IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIAN T. PHEIL,

Petitioner, ORDER

v. 03-C-0487-C

MATTHEW FRANK, Secretary, Wisconsin
Department of Corrections,

Respondent.

Petitioner Brian T. Pheil, a Wisconsin prisoner currently incarcerated in a private correctional facility in Appleton, Minnesota, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner challenges his April 1988 convictions for first degree murder, armed burglary, armed robbery and theft, all as party to a crime, for which he is serving a life sentence plus 35 years. Because the petitioner is challenging a judgment imposed by a court located in this district (Douglas County), this court has jurisdiction over the petition. See 28 U.S.C. § 2241.

Petitioner contends that the state violated his rights to due process and equal protection and his freedom from double jeopardy when it charged and convicted him for the

four offenses listed above. According to petitioner, he should have been charged and convicted only for felony murder, because the murder arose from what started out as a burglary attempt. Petitioner's claims arguably set forth viable constitutional claims, and it appears from the documents attached to the petition that petitioner has exhausted his state court remedies. However, it appears that the petition is untimely.

The Antiterrorism and Effective Death Penalty Act of 1996 established a one-year statute of limitations period for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation begins to run from the latest of: 1) the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. See § 2244(d)(1)(A)-(D). Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled during the pendency of any properly filed application to the state for post-conviction relief.

Petitioner does not appear to be seeking habeas relief on the basis of any newly-recognized constitutional right or newly-discovered facts or contending that the state impeded him from filing his habeas petition sooner. Accordingly, the relevant starting date for statute of limitations purposes is the date on which petitioner's conviction became

"final," as described in § 2244(d)(1)(A). According to the petition, petitioner's conviction became final 90 days after the Wisconsin Supreme Court denied his petition for review on direct appeal from the conviction, or March 5, 1990. See Pet., ¶ 11; Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (time for seeking direct review under § 2244(d)(1)(A) includes 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). The Antiterrorism and Effective Death Penalty Act went into effect on April 24, 1996. Because petitioner's conviction became final before the act's effective date, his one-year limitation period did not start running until April 24, 1996. All delay prior to that date is excluded from the calculation. See Freeman v. Page, 208 F.3d 572, 573 (7th Cir. 2000).

Petitioner's deadline for filing a federal habeas petition expired one year later, or April 24, 1997. Petitioner did not file his habeas petition until September 8, 2003. Thus, his petition is untimely unless there is time that may properly be excluded from the one year under the AEDPA's tolling provision, § 2244(d)(2). Under § 2244(d)(2), "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" is not counted towards the statute of limitations. Petitioner did file a postconviction motion under Wis. Stat. § 974.06 in 1998. However, in order to toll the statute of limitations, petitioner had to have filed that motion *before* his statute of limitations expired. Because that motion was not filed until several

months *after* April 24, 1997, it could not operate to toll the federal statute of limitations. See Fernandez v. Sternes, 277 F.3d 977, 979 (7th Cir. 2000).

The petition shows that petitioner filed a second postconviction motion in the state court in early 2001, appealed the denial of that motion to the Wisconsin Court of Appeals and then to the Wisconsin Supreme Court and filed the instant habeas petition within one year of the state supreme court's decision denying his petition for review. However, the federal habeas clock begins running when a prisoner's time for seeking *direct review* of his judgment expires. 28 U.S.C. § 2244(d)(1)(A). A collateral attack under Wis. Stat. § 974.06 is not direct review. State court collateral attacks are relevant for federal statute of limitations purposes only insofar as they might toll the statute of limitations, but to do this, such attacks must be underway before the limitations period expires. This is true even though the state courts may not impose any time limitations on the filing of a postconviction motion.

In sum, the facts set forth in the petition indicate that petitioner failed to file it within the limitations period set forth in 28 U.S.C. § 2244(d)(1). Before dismissing the petition, however, I will allow petitioner the opportunity to present any additional facts that might show that the petition is timely. Even if petitioner cannot show that his petition is timely under the statute, the possibility remains that his failure to file his petition on time may be excused for equitable reasons. See United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000). However, equitable tolling is granted sparingly and only when

"[e]xtraordinary circumstances far beyond the litigant's control . . . prevented timely filing." Id. See, e.g., U.S. ex rel. Ford v. Page, 132 F. Supp. 2d 1112, 1115 (N.D. Ill. 2001) (run-of-the-mill claim of ignorance of law not sufficient to warrant equitable tolling); Posada v. Schomig, 64 F. Supp. 2d 790, 796 (C.D. Ill. 1999) (fact that prison was sometimes on lock-down, preventing access to prison law library, did not establish "extraordinary circumstances" justifying equitable tolling). Petitioner's response should include any facts that might allow this court to apply the doctrine of equitable tolling.

ORDER

IT IS ORDERED that petitioner has until October 14, 2003 within which to show cause why his petition is not untimely. If petitioner fails to make such a showing, or if he fails to file a response within this deadline, the court will find that his petition is untimely and will enter an order dismissing the petition with prejudice.

Dated this 24th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge