

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

KEITH HEWITT,

Petitioner,

ORDER

v.

08-cv-0172-bbc

DEIRDRE MORGAN, Warden,
Oakhill Correctional Institution,

Respondent.

This case presents an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his confinement resulting from his 1998 and 1999 bail jumping convictions in the Circuit Court for Wood County. The convictions resulted from petitioner's having violated a bond condition that prohibited him from having contact with a woman named Tracy Erdmann. Petitioner was sentenced to probation on both cases on June 10, 1999. Petitioner took no action in either state or federal court to challenge his convictions until 2006. (In the meantime, petitioner's probation had been revoked and he was sentenced to six years in prison.)

On April 2, 2008, I reviewed the application preliminarily. After concluding that the petition appeared to be untimely, I entered an order directing petitioner to show either that the petition was timely or that it ought to be considered for equitable reasons. Petitioner has now responded to that order. He argues that this court should consider the petition

because at the time he entered his pleas to the bail jumping charges and afterwards, he was suffering from physical and mental injuries he sustained as a result of being shot on February 9, 1998 during an incident underlying one of the bail jumping charges. He also contends that he is actually innocent of the bail jumping charge arising from the February 9, 1998 incident.

Neither of petitioner's arguments is sufficient to show that this court should consider his belated petition. Petitioner's self-serving allegations of mental incapacitation fall far short of showing that he was *incapable* of acting on his legal rights during the entire seven years between the time he was convicted and the time he filed a motion for postconviction relief in state court. Miller v. Runyon, 77 F.3d 189, 192 (7th Cir. 1996) (“[M]ental illness tolls a statute of limitations only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them”) (citations omitted; emphasis in original). Although it is understandable why petitioner might have preferred to leave memories of the traumatic events of February 9, 1998 in the past, his desire to do so is not an “extraordinary circumstance” that stood in the way of his pursuing his legal rights. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (petitioner seeking equitable tolling must show that he has been pursuing his rights diligently and that some extraordinary circumstance” stood in his way and prevented timely filing. See also United States v. Marcello, 212 F. 3d 1005, 1010 (7th Cir. 2000) (“[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule”).

This leaves petitioner's claim of "actual innocence." To overcome a failure to file a federal habeas petition within the deadline prescribed by the Antiterrorism and Effective Death Penalty Act, a petitioner must show that he is actually innocent *and* that he discovered a factual predicate for his claims that could not have been discovered earlier. Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005). See also Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004) (holding same). Petitioner has not made this showing. Although he has presented several pieces of evidence that he claims show that he did not violate the no-contact order on February 9, 1998, all of this evidence was discoverable at the time petitioner entered his plea to the bail jumping charge. Unfortunately for petitioner, actual innocence without a newly discovered claim "does nothing at all." Escamilla, 426 F.3d at 872.

In sum, petitioner has failed to present facts to show that any extraordinary circumstances stood in the way of his pursuing his legal rights or that any other equitable reasons exist to warrant allowing his admittedly untimely petition. Accordingly, it must be dismissed.

ORDER

IT IS ORDERED that the petition of Keith Hewitt 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).

Entered this 22nd day of April, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge