

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

---

JOSE D. FUENTES,

Petitioner,

OPINION AND ORDER

v.

04-C-763-C

DANIEL BENIK, Warden, Stanley  
Correctional Institution,

Respondent.

---

This is an action for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The petitioner, Mexican citizen Jose D. Fuentes, challenges his custody in the Wisconsin State Prison System arising out of his conviction on March 19, 1996, for the offense of first-degree reckless homicide. On December 7, 2004, respondent filed a motion to dismiss the petition on the ground that petitioner failed to file it within the one-year limitation period for filing habeas corpus actions, or alternatively, on the ground that petitioner failed to exhaust his state court remedies with respect to the claims raised in the petition. Petitioner responded by filing a motion for judicial notice, a petition for a writ of mandamus and an “affirmative defense” to respondent’s motion to dismiss. I have considered these three documents together as petitioner’s response to the motion. Because the undisputed facts show that the petition is untimely, it will be dismissed pursuant to 28 U.S.C. § 2244(d).

## PROCEDURAL HISTORY

On March 19, 1996, the Circuit Court for Columbia County entered a judgment of conviction, pursuant to a jury verdict, against petitioner for one count of first degree reckless homicide. The court sentenced petitioner to the Wisconsin state prison system for the maximum term of 40 years.

On August 19, 1996, petitioner filed a postconviction motion in the trial court in which he alleged four grounds for setting aside his conviction: 1) he did not knowingly and voluntarily waive his right to testify; 2) trial counsel was ineffective for, among other things, advising petitioner incorrectly about the hazards of testifying; 3) Detective Kuhl improperly commented on petitioner's credibility; and 4) the real issue in controversy was not fully tried. On October 21, 1996, the trial court held an evidentiary hearing. The court denied the motion on April 21, 1997.

Petitioner appealed, raising the same issues he had presented in his postconviction motion. In a decision issued March 12, 1998, the Wisconsin Court of Appeals rejected petitioner's challenges and affirmed the conviction and order denying postconviction relief.

As a result of an oversight by the court of appeals, its decision was mailed to the wrong attorney. As a result, neither petitioner nor his attorney received a copy of it until it was too late to seek discretionary review in the Wisconsin Supreme Court. After failing to obtain relief from the court of appeals, petitioner filed a petition for state habeas relief in the Wisconsin Supreme Court, asking for leave to file a late petition for review. In a decision

filed May 14, 1999, the supreme court granted the writ and allowed petitioner to file an untimely petition for review. Petitioner subsequently filed a petition for review. On July 23, 1999, the supreme court issued an order denying the petition.

Petitioner did not take any further steps to challenge his conviction in state court. On September 27, 2004, more than five years after the state supreme court denied his petition for review, petitioner filed a petition for federal habeas relief in the United States District Court for the Eastern District of Wisconsin. That court issued an order on October 7, 2004, transferring the case to this court because both the county of petitioner's conviction and the county of his custody are in this district.

In his habeas petition, petitioner challenges his custody on the following grounds: 1) trial counsel was ineffective in several respects; 2) the English translation of the trial court proceedings did not match what was said in Spanish; 3) petitioner was not informed that deportation was a collateral consequence of his conviction; and 4) petitioner was not informed upon his arrest of the right to contact the Mexican consulate pursuant to Article 36 of the Vienna Convention on Consular Relations.

### OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 established a one year statute of limitations for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation period 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).

Petitioner's conviction became "final" October 23, 1999, ninety days after the Wisconsin Supreme Court denied his petition for review. 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). This means that petitioner had until October 23, 2000, in which to file a federal habeas action challenging his state criminal conviction. As noted above, petitioner did not file his federal habeas petition until almost four years later than October 2000.

Thus, under 28 U.S.C. § 2244(d)(1)(A), the petition is untimely. It must be dismissed unless petitioner can show that the limitations period should run from some date later than the date on which his conviction became final. Petitioner suggests that he did not know until recently that his rights under Article 36 of the Vienna Convention on Consular Relations were violated when the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Mexican Consulate. Petitioner suggests that this

claim was not available to him until the International Court of Justice decided the case of Avena and Other Mexican Nationals (Mexico v. United States of America) on March 31, 2004. In that case, the International Court of Justice held that the United States had violated the Vienna Convention when it failed to advise certain Mexican detainees of their right to consult the Mexican Consulate. The court indicated that to remedy the breach, the United States courts should review and reconsider the convictions and sentences of affected Mexican nationals.

Petitioner's alleged recent discovery of his rights under the Vienna Convention is not a basis on which to toll the one-year limitations period. Even assuming the Vienna Convention confers on an individual the right to consular assistance following arrest, see United States v. Lawal, 231 F.3d 1045, 1049 (7th Cir. 2000) (declining to decide whether Article 36 creates individual rights enforceable in judicial proceedings), the Convention has been in effect continuously since 1969. Indeed, just a month after the state court of appeals rejected petitioner's direct appeal, the United States Supreme Court considered a case in which the petitioner made the very same claim petitioner makes here. See Breard v. Greene, 523 U.S. 371 (1998) (per curiam) (rejecting claim on procedural default grounds). In other words, petitioner could have discovered both the legal and factual predicate of his claims long before now.

Petitioner suggests that decisions of the International Court of Justice are binding on this court, and that therefore this court must review his conviction in light of the Avena

court's finding that United States courts should review the convictions and sentences of Mexican nationals whose rights were violated under Article 36. However, in Breard, the Court held that a petitioner's ability to obtain relief under the Vienna Convention is subject to the rules of the AEDPA, "just as any claim arising under the United States Constitution would be." Id. at 376. Thus, petitioner's claim under the Vienna Convention, like his other claims, had to be brought within one year of the date on which petitioner's conviction became final. Petitioner's failure to do so means that this claim is barred.

In any event, even if petitioner's Vienna Convention claim were properly before this court, he would not be entitled to habeas relief because he has made no showing that the alleged violation of his rights under Article 36 prejudiced the outcome of his trial. Id. at 377 (in absence of any showing of prejudice by petitioner, it was "extremely doubtful" that Vienna Convention violation would result in habeas relief). Nowhere in his various submissions does petitioner explain how consulting with the Mexican consulate would have changed the outcome of his case.

Finally, petitioner has not established that "extraordinary circumstances" outside his control prevented timely filing of the habeas petition so as to warrant application of the doctrine of equitable tolling. See United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000). Equitable tolling "excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." Taliani v. Chrans, 189 F.3d 597, 597 (7th Cir. 1999).

In a document filed by petitioner entitled “Motion for Judicial Notice,” (dkt. #5), petitioner asserts that he learned only recently that the state supreme court had denied his petitioner for review in 1999. Petitioner asserts that the court did not mail him a copy of its decision and that his lawyer did not tell him about the decision or that he could file a federal habeas petition. Petitioner also asserts that for a time he was transferred to an out-of-state prison; that he does not understand English very well; and that he has been unable to obtain legal assistance.

Even assuming these allegations are true, none of them, singly or in combination, rises to the level of “extraordinary circumstances” warranting equitable tolling. The state supreme court’s decision denying his petition for review was a matter of public record that petitioner could have discovered with reasonable diligence. Accord *Montenegro v. United States*, 248 F.3d 585, 593 (7th Cir. 2001) (even with petitioner’s language barrier and other difficulties, petitioner could have discovered that his attorney had not filed appeal) (overruled on other grounds by *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001)). Likewise, petitioner’s alleged lack of understanding of English and his transfers from one prison to another are not the sort of circumstances that warrant a finding that petitioner could not have filed his petition on time. *Montenegro*, 248 F.3d at 594 (equitable tolling not justified by lack of response from attorney, language barrier, limited education, lack of knowledge of United States legal system and prison transfers).

ORDER

Accordingly, IT IS ORDERED that the petition of Jose D. Fuentes for a writ of habeas corpus is DISMISSED WITH PREJUDICE for his failure to file it within the one-year limitations period under 28 U.S.C. § 2244(d).

Entered this 3<sup>rd</sup> day of January, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge