

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

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TOD HAMILTON,

Petitioner,

OPINION AND ORDER

v.

04-C-133-C

DANIEL BENIK, Warden, Stanley  
Correctional Institution,

Respondent.

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Tod Hamilton, an inmate at the Stanley Correctional Institution, challenges his October 30, 2000, conviction in the Circuit Court for Rock County for one count of second degree sexual assault of a child and one count of abduction of a child. Petitioner contends that he was denied his right to the assistance of counsel on appeal because he did not understand that he had a right to insist that his appellate lawyer file a no merit report if he disagreed with her conclusion that there were no meritorious issues for appeal.

The state has filed a motion to dismiss the petition on the ground that it is untimely under 28 U.S.C. § 2244(d). The motion will be granted. The record demonstrates that petitioner did not file his federal habeas petition until more than one year after his conviction became final and he has failed to show that equitable circumstances exist for tolling the statute of limitations.

## FACTS

Petitioner was convicted on October 30, 2000, in the Circuit Court for Rock County after entering a plea of guilty to one count of abducting a child and one count of second-degree sexual assault of a child. The circuit court sentenced him to ten years on each count, with the terms to be served consecutively.

Petitioner filed a notice of intent to pursue postconviction relief. The Office of the State Public Defender appointed Martha K. Askins to represent petitioner. On August 9, 2001, Askins filed a motion in the Wisconsin Court of Appeals seeking an extension of time within which to file an appeal or postconviction motion. The court granted the motion, extending the deadline to October 10, 2001. The deadline passed without Askins or anyone else filing an appeal or postconviction motion on petitioner's behalf.

On March 21, 2003, petitioner filed a motion in the Wisconsin Court of Appeals seeking the appointment of counsel and the reinstatement of his right to direct appeal. Petitioner alleged that Askins had failed to advise him adequately concerning the no-merit appeal procedure under Wis. Stat. Rule 809.32, and that therefore, he was entitled to a fresh appeal. The court construed the motion as a petition for a writ of habeas corpus alleging ineffective assistance of appellate counsel and ordered the state to respond to it.

The state submitted copies of documents from Askins's file that she had sent to petitioner concerning his appeal. One of the documents was an informational sheet that explained the appeal process and petitioner's options in the event his lawyer concluded that

an appeal would be frivolous or without arguable merit, including his right to direct his attorney to file a no-merit report. Another document was a letter from Askins to petitioner on July 20, 2001, in which she again reviewed these options. Finally, a letter from Askins to petitioner, dated September 11, 2001, indicated that after meeting with Askins and reviewing his options, petitioner had agreed that Askins could close her file.

After receiving the state's response, the court denied the petition on May 16, 2003. It concluded from the exhibits attached to the response that Askins had adequately explained the no-merit procedure to petitioner. The Wisconsin Supreme Court denied petitioner's request for review on July 9, 2003. Petitioner filed his federal habeas petition on February 25, 2004.

## DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 established a one-year statute of limitations for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one-year limitation period begins to run from the latest of 1) the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable

to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. See § 2244(d)(1)(A)-(D).

Petitioner appears to contend that his petition is timely under § 2244(d)(1)(A) because he brought it within one year after the state supreme court denied his petition for review of the court of appeals' decision denying his postconviction motion to reinstate his direct appeal. However, under § 2244(d)(1)(A), petitioner's conviction became "final" when the time expired within which he could have filed a direct appeal from his conviction. That occurred on October 10, 2001, when his deadline expired for filing a direct appeal or postconviction motion. Petitioner's unsuccessful motion in March 2003 for reinstatement of his direct appeal did not affect the finality of that judgment.

None of the alternative starting dates for calculating the statute of limitations applies in this case. Thus, the petition is untimely unless there is time that can be excluded by virtue of statutory or equitable tolling. Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled, that is, it does not count against the one-year statutory period, while a properly filed application for post-conviction relief is pending in state court. That provision does not help petitioner because he did not file any motion for postconviction relief in the state courts until March 2003, well after his federal limitations period had expired. Once that period expired, there was no time to which the tolling provision could apply. Fernandez v. Sternes, 277 F.3d 977, 979 (7th Cir. 2000).

Likewise, petitioner cannot benefit from the doctrine of equitable tolling. Although the Court of Appeals for the Seventh Circuit has not determined conclusively whether or to what extent the one-year deadline in § 2244(d)(1) is actually subject to the doctrine of equitable tolling, see Taliani v. Chrans, 189 F.3d 597, 597 (7th Cir. 1999), it has noted that equitable tolling "may be available when some impediment of a variety not covered in § 2244(d)(1) prevents the filing of a federal collateral attack." Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2000). Equitable tolling "excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." Taliani, 189 F.3d at 597.

Petitioner has not identified any impediment that might excuse his failure to file his petition on time. Although petitioner points out that he is impaired by dyslexia, a learning disability and a lack of legal knowledge and has had to rely on the help of other inmates to pursue his claims, none of those allegations is sufficient to warrant equitable tolling. It is well settled that a claim of ignorance of the law is not one of the "extraordinary circumstances" that justifies equitable tolling. Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) ("neither a plaintiff's unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling"); U.S. ex rel. Ford v. Page, 132 F. Supp. 2d 1112, 1115 (N.D. Ill. 2001) (citing cases).

As for petitioner's alleged mental limitations, he has not made the necessary showing that he was prevented by his mental condition from "managing his affairs and thus from

understanding his legal rights and acting upon them” during the period between the time his conviction became final and the date on which he filed his motion for reinstatement of his direct appeal. Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996). To be entitled to equitable tolling on the basis of mental illness, petitioner must show more than that it is difficult for him to understand and act upon his legal rights; rather, he must show that he was *incapable* of preparing and filing a federal habeas petition or postconviction motion any earlier than he did. There is no evidence in the record from which I can find that petitioner was incapacitated by any mental illness from bringing his federal petition earlier.

In sum, petitioner has failed to show that there were any external circumstances that impeded him from filing his federal habeas petition within the one-year limitations period prescribed by § 2244(d). Accordingly, the petition must be dismissed. However, it is worth noting that even if petitioner had filed his federal habeas petition on time, he could not have prevailed on the merits. Petitioner concedes that Askins provided him with an informational handout and letters that explained his options on appeal and he concedes that he told Askins that she could close her file without filing an appeal or no-merit brief. Petitioner contends that Askins did not adequately explain his options and that the court of appeals should have held an evidentiary hearing to determine whether petitioner made an informed choice to have Askins close her file. However, there is no clearly established Supreme Court law that has extended the rules governing waiver of counsel at trial to waivers of counsel on appeal. Speights v. Frank, 361 F.3d 962, 965 (7th Cir. 2004). As the Court of Appeals for the

Seventh Circuit explained in Speights, “[i]f such an extension (or a requirement that counsel explain the no-merit procedure clearly enough for a client to grasp) [is] to occur nonetheless, that must happen on direct review; given § 2254(d) a collateral attack is not the occasion for the development of new constitutional rules.” Id. Because the state court of appeals did not unreasonably apply clearly established federal law when it concluded that petitioner had not shown that his appellate counsel was ineffective for failing to meaningfully explain the no merit procedure to him, this court could not grant the petition even if petitioner had filed it within the limitations period.

ORDER

IT IS ORDERED that the petition of Tod Hamilton for a writ of habeas corpus is DISMISSED WITH PREJUDICE for his failure to file it within the limitations period set forth in 28 U.S.C. § 2244(d).

Dated this 3rd day of June, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge