IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANTONIO SANCHEZ FRANKLIN,

Petitioner, : Case No. 3:04-cv-187

- vs -

Magistrate Judge Michael R. Merz

NORMAN ROBINSON, Warden,

Respondent. :

DECISION AND ORDER DENYING *PRO SE* MOTION FOR RELIEF FROM JUDGMENT

This capital habeas corpus case is before the Court on a Motion for Relief from Judgment filed *pro se* by Petitioner Antonio Franklin (Doc. Nos. 157, 158)[1]. The Warden opposes the Motion (Doc. No. 161) and Franklin has filed a Reply in support (Doc. No. 169).

This post-judgment Motion is properly decided by the Magistrate Judge because the case was referred under 28 U.S.C. § 636(c) with the unanimous consent of the parties (Doc. No. 26).

Procedural History

Franklin was indicted for the aggravated murders of his two grandparents and an uncle. A Montgomery County trial jury convicted him and recommended the death sentence which Judge James Gilvary imposed. The convictions and sentence were affirmed by the Supreme Court of Ohio on direct appeal. *State v. Franklin*, 97 Ohio St. 3d 1, 2002-Ohio-5304 (2002). Upon notice of his intent to

[1] These documents are identical except that Franklin has added a cover page and a table of contents to Doc. No. 158. References herein to the Motion will be to Doc. No. 158-1.

seek habeas relief, this Court appointed counsel who filed the Petition on June 1, 2004, seeking relief on fifty-one grounds (Doc. No. 21). The Court denied habeas corpus relief. *Franklin v. Bradshaw*, 2009 U.S. Dist. LEXIS 23715 (S.D. Ohio Mar. 9, 2009)(copy at Doc. No. 104). Franklin appealed to the Sixth Circuit and this Court granted a certificate of appealability on nine grounds for relief, including Ground Fourteen, the claim in issue in this Motion (Doc. No. 139). The Sixth Circuit then affirmed the dismissal. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012), and the Supreme Court denied certiorari. *Franklin v. Robinson*, 133 S. Ct. 1724 (Apr. 1, 2013). The instant Motion followed.

Petitioner's Claims

Franklin seeks to raise the following claims under Fed. R. Civ. P. 60(b)(1):

1. Prosecutorial misconduct by eliciting inadmissible hearsay testimony from Dr. Stukey in bad faith and violation of *Berger v. United States*, 295 U.S. 78 (1935)(Motion, Doc. No. 158-1, PageID 2330-36). Franklin admits that this claim was omitted from his direct appeal and claims it was thereafter submitted as an underlying claim in his application to reopen the direct appeal. *Id.* at PageID 2334.

2. Ineffective assistance of trial counsel for failure to present evidence of insanity (Motion, Doc. No. 158-1, PageID 2336-40). Franklin refers particularly to evidence of the heavy winter coat he was wearing and the large amount of personal property in his possession when he was arrested.

3. Ineffective assistance of trial counsel for failure to question prospective jurors on their views "on the different aspects of insanity." (Motion, Doc. No. 158-1, PageID 2340-45.)

4. Ineffective assistance of trial counsel for failure to object "to highly inflammatory, derogatory statements made by the prosecution against Petitioner concerning him and his tattoos.

. . .” (Motion, Doc. No. 158-1, PageID 2345-49.)

5. Unconstitutional abuse of discretion in restricting questioning during voir dire (Motion, Doc. No. 158-1, PageID 2340-55.)

6. Prosecutorial Misconduct in Opening Statement and Closing Argument, referring again to comments about Franklin’s tattoos (Motion. Doc. No. 158-1, PageID 2355-62).

Franklin seeks to raise the following claims under Fed. R. Civ. P. 60(b)(6):

1. Ineffective assistance of trial counsel for failure to interview Brian Dallas (Motion, Doc. No. 158-1, PageID 2366-71).

2. Ineffective assistance of trial counsel for failure to subpoena the prosecutor’s investigator (Motion, Doc. No. 158-1, PageID 2371-75).

3. Ineffective assistance of trial counsel for failure to obtain and present the photo album Franklin took from his grandparents’ home after killing them (Motion, Doc. No. 158-1, PageID 2375-78).

4. Ineffective assistance of trial counsel for failure to use Franklin’s notes, created while he was incarcerated in Nashville after his arrest, as further proof of his insanity (Motion, Doc. No. 158-1, PageID 2378-80).

5. Ineffective assistance of trial counsel for failure to appeal the trial judge’s restrictions on voir dire (Motion, Doc. No. 158-1, PageID 2380-84).

6. Ineffective assistance of trial counsel for failure to effectively voir dire to determine if prospective jurors had learned of Franklin’s stabbing another inmate in the Montgomery County Jail while awaiting trial (Motion, Doc. No. 158-1, PageID 2384-86).

7. Ineffective assistance of trial counsel for failure to seek a change of venue in light of

media coverage of Franklin's attempted murder of another inmate while awaiting trial. *Id.*

8. Ineffective assistance of trial counsel for failure "to present the oddity of Franklin donning a heavy winter coat in warm weather to bolster his insanity plea." (Motion, Doc. No. 158-1, PageID 2387-90.)

9. Prosecutorial Misconduct by suppressing evidence, to wit, the Brian Dallas interview, the photo albums Franklin took from the scene of the crime, and by instructing his remaining family members not to talk to defense investigators (Motion, Doc. No. 158-1, PageID 2390-2402).

10. Cumulative Error (Motion, Doc. No. 158-1, PageID 2402-05).

Analysis

Franklin's Fed. R. Civ. P. 60(b)(1) Claims Are Untimely

The Warden objects that the portion of Franklin's *pro se* Motion brought under Fed. R. Civ. P. 60(b) (1) is untimely (Memo. In Opp., Doc. No. 161, PageID 2484-85).

Fed. R. Civ. P. 60(b) (1)provides "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect;" Under Fed. R. Civ. P. 60(c), motions made under Fed. R. Civ. P. 60(b)(1) must be made within one year after the entry of the judgment. The one-year time limit on a 60(b) motion is jurisdictional. *Arrieta v. Battaglia*, 461 F.3d 861, 864 (7th Cir. 2006), cited with approval in *Mitchell v. Rees II*, 261 Fed. Appx. 825, 2008 U.S. App. LEXIS 927 (6th Cir. 2008).

The judgment from which Franklin seeks relief was entered March 10, 2009 (Doc. No.

104). Franklin's *pro se* Motion was not filed until October 23, 2013, three and one-half years after the filing deadline.

Franklin responds that his *pro se* Motion is timely because this Court lacked jurisdiction to grant the motion until the Sixth Circuit returned jurisdiction to this Court by issuing the Mandate on April 10, 2013 (Doc. No. 150).

Franklin is correct that the filing of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters relating to the appeal from the District Court to the Court of Appeals. It divests the District Court of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes under Fed. R. Civ. P. 60(a) or Rule 36 of the Federal Rules of Criminal Procedure, or in aid of execution of a judgment that has not been superseded, until the District Court receives the mandate of the Court of Appeals. 9 Moore's Federal Practice ¶ 203.11 at 3-45 and 3-46. *Marrese v. American Academy of Osteopathic Surgeons,* 470 U.S. 373 (1985); *Pickens v. Howes,* 549 F.3d 377, 381 (6th Cir. 2008); *Pittock v. Otis Elevator Co.,* 8 F.3d 325, 327 (6th Cir. 1993); *Lewis v. Alexander,* 987 F.2d 392, 394 (6th Cir. 1993); *Cochran v. Birkel,* 651 F.2d 1219, 1221 (6th Cir. 1981).

However, taking an appeal does not extend the time for filing a motion for relief from judgment. The fact that a District Court cannot decide the motion while an appeal is pending has no impact on the deadline for filing such a motion.

Franklin's *pro se* Motion under Fed. R. Civ. P. 60(b)(1) is denied as untimely.

Because Franklin's claims under Fed. R. Civ. P. 60(b)(1) are untimely, the Court need not decide whether they are also "second or successive," thereby requiring permission of the Court of Appeals before District Court consideration.

Franklin's Fed. R. Civ. P. 60(b)(6) Claims, Although Timely, Do Not Warrant Relief under *Martinez v. Ryan*

Respondent also asserts Franklin's *pro se* claims under Fed. R. Civ. P. 60(b)(6) are untimely (Memo. In Opp., Doc. No. 161, PageID 2485). However, the Court finds Franklin's *pro se* Motion under Fed. R. Civ. P. 60(b)(6) is timely. Franklin filed his initial *pro se* Motion For Relief From Judgment in reliance on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), on March 14, 2013, virtually a year after *Martinez* was decided on March 20, 2012 (Doc. No. 145). The Court denied that Motion pending reconsideration after the mandate issued[2] and Franklin had time to reconsider his intent to dismiss his counsel (Doc. No. 148). After the mandate issued, the Court set a new deadline for Rule 60(b) motions (Doc. No. 153) and Franklin's *pro se* Motion met that deadline.

Franklin raises ten claims under Fed. R. Civ. P. 60(b)(6). As the Warden notes, the first eight of these are ineffective assistance of trial counsel claims, whereas the ninth claim is for prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), and the tenth reasserts the cumulative error claim made in the Petition (Memo. In Opp., Doc. No. 161, PageID 2489-91). The Warden asserts that Claims 1, 2, 3, 4, 5, 6, and 8 are new claims not made in the Petition and that Claims 7, 9, and 10 were made in the Petition and decided on the merits. *Id.*

The Warden asserts **Claim 1** (failure of trial counsel to interview Brain Dallas) was never presented to this Court as an ineffective assistance of trial counsel claim. Rather, the claim regarding Brian Dallas in the Petition was made under *Brady v. Maryland, supra.* (Memo. In Opp., Doc. No. 161, PageID 2489-90). Franklin admits this is accurate, but says his trial counsel were not free to present this claim as an ineffective assistance of trial counsel claim because it

[2] Issuance of the mandate was stayed at that point in time pending a decision on Franklin's petition for certiorari in the United States Supreme Court.

was procedurally defaulted (Reply, Doc. No. 169, PageID 2574-75). He asserts *Martinez* now gives him an opportunity to permit this habeas court to reach the merits of the claim. *Id.* at PageID 2475.

Franklin misunderstands the impact of *Martinez*. That case permits courts to hear claims of ineffective assistance of trial counsel which were previously barred from consideration by the procedural default of post-conviction counsel's failure to present them in a mandatory state post-conviction collateral attack on the judgment. *Martinez* in no way obviates 28 U.S.C. § 2244(b)(2) which requires that new habeas claims – claims not presented in a first petition under 28 U.S.C. § 2254 – not be decided by a district court without prior certification from the Court of Appeals. Franklin has neither sought nor obtained such permission. Therefore this Court cannot decide Claim 1. *Burton v. Stewart*, 549 U.S. 147 (2007).

The Warden asserts **Claim 2** is completely new and has no cognate claim in the Petition. Franklin admits it is new and offers to dismiss it if it will make his 60(b) motion into a second or successive petition. The Court believes it is proper to administer the second or successive restriction on a claim-by-claim basis. Because the claim is a new claim, the Court will deny it on that basis without insisting Franklin withdraw it. This same ruling applies to Franklin's offer to withdraw Claims 5 and 8.

Claim 3 is that trial counsel were ineffective for failing to obtain and present to the jury the family photo albums he took with him after the murders. The Warden asserts this is also a new claim not made in the Petition (Memo. In Opp., Doc. No. 161, PageID 2490). Franklin responds that this claim "was exhausted . . . in the state courts on postconviction." (Reply, Doc. No. 169.) However, exhaustion is irrelevant to the point made by the Warden: this is not a claim made in the Petition and found to have been procedurally defaulted. Instead, it was not made in

the Petition at all. It is therefore a "new" claim in habeas and requires permission from the Court of Appeals to proceed.

Claim 4 asserts trial counsel should have obtained and introduced Franklin's jail notes from Nashville. As the Warden points out, the only prior reference to these notes was in a *Brady* claim. This claim is barred on the same basis as Claim 1.

Claim 5 asserts trial counsel were ineffective for failing to appeal at once Judge Gilvary's limitations on voir dire. This is also a completely new claim, barred on the same basis as Claim 2. If the Court were to reach the merits, it would find the claim meritless, because Ohio law does not allow an interlocutory appeal in the circumstances Franklin suggests one should have been taken.

Claim 6 is that counsel were ineffective for failing to inquire in voir dire about knowledge of Franklin's attempting to kill a fellow inmate. This is a completely new claim, barred on the same basis as Claim 2.

Claim 7 charges counsel with ineffective assistance for failure to seek a change of venue. This is a claim never before presented to this Court and is barred on the same basis as Claim 1. If the Court were to reach the merits, it would find no merit on the same basis as it upheld the Ohio Supreme Court's determination that there was no ineffective assistance of trial counsel in failing to examine jurors more intensively on this question.

Claim 8 is that counsel should have bolstered the insanity plea by pointing out the oddity of Franklin's donning a heavy winter coat in warm weather, the coat Franklin was wearing when arrested. The coat was part of Franklin's Forty-Seventh Ground for Relief where he claimed his appellate counsel were ineffective for failing to claim that trial counsel were ineffective for failure to present the coat to the jury. The Court decided the appellate ineffectiveness claim on

the merits, in part by deciding the underlying claim had no merit (Decision, Doc. No. 104, PageID 1627-28). Thus the ineffective assistance of appellate counsel claim was available to Franklin to argue on appeal to the Sixth Circuit. The underlying ineffective assistance of trial counsel claim has never been presented to this Court as a free-standing claim and thus is barred under 28 U.S.C. § 2244(b)(2).

In **Claim 9** Franklin asserts post-conviction counsel were ineffective for failing to raise several *Brady* claims. *Martinez*, however, only applies to ineffectiveness of post-conviction counsel when that negligence results in having an ineffective assistance of trial counsel claim procedurally defaulted. In other words, *Martinez* speaks only to ineffective assistance of trial counsel claims which should have been, but were not, raised in post-conviction. A *Brady* claim speaks to prosecutorial misconduct, not ineffective assistance of trial counsel. Franklin properly concedes Claim 9 (Reply, Doc. No. 169, PageID 2579).

Claim 10 reasserts the cumulative error claim which this Court found not to be cognizable (Decision, Doc. No. 104, PageID 1630-31). Franklin also agrees to drop this claim (Reply, Doc. No. 169, PageID 2579).

Conclusion

Based on the foregoing analysis, Franklin's *pro se* Motion for Relief from Judgment is DENIED in its entirety. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous.

August 26, 2014.

s/ *Michael R. Merz*
United States Magistrate Judge