

PEARSON, J.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION

WILLIAM HASCHENBURGER,)	
)	CASE NO. 4:11cv1196
Petitioner,)	
)	
v.)	JUDGE BENITA Y. PEARSON
)	
BENNIE KELLY, <i>Warden</i> ,)	
)	<u>MEMORANDUM OF OPINION AND</u>
Respondent.)	<u>ORDER</u> [Regarding ECF No. 9]

On August, 27, 2013 Magistrate Judge William H. Baughman, Jr. issued a Report (“R&R”) recommending dismissal of Petitioner’s petition for a writ of habeas corpus pursuant to [28 U.S.C. § 2254](#) as untimely. [ECF No. 9](#). Petitioner filed an objection on September 10, 2013. [ECF No. 10](#). For the reasons that follow, the Court overrules Petitioner’s objection, adopts the R&R and dismisses the petition as untimely.

I. Background

Petitioner was convicted in 2005 of ten counts of rape and sentenced to 10 years in prison for each count, for a total of 100 years. [ECF No. 9 at 1](#). He timely appealed, and the court of appeals vacated the conviction on one count. [ECF No. 9 at 1](#). The court of appeals also vacated his sentences as to all counts because of the recent Ohio Supreme Court decision [State v. Foster](#), [845 N.E.2d 470 \(Ohio 2006\)](#), and remanded for resentencing.¹ [State v. Haschenburger, 2007 WL 969067, at *13 \(Oh. Ct. App. March 27, 2007\)](#). The trial court resentenced him in November 2007 on nine counts for a total of 90 years. [ECF No. 9 at 6](#). Petitioner again timely

¹ The *Foster* court held that portions of Ohio’s sentencing statute regarding maximum and consecutive sentence findings were unconstitutional. [845 N.E.2d at 494](#).

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appealed, and the trial court's judgment was affirmed. [ECF No. 9 at 7](#).

In September 2008, Petitioner filed a state post-conviction petition, which the trial court denied as untimely pursuant to [R.C. 2953.21\(A\)\(2\)](#), which requires a petition to be filed within 180 days after the trial transcript is certified to the court of appeals. [ECF No. 9 at 7](#). The court of appeals affirmed the trial court's finding that the petition was untimely. [ECF No. 9 at 8](#). Petitioner filed this federal habeas petition on June 9, 2011. [ECF No. 1](#).

The magistrate judge found, and the parties agree, that the one-year federal habeas statute of limitation period began on February 13, 2009. [ECF No. 9 at 13](#). Petitioner filed the instant petition on June 9, 2011, more than one year after the limitations period expired. [ECF No. 9 at 13](#). Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), however, the statute of limitations is tolled pending a state post-conviction petition. *See* [28 U.S.C. § 2244\(d\)\(2\)](#). Petitioner argued that his post-conviction petition in the trial court filed in September 2008 is an action that tolled the statute of limitations. [ECF Nos. 9 at 13; 10 at 8](#).

The magistrate judge found that the September 2008 action did not toll the AEDPA statute of limitations because the state courts had found the petition untimely, meaning it was not "properly filed" for purposes of tolling the one-year limitations period. [ECF No. 9 at 14](#). The magistrate judge also considered whether Petitioner is entitled to equitable tolling pursuant to [Holland v. Florida, 560 U.S. 631 \(2010\)](#), and found that he is not. [ECF No. 9 at 14-18](#).

Petitioner objects to these findings. [ECF No. 10](#). He argues that the law in Ohio at the time he filed his September 2008 action was such that it was "properly filed," and that the magistrate judge erred in finding the limitations period did not toll. [ECF No. 10 at 9](#). He also

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asserts that the magistrate judge erred in finding that he is not entitled to equitable tolling. [ECF No. 10 at 20](#).

II. Legal Standard

When an objection has been made to a magistrate judge's report and recommendation, the district court 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. *Id.* 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.*

Accordingly, the Court has conducted a *de novo* review of the magistrate judge's Report and has considered Petitioner's arguments raised in his objection. The Court agrees with the recommendation of the magistrate judge that the petition be dismissed as untimely.

III. Analysis

A. Statutory Tolling

The issue of whether Petitioner's post-conviction petition in the state court tolls the AEDPA statute of limitations turns on the timeliness of his state petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Pursuant to [R.C. 2953.21\(A\)\(2\)](#), a post-conviction petition "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication." The trial court found that the operative date was 180 days following the date Petitioner's trial court transcript was certified to the court of appeals in his direct appeal, which was on April 13, 2006. [ECF Nos. 6-1 at 315; 9 at 14](#). Because Petitioner did not file a state

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petition until after his November 2007 resentencing, 881 days after his transcript was certified in his direct appeal, the trial court found the petition untimely. [ECF Nos. 6-1 at 315; 9 at 13-14.](#)

Petitioner urges the Court to find that his post-conviction petition was timely because the Ohio courts were “fluctuating and inconsistent” in its rulings pertaining to whether resentencing voids the original sentence or makes it merely voidable. [ECF No. 10 at 9.](#) He claims that at the time of his first appeal, in 2006, Ohio courts had ruled that the sentencing deficiency present in Petitioner’s case rendered the sentence void. Therefore, Petitioner argues, because his original sentence was void, his “first appeal” is the appeal of his resentencing in 2007, rather than the appeal of his original conviction in 2006. [ECF No. 10 at 9.](#)

In support of his argument, Petitioner cites numerous Ohio cases that address the issue of “void” versus “voidable” sentences pursuant to *Foster*. See, e.g., [ECF No. 10 at 9-10.](#) However, none of these cases considered a void or voidable sentence in the context of a post-conviction petition. Ohio courts that have considered the timeliness of a post-conviction petition after the original sentence was remanded for resentencing have found that the 180 days begins to run after the transcript is filed in the original, direct appeal. See [State v. Laws, 2004 WL 2757841 \(Ohio Ct. App. Dec. 2, 2004\)](#); [State v. Casalicchio, 2008 WL 2058528 \(Ohio Ct. App. May 15, 2008\)](#); [State v. O’Neal, 2008 WL 5205205 \(Oh. Ct. App. Dec. 15, 2008\).](#)

In the instant case, the court of appeals affirmed the trial court’s finding that Petitioner’s post-conviction petition was untimely, and thoroughly considered Petitioner’s arguments pertaining to “void” and “voidable.” See [State v. Haschenburger, 2009 WL 4758813, at *4-5 \(Oh. Ct. App. Dec. 10, 2009\).](#) The court found *Laws* persuasive in finding that the time for a

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post-conviction petition begins to run 180 days after the trial transcript is filed in the court of appeals in the direct appeal of the judgment. [Id. at *5](#). The magistrate judge also reviewed the applicable case law, the court of appeals' opinion, and Petitioner's arguments. [ECF No. 9 at 15-18](#). Although Petitioner contends that the magistrate judge "should have recommended that the Petitioner's post-conviction petition was 'properly filed' because Ohio law [] held [] that the prisoner's original sentence was void," [ECF No. 10 at 8-9](#), Petitioner does not sufficiently explain how, even if the original sentence were void, the petition should be deemed "properly filed" given the above-cited case law which supports a finding that his petition was not "properly filed."

Petitioner advances [State v. Roberts, 2007 WL 3052212 \(Oh. Ct. App. Oct. 19, 2007\)](#) in support of his argument, and claims that the court of appeals "either misunderstands the *Roberts* case or intentionally mischaracterizes it." [ECF No. 10 at 13, 15](#). Having reviewed *Roberts*, the undersigned understands and characterizes it as the court of appeals did. The court of appeals noted that the *Roberts* court "dealt with multiple, *simultaneous* appeals," rather than "a *subsequent* appeal of a resentencing," and that *Roberts* did not address whether the petition was timely pursuant to R.C. 2953.21. [Haschenburger, 2009 WL 4758813](#), at *4 (emphasis in original, citing *Roberts*). *Roberts* is, therefore, inapplicable to the instant case.

B. Equitable Tolling

Petitioner argues that the magistrate judge erred by not finding that Petitioner is entitled to equitable tolling. [ECF No. 10 at 20](#). A petitioner may be entitled to equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary

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circumstance stood in his way' and prevented timely filing.” [Holland, 130 S.Ct., at 2553](#) (citing *Pace*, 544 U.S. at 418). The magistrate judge found that Petitioner failed to state an equitable ground for noncompliance with the 180-day requirement, and denied Petitioner equitable tolling.

Petitioner argues that he should be entitled to equitable tolling because “[t]here was ample Ohio law to suggest that his first sentence was void.” [ECF No. 10 at 21](#). As noted above, however, the 180-day filing requirement is clearly set forth in [R.C. 2953.21\(A\)\(2\)](#) and, prior to Petitioner’s direct appeal, an Ohio court of appeals had found the requirement corresponds to the direct appeal. See [Laws, 2004 WL 2757841](#), at *2.

Petitioner also claims that an “attorney’s failure to satisfy professional standards of care may constitute ‘extraordinary circumstances’ for purposes of obtaining an equitable toll in a habeas corpus proceeding,” and that, because Petitioner’s trial counsel committed misconduct, extraordinary circumstances are present here. [ECF No. 10 at 23](#) (citing *Robertson v. Simpson*, [624 F.3d 781, 785 \(6th Cir. 2010\)](#)). However, the egregious conduct committed by an attorney for equitable tolling purposes must have effected the filing of the federal habeas petition. See *id.* Although Petitioner alleges his trial counsel violated professional standards and “abandoned” him, [ECF No. 10 at 21](#), his explanations describe how this effected his trial and his reasons for not timely filing a state post-conviction petition, not his ability to timely file a federal habeas petition. See [ECF No. 10 at 22](#). Petitioner had until February 12, 2010 to file a federal habeas petition, during which time he was actively pursuing appeals in state court while represented by legal counsel.

In sum, the magistrate judge did not err in finding that the Ohio courts properly

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determined Petitioner's post-conviction petition was untimely and, thus, it is not properly filed for purposes of tolling the AEDPA statute of limitations. Nor is Petitioner entitled to equitable tolling. Accordingly, Petitioner's objections are overruled.

IV. Conclusion

For the reasons stated above, the Court adopts the magistrate judge's Report and Recommendation. [ECF No. 9](#). Petitioner's petition is dismissed as untimely.

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.

September 27, 2013
Date

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