

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

TOD A. HAMILTON,

Petitioner,

ORDER

v.

04-C-133-C

DANIEL BENIK, Warden, Stanley
Correctional Institution,

Respondent.

On June 4, 2004, this court entered judgment dismissing Tod A. Hamilton's petition for a writ of habeas corpus under 28 U.S.C. § 2254 on the ground that he did not file it within the one year statute of limitations set forth in 28 U.S.C. § 2244 and that no circumstances existed that would warrant equitable tolling of the limitations period. Petitioner has now requested a certificate of appealability in accordance with 28 U.S.C. § 2253(c). He has paid the appellate filing fee.

The motion for a certificate of appealability will be denied. A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000); see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to

deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

Jurists of reason would not debate the correctness of this court's conclusion that petitioner's habeas application was untimely. Petitioner suggests that he was unaware that he had a viable legal claim until after his one year time period had expired. However, as explained in this court's order dismissing the petition, ignorance of the law is not a circumstance that justifies equitable tolling.

Even in the unlikely event that petitioner could convince a reasonable jurist that his is the extremely rare case in which equitable tolling should be applied, he still would not be entitled to a certificate of appealability because his underlying claim fails to state the denial of a constitutional right. Petitioner complains that his appellate lawyer did not adequately explain the no-merit procedure to him. There is no clearly established Supreme Court law

that holds that a defendant's waiver of his rights on appeal must be "knowing and intelligent" to survive constitutional scrutiny. Speights v. Frank, 361 F.3d 962, 965 (7th Cir. 2004). Accordingly, petitioner cannot make a substantial showing of the denial of a constitutional right.

ORDER

IT IS ORDERED that the motion of Tod A. Hamilton for a certificate of appealability is DENIED.

Dated this 23rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge