IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARRIN D. GROSSKOPF,

ORDER

Petitioner,

11-cv-667-bbc

v.

WILLIAM POLLARD, Warden,
Waupun Correctional Institution,

Respondent.

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Petitioner Darrin D. Grosskopf has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his 2002 conviction for intentional homicide. In an order dated December 2, 2011, I informed petitioner that his petition was untimely under 28 U.S.C. § 2244(d)(1)(A) because more than one year had passed since petitioner's conviction became final in July 2004, even if I excluded all the time he spent seeking collateral relief in state court. However, I noted that it was possible that his petition was timely under § 2244(d)(1)(D), which gives petitioner one year from the date he discovered the facts underlying his claim to file his petition. Because it was not clear when petitioner learned of his claim regarding destruction of evidence, I asked him to file a supplement to his petition

identifying that date.

In petitioner's response, he admitted that he learned the facts for his destruction of evidence of claim on February 13, 2008. Dkt. #10. Even if I subtracted the time between November 2008 and September 2010 when petitioner was pursuing a motion under Wis. Stat. § 974.06, petitioner missed the one-year limitations period by many months.

This means that the petition must be dismissed unless petitioner can show that he meets the standard for equitable tolling: (1) he has been pursuing his rights diligently and (2) some extraordinary circumstance stood in his way and prevented timely filing. Holland v. Florida, 130 S. Ct. 2549, 2562–63 (2010). In the December 2 order (and again in an order dated December 13, dkt. # 11), I instructed petitioner that he needed to explain why he believes he meets this standard in the event that his petition was untimely under § 2244(1)(d). In particular, what caused petitioner to wait 10 months to file his § 974.06 petition after he learned of the destruction of evidence and what caused him to wait another 11 months to file his petition in this court after the Wisconsin Supreme Court denied his petition for review in October 2010?

In his response, petitioner says he began suffering from migraine headaches at some point after April 23, 2008, that the headaches were "amplified" by medication he received and that he received treatment for the headaches from a neurology specialist. These vague allegations do not satisfy the Holland standard. Even if I assume that the allegations are

true, petitioner does not identify exactly when his headaches began and he does not suggest that he was in continuous pain or that his pain was so great that he could not file a motion under § 974.06.

Further, subtracting the time between April 2008 and November 2008 cannot save his claim because that still leaves more than one year between the time he received notice of this claim in February 2008 and when he filed this petition in September 2011. Petitioner identifies no reason why he waited 11 months to file this petition after the Wisconsin Supreme Court denied his petition in October 2010. Adding the more than two months that lapsed from February 13, 2008, to April 23, 2008, puts petitioner over the one year limit.

Petitioner seems to believe that his deadline was tolled while he was pursuing a state court habeas corpus petition until April 23, 2008. However, that petition did not include a claim for destruction of evidence, so that petition could not have tolled the statute of limitations for the destruction of evidence claim.

Finally, petitioner says that the "Wisconsin Court of Appeals recognized that Grosskopf could not be barred . . . because the newly discovered evidence was not found for 8 years after his trial and therefore could not have been raised in any prior motion or appeal." Petitioner is correct about the observation of the court of appeals, but that means only that his limitations period began when he discovered his new claim in February 2008

rather than when his original appeal was denied; it does not mean he was free to file this petition at any time.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means 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." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate the decision that the petition should be denied because petitioner has failed show that his constitutional rights were violated during the state proceedings. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Petitioner Darrin Grosskopf's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED as untimely.

2. Petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 28th day of February, 2012.

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