)](#).

The statute of limitations is tolled for any period of time in which a properly filed petition for post-conviction relief is pending before the state courts. [Jurado v. Burt, 337 F.3d 638, 640 \(6th Cir. 2003\)](#) (quoting [28 U.S.C. § 2244\(d\)](#)). The tolling provision does not reset the limitations period, however; “it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of

(1:14cv316)

limitations.” [Vroman v. Brigano](#), 346 F.3d 598, 602 (6th Cir. 2003) (quoting [Rashid v. Khulmann](#), 991 F. Supp. 254, 259 (S.D.N.Y. 1998)).

Under limited circumstances, AEDPA’s statute of limitations may be subject to equitable tolling. [Hall v. Warden, Lebanon Corr. Inst.](#), 662 F.3d 745, 749 (6th Cir. 2011) (citing [Holland v. Florida](#), 560 U.S. 631, 646 (2010)). The doctrine of equitable tolling “allows courts 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, 783 (6th Cir. 2010) (internal quotation marks omitted). The doctrine is one that is used sparingly. [Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.](#), 209 F.3d 552, 560 (6th Cir. 2000). Equitable tolling is limited to those extraordinary circumstances when a habeas petitioner can establish he is entitled to equitable tolling. In order to carry this burden, a petitioner must show that he has been pursuing his or her rights diligently, but some extraordinary circumstance has prevented timely filing. [Holland](#), 560 U.S. at 646 The diligence required to satisfy petitioner’s burden needs to be “reasonable,” not “maximum feasible.” [Id.](#) at 653.

Petitioner objects to the magistrate judge’s finding that he had not shown an exceptional circumstance entitling him to equitable tolling. Petitioner argues that ineffective assistance of counsel is a structural error that entitles him to equitable tolling. According to Petitioner, Attorney Ranke was ineffective because her representation as both trial and appellate counsel constitutes “silent waiver of possible ineffective assistance of trial retained counsel, [with Attorney Ranke] being the same in both instances.” [ECF No. 23 at 3](#). Petitioner also argues that

(1:14cv316)

all appearances entered by Ranke, including the multiple continuances, the notice of appeal, and referrals are “void ab initio” due to her failure to “disclose a suspension to practice law in Ohio.” [ECF No. 23 at 3–4](#).

Petitioner’s assertions, even if accepted as true,¹ do not satisfy the standard for equitable tolling. Ranke’s (allegedly) deficient performance during direct appeal in *state-court* proceedings does not impact Petitioner’s ability to pursue *federal* post-conviction relief in a timely manner. [Holland, 560 U.S. at 650](#) (“Equitable tolling . . . asks whether federal courts may excuse a petitioner’s failure to comply with *federal* timing rules, an inquiry that does not implicate a state court’s interpretation of state law.”) (emphasis added). The docket reflects that Petitioner had obtained new counsel by, at latest, January 26, 2012. [ECF No. 6-1 at 302](#). AEDPA’s statute of limitations did not begin to run until August 26, 2012, the date by when Petitioner was required, pursuant to [Sup. Ct. Prac. R. 7.01\(A\)\(1\)\(a\)](#), to file a notice of appeal with the Ohio Supreme Court. *See* [28 U.S.C. § 2244\(d\)\(1\)\(A\)](#) (setting the date of “the expiration of the time for seeking [direct] review” as a starting point for AEDPA’s statute of limitations). Accordingly, Ranke’s involvement with Petitioner’s direct appeal terminated prior to the time when AEDPA’s statute of limitations began to run. There are no facts in the record that suggest Ranke’s performance as counsel prevented Petitioner from filing his petition in a timely manner.

¹ Petitioner’s assertion that Ranke was not licensed to practice in Ohio during her representation of Petitioner is indisputably untrue. Ranke’s representation of Petitioner ceased when the state appellate court *sua sponte* dismissed Petitioner’s appeal on December 17, 2010. [ECF No. 6-1 at 338](#). Ranke’s license was not suspended until September 22, 2011, a full nine months later. [Disciplinary Counsel v. Ranke, 956 N.E.2d 288 \(Ohio 2011\)](#). Ranke could practice law in Ohio prior to the date of her suspension, including the time when she was representing Petitioner in his direct appeal.

(1:14cv316)

Cf. Holland, 560 U.S. at 653–54 (remanding case to lower court in order to determine whether counsel’s failure to file a timely petition for a writ of habeas corpus was “extraordinary” when petitioner repeatedly mailed counsel to remind him of AEDPA’s statute of limitations that counsel had incorrectly ignored). Petitioner’s Objection is overruled.

IV. Conclusion

Plaintiff’s Objection ([ECF No. 23](#)) is overruled and the Report and Recommendation ([ECF No. 20](#)) of the magistrate judge is hereby adopted and Respondent’s motion to dismiss is granted. Terrell West’s Petition for a Writ of Habeas Corpus is dismissed as time-barred by [28 U.S.C. § 2244](#). The Court certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. [28 U.S.C. § 2253\(c\)](#); [Fed. R. App. P. 22\(b\)](#).

IT IS SO ORDERED.

March 24, 2015
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge