

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

---

ERIC HUNE,

Petitioner,

ORDER

v.

03-C-0013-C

GARY R. MCCAUGHTRY, Warden,  
Waupun Correctional Institution,

Respondent.

---

Petitioner Eric Hune has filed a motion for a certificate of appealability so that he may challenge this court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner also seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, I am granting petitioner leave to proceed in forma pauperis, but I am declining to issue a certificate of appealability.

In orders entered January 23 and February 13, 2003, this court determined that petitioner's application for habeas relief had to be dismissed because petitioner had failed to file it within the statutory limitations period and there were no circumstances that would permit tolling the statute of limitations. Because the petition was dismissed on statutory procedural grounds, this court did not evaluate the merits of the claims raised in the petition.

Because petitioner seeks leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. See 28 U.S.C. § 1915(a)(3).

Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner.

To find that an appeal is in good faith, a court need only find that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, a certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” Id.; see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must “sho[w] 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.’ ” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack, 529 U.S. at 484. Thus, “[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding.” Id. at 484-85.

Petitioner asserts the following grounds for appeal: 1) his trial lawyer was ineffective for failing to seek suppression of the drugs and paraphernalia that were found in a laundry bag that were used at trial to convict petitioner; 2) trial counsel was ineffective for failing to investigate the crime scene and present an accurate diagram of the scene at trial; 3) trial counsel was ineffective for failing to impeach the state's witness-in-chief; and 4) appellate counsel was ineffective for failing to raise the alleged errors of trial counsel on appeal and for failing to establish that petitioner had a reasonable expectation of privacy in the laundry bag. He also challenges this court's determination that there were no circumstances beyond petitioner's control to warrant tolling the one-year statute of limitations, arguing that the highly-restrictive nature of his confinement at the Supermax prison and his lawyers' failure to provide him with transcripts amounted to external impediments that prevented him from filing his petition on time.

Applying the standards outlined above, I conclude that petitioner may proceed in forma pauperis. His affidavit demonstrates that he is unable to prepay the costs of filing his appeal. Furthermore, reasonable people could find some merit in petitioner's claim that the statute of limitations should be tolled.

However, petitioner has not shown that he is entitled to a certificate of appealability. Even assuming petitioner's claims of ineffective assistance of counsel present a substantial constitutional issue, reasonable jurists would not debate petitioner's claim that the circumstances he has alleged amount to a state-created impediment sufficient to excuse him

from the one-year statute of limitations. As noted in this court's order of February 13, 2003, limited access to legal materials and the absence of transcripts are not circumstances sufficient to warrant either statutory or equitable tolling.

Accordingly, petitioner's motion for leave to proceed in forma pauperis is GRANTED. However, his request for a certificate of appealability is DENIED.

Dated this 21st day of March, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge