



Not Reported in F.Supp.2d, 2004 WL 2252115 (E.D.Pa.)

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United States District Court,

E.D. Pennsylvania.

Boyman TRAUB

v.

Louis S. FOLIO, et al

No. Civ.A.04-CV-386.

Oct. 5, 2004.

Boyman Traub, Waynesburg, PA, Plaintiff Pro Se.

[Thomas W. Dolgenos](#), District Attorney's Office,
Philadelphia, PA, for Defendant.

MEMORANDUM

[BAYLSON](#), J.

I. Introduction

*1 Petitioner Boyman Traub filed a *pro se* Petition for Habeas Corpus in this Court on January 28, 2004 and this Court referred the case to Magistrate Judge Thomas J. Rueter ("the Magistrate Judge") on February 2, 2004. On April 13, 2004 the Magistrate Judge issued a Report and Recommendation ("R & R") pursuant to [28 U.S.C. § 636\(b\)\(1\)\(c\)](#) suggesting that this Court dismiss the Petition as time-barred by the one-year statute of limitations for the filing of a habeas corpus petition. On September 10, 2004, Petitioner filed objections to the R & R. On September 20, 2004, the Government filed a Response. Upon independent and thorough consideration of the administrative record and all filings in this Court, Petitioner's objections are overruled and the recommendations by the Magistrate Judge are accepted.

II. Background and Procedural History

A summary of the background and procedural history follows.

* March 3, 1994

Petitioner is convicted of murder, robbery, and related

offenses in the Court of Common Pleas for Philadelphia County. Petitioner was sentenced to a mandatory life sentence.

* July 29, 1996

Petitioner filed a *pro se* motion under the Post Conviction Relief Act ("PCRA"), [42 Pa. Cons.Stat. Ann. §§ 9541](#), *et seq.*, seeking to have his direct appeal rights reinstated *nunc pro tunc*.

* August 27, 1998

The State Court reinstated Petitioner's direct appeal rights.

* December 7, 1999

Pennsylvania Superior Court affirmed Petitioner's conviction.

* January 6, 2000

30 days after Superior Court's decision and conviction becomes final. No timely request for review filed by Petitioner. Statute of Limitations begins to run for filing of habeas petition.

* February 11, 2000

Petitioner claims to receive first Notice of Pennsylvania Superior Court's decision affirming conviction. Petitioner claims a 60 day mail delay and cause for the statute to be equitably tolled.

* March 2000

Petitioner filed a Petition for Allowance of Appeal *nunc pro tunc*.

* August 10, 2000

Petitioner's appeal denied.

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* January 6, 2001

End of Statute of Limitations for filing habeas corpus petition.

* March 7, 2001

Alternate end of Statute of Limitations if equitably tolled for 60 days.

* March 27, 2001

Petitioner filed second PCRA.

* September 26, 2002

Petitioner's second PCRA is dismissed. Petitioner did not appeal the decision to the Superior Court.

* January 28, 2004

Petitioner filed the present habeas petition.

* March 31, 2004

The Government filed a response to the petition arguing it should be dismissed as untimely because it was not filed within the one-year statute of limitations as required by [28 U.S.C. § 2244](#).

III. Summary of Magistrate Judge's Report and Recommendation

The Magistrate Judge concluded in his R & R that this habeas corpus petition should be dismissed as time-barred. This conclusion is based upon the determination that the statute of limitations started to run on January 6, 2000, thirty days after the Pennsylvania Superior Court affirmed Petitioner's conviction. As a result, Petitioner had until January 6, 2001 to comply with the one-year statute of limitations specified in [28 U.S.C. § 2244\(d\)\(1\)](#)^{FN1} in order to file a timely habeas petition. (R & R at 4).

[FN1. 28 U.S.C. § 2244\(d\)\(1\)\(A\)](#) provides that the statute of limitations runs from "the date on which the judgment became final by the

conclusion of direct review or the expiration of the time for seeking such review."

*2 While it is true that before the statute of limitations expired, Petitioner filed a Petition for Allowance of Appeal in March 2000; the Magistrate Judge pointed out that under controlling Third Circuit case law, a Petition for Allowance of Appeal *nunc pro tunc* does not toll the statute of limitations. See [Douglas v. Horn, 359 F.3d 257, 262 \(3d Cir.2004\)](#) (noting that time during which *nunc pro tunc* request for allowance of appeal is pending does not toll statute of limitation). However, the one-year statute of limitations is tolled during the time a properly filed PCRA petition is filed in the state courts. See [28 U.S.C. § 2244\(d\)\(2\)](#). In this case, Petitioner's second PCRA petition, filed March 27, 2001, did not toll the statute of limitations because it was filed after the habeas statute of limitations expired on January 6, 2001. Thus, this habeas petition, filed January 28, 2004, is time-barred under [28 U.S.C. § 2244\(d\)](#).

The Magistrate Judge further concluded that Petitioner has not alleged any facts to warrant the statute of limitations be equitably tolled. Under controlling Third Circuit precedent, the federal habeas statute of limitations is subject to equitable tolling in only extraordinary circumstances. See [Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 \(3d Cir., 1998\)](#). The Third Circuit has defined extraordinary circumstances to exist only when:

1. The state has actively misled the petitioner;
2. The petitioner has in some extraordinary way been prevented from asserting his rights; or
3. The petitioner has timely asserted his rights but in a wrong forum.

See [Jones v. Morton, 195 F.3d 153, 159 \(3d Cir.1999\)](#). The Magistrate Judge determined that the mail delay claimed by Petitioner did not fall into any of these categories. In his Objections, Petitioner contends that he was prevented from asserting his rights due to the prison mailroom's mishandling of his legal correspondence from December 7, 1999 until February 11, 2000. The

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Magistrate Judge concluded that this alleged mistake does not constitute the extraordinary circumstances required for equitable tolling.

In determining whether extraordinary circumstances exist, the district court must examine Petitioner's due diligence in pursuing the matter under the specific circumstances he faced. See [Schlueter v. Varner, 2004 WL 2035180 at *21 \(3d Cir. June 25, 2004\)](#) (affirming district court's dismissal of inmate's habeas corpus petition as time barred and not entitled to equitable tolling since lengthy periods of time had elapsed following his conviction before he sought relief). The Petitioner must also show that he acted with reasonable diligence, and that the extraordinary circumstances caused his petition to be untimely. *Id.* With this standard in mind, the court notes that even though the alleged delay may have affected Petitioner's ability to file a timely appeal to the Superior Court, it had no effect on Petitioner's ability to file a timely PCRA or habeas petition. Petitioner offers no reason for his thirteen month delay in filing his second PCRA after being notified that the Superior Court affirmed his conviction. Petitioner also waited sixteen months to file this habeas petition after his second PCRA petition was denied. These delays indicate a lack of reasonable diligence on Petitioner's part. Because the circumstances did not cause this petition to be untimely, Petitioner was not prevented in an extraordinary way from asserting his rights and is, therefore, not entitled to equitable tolling of the statute of limitations.

***3** Even if Petitioner were entitled to equitable tolling for 60 days due to the mail delay, the statute of limitations for filing his habeas petition would be extended only until March 7, 2001. Petitioner would still be time-barred because he did not file his second PCRA petition until March 27, 2001.

IV. Conclusion

Because Petitioner did not file his habeas petition within the one-year statute of limitations period required by [28 U.S.C. § 2244](#), he is not entitled to equitable tolling, and his habeas petition is dismissed as time-barred. Even if the court decided that Petitioner has articulated extraordinary circumstances to warrant the equitable

tolling of the statute of limitations, his petition would still be time-barred.

An appropriate order follows.

ORDER

AND NOW, this _____ day of _____, 2004, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of the United States Magistrate Judge Thomas J. Rueter pursuant to [28 U.S.C. § 636\(b\)\(1\)\(c\)](#), it is hereby

ORDERED

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The petition for writ of habeas corpus is DISMISSED;
3. A certificate of appealability is *not* granted; and
4. The Petitioner's objections to the Report and Recommendation are OVERRULED.

E.D.Pa.,2004.

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