

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

VICTOR L. GREEN,

Petitioner,

ORDER

v.

00-C-480-C

ARTHUR THURMER, Warden, John C.
Burke Correctional Center,

Respondent.

Petitioner Victor L. Green is currently serving a 25-year term of imprisonment imposed by the Circuit Court for Rock County following petitioner's guilty plea in 1986 to second-degree murder, as party to a crime, and a sentencing enhancer for concealing his appearance during the crime. Petitioner has filed a petition under 28 U.S.C. § 2254, alleging that the portion of his sentence that he is serving for the penalty enhancer is unconstitutional. He has paid the five dollar filing fee.

Unfortunately for petitioner, habeas relief on his 1986 sentence is unavailable to him because he did not file his petition within the one-year statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act, which went into effect on April 24, 1996. The AEDPA imposed a new, one-year statute of limitations upon prisoners seeking to bring a federal habeas petition challenging their state court convictions. See 28 U.S.C. § 2244(d)(1)(A).

Under Lindh v. Murphy, 96 F.3d 856, 865-66 (7th Cir. 1996), reversed on other grounds, 521 U.S. 320 (1997), prisoners like petitioner whose convictions became final before the date the AEDPA's enactment had a grace period of one year, or until April 23, 1997, in which to file a federal habeas petition.

Although it is unclear from the petition when Green's petition became final by the conclusion of direct review, see § 2244(d)(1)(A), it appears that petitioner never filed a direct appeal from his conviction and sentence. See 5/18/00 opinion of Wisconsin Court of Appeals denying petition for postconviction relief pursuant to Wis. Stat. 974.06, attached to Petr.'s Mem. in Support of Writ, dkt. #2 at app. 15-16; Petr.'s Mem. in Support of Writ, dkt. #2 at 3. Thus, petitioner's conviction became final in 1986 or perhaps 1987 but in either case before April 24, 1996. This meant that petitioner had until April 23, 1997 in which to file a petition for federal habeas corpus. Petitioner did not file the instant habeas petition until July 24, 2000.

Consequently, Green's petition is untimely unless one of the tolling provisions set forth in § 2244(d) applies to him. None does. Although § 2244(d)(2) provides that the statute of limitations is tolled while any properly filed application for state postconviction or other collateral relief with respect to the pertinent judgment is pending, petitioner states that he did not seek such relief until May 20, 1999, when he filed a petition for modification of his sentence under Wis. Stat. § 974.06. See Petr.'s Mem., dkt. #2 at 3. Because the one-year grace period had already expired by that time, petitioner's postconviction motion could not have tolled the limitations period.

None of the other tolling provisions apply. Petitioner claims that the trial court's imposition of the sentencing enhancer violated state law and the double jeopardy clause and constituted an abuse of discretion. Also, he contends that he did not know that he was pleading guilty to the sentencing enhancer at the time he entered his plea on the murder charge. None of petitioner's claims depend on any constitutional right newly recognized and retroactively applied by the United States Supreme Court, see § 2244(d)(1)(C), or on any new facts. See § 2244(d)(1)(D). Petitioner does not assert that he was prevented from filing a timely habeas petition by any illegal state action. See § 2244(d)(1)(B). Finally, absent from the allegations in Green's petition is any indication that "extraordinary circumstances far beyond [his] control" prevented him from timely filing his petition; therefore, there are no grounds for equitable tolling. United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000).

For these reasons, the petition must be dismissed with prejudice.

ORDER

IT IS ORDERED that petitioner Victor L. Green's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE for his failure to file it within the one-year statute of limitations under 28 U.S.C. § 2244(d)(1). The clerk of court is directed to close this case.

Entered this 17th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge