

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

ROGER O'NEAL,

Petitioner,

OPINION AND ORDER

v.

06-C-0149-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. On April 19, 2006, this court entered an order allowing petitioner to show cause why his petition should not be dismissed as untimely. Petitioner has now responded to that order. Because I conclude that none of the facts alleged by petitioner are sufficient to warrant application of the doctrine of equitable tolling, the petition will be dismissed.

From the petition and petitioner's response to the April 19 order, I find the following facts for the purpose of deciding whether the petition is timely.

FACTS

In 2004, in the Circuit Court for Dane County, a jury found petitioner guilty of two counts of first degree intentional homicide and one count of first degree reckless endangerment. Sentencing took place on May 11, 2004. At the sentencing hearing, the

court advised petitioner that he had a right to seek postconviction relief and that petitioner's lawyer was obligated to assist him in making the decision whether to seek that relief. The court also advised petitioner that a notice to seek such relief had to be filed within 20 days and that, if petitioner wanted to seek such relief and gave his lawyer timely notice of that intent, petitioner's lawyer was obligated to file that notice on petitioner's behalf. Wis. Stat. § 809.30(2)(b) (notice of intent to seek postconviction relief must be filed within 20 days after date of sentencing or final adjudication).

Petitioner did not file a notice of intent to pursue postconviction relief within the 20-day period prescribed by state law. Thus, his conviction became final on May 21, 2004.

More than one year later, in December 2005, petitioner filed a motion in the Wisconsin Court of Appeals seeking permission to file a belated appeal from his conviction. Petitioner alleged that he was not informed at his sentencing hearing of his right to appeal and was not given a notice of appeal form to sign. At the appellate court's request, the state responded to the motion with the excerpt from the sentencing hearing showing that the trial court had informed petitioner of his appellate rights and that petitioner had been provided with a notice of appeal form but had not signed it at the hearing. Relying on the state's submissions, the court rejected petitioner's claim that he had not been advised of his right to appeal and denied his motion.

After filing an unsuccessful petition for review in the Wisconsin Supreme Court, petitioner filed this federal habeas petition on March 20, 2006.

OPINION

As noted in the order to show cause, under the Antiterrorism and Effective Death Penalty Act, a petitioner has one year from the date on which his state court conviction becomes final in which to file a federal petition for a writ of habeas corpus, not counting time during which any properly filed state court motion for postconviction relief was pending. 28 U.S.C. §§ 2244(d)(1)(A) and (d)(2). Because petitioner did not file any motions for state court postconviction relief until more than one year after his conviction became final, no time can be excluded under § 2244(d)(2). Fernandez v. Sternes, 227 F.3d 977, 979 (7th Cir. 2000). Thus, petitioner's deadline for filing his federal habeas petition was May 21, 2005, one year after his state court conviction became final. He did not file this petition until March 20, 2006.

In his response to the order to show cause, petitioner asserts that this court should excuse his failure to file his petition within the limitations period because he was without representation during 2004 and 2005. He lists the names of various lawyers that he asked to help him *pro bono*, asserting that he was without funds to retain a lawyer. Also, he asserts that he could not prosecute his appeal on his own without the transcripts.

Petitioner's allegations are insufficient to warrant application of the doctrine of equitable tolling. To be entitled to equitable tolling, a petitioner must show that 1) he has been pursuing his rights diligently; and 2) some extraordinary circumstance stood in his way. Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 1814 (2005). Petitioner cannot make

either of these showings. Although petitioner asserts that he was attempting diligently to obtain legal representation, that does not explain why petitioner, having been advised by the trial court of the need to file a notice of intent to seek postconviction relief within 20 days of sentencing, did not file such a notice or ask his lawyers to file one on his behalf. Notably, petitioner does not allege that he thought an appeal had been filed on his behalf. In any case, even if he had thought so, he could have discovered with reasonable diligence that no motion for postconviction relief had been filed. See Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2000) (denying petitioner's request for equitable tolling where petitioner could have discovered with reasonable diligence that public defender's office had not filed petition for discretionary review).

The facts alleged by petitioner fail to explain adequately why he waited more than a year after his appeal deadline had expired to make any attempt to pursue his legal claims. None of the claims that he seeks to raise in his habeas petition depend on any new facts that were not known to petitioner at the time of his conviction. That petitioner was proceeding *pro se* and has limited legal knowledge and abilities are facts insufficient to establish the extraordinary circumstances required for equitable tolling. Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001) (petitioner's language barrier, limited education, lack of knowledge of United States legal system and prison transfer did not constitute extraordinary circumstances excusing petitioner's failure to discover that attorney had not filed appeal), overruled in part by Ashley v. United States, 266 F.3d 671 (7th Cir. 2002). Although

petitioner asserts that he did not have the transcripts, none of his submissions show that he attempted to get them. Moreover, petitioner did not need any transcripts in order to file his motion for an extension of time to file a direct appeal.

Because petitioner has failed to show either that he diligently pursued his rights or that extraordinary circumstances prevented him from filing his habeas petition on time, equitable tolling cannot apply to excuse his untimely petition. Accordingly, the petition must be dismissed.

ORDER

The petition of Roger O'Neal for a writ of habeas corpus is DISMISSED WITH PREJUDICE for petitioner's failure to file it within the one year limitations period prescribed by 28 U.S.C. § 2244(d)(1)(A).

Entered this 1st day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge