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

ROGER LEE KAUFMAN,

Petitioner,

v.

DANIEL BERTRAND, Warden, Green Bay Correctional Institution,

Respondent.

ORDER

04-C-802-C

Roger Lee Kaufman, an inmate at the Green Bay Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his October 1989 conviction in the Circuit Court for Juneau County for first degree intentional homicide and theft while armed. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

BACKGROUND

A review of the Wisconsin Court of Appeals' unpublished decision on petitioner's direct appeal, State v. Kaufman, 159 Wis. 2d 432, 464 N.W. 2d 681 (Ct. App. 1990) (unpublished), provides some helpful background for this case. Petitioner was charged in

1989 in the Circuit Court for Juneau County with intentionally killing his mother-in-law by shooting her dead at close range. At trial, petitioner asked the court to instruct the jury on the lesser included offenses of first degree reckless homicide and second degree reckless homicide. The court agreed to read the first instruction but denied the second. The jury returned a verdict convicting petitioner of first degree intentional homicide. The trial court sentenced petitioner to life in prison plus five years, and set his parole eligibility date at 25 years.

On appeal, petitioner challenged the trial court's refusal to submit the second degree reckless homicide instruction to the jury. On November 20, 1990, the court of appeals issued a decision in which it rejected petitioner's argument and affirmed the conviction. The Wisconsin Supreme Court denied petitioner's request for review on March 5, 1991.

According to the petition, in January 1997 petitioner filed a postconviction motion requesting the trial court to modify his sentence. Petitioner argued that the trial court had abused its discretion in setting his parole eligibility date at 25 years instead of allowing the parole commission to determine his eligibility date. The trial court denied the motion. In a decision issued December 18, 1997, the state appellate court affirmed the trial court's decision. State v. Kaufman, 216 Wis. 2d 114, 573 N.W. 2d 900 (Ct. App. 1997) (unpublished). It appears that petitioner did not file a petition for review of that decision in the Wisconsin Supreme Court.

In his habeas petition, petitioner contends that his trial lawyer was ineffective for failing to discover records from the Juneau County jail that show that one of the state's witnesses, Kenneth Mavis, committed perjury when he testified at trial that he had a conversation with petitioner at the Juneau County jail during which petitioner made inculpatory statements regarding his state of mind when he shot his mother-in-law. According to petitioner, newly discovered booking log records from the jail show that Mavis was never in the same part of the jail with petitioner. Petitioner claims that his trial lawyer was ineffective for failing to discover these records and for committing a host of other errors, including failing to argue that the homicide was accidental, failing to "fully challenge" the presentence report and failing to challenge the trial court's authority to extend petitioner's parole eligibility date. In addition, petitioner contends that his postconviction lawyer was ineffective for failing to challenge trial counsel's effectiveness.

Petitioner asserts that he presented these claims to the state circuit court in a postconviction motion pursuant to Wis. Stat. § 974.06 that he filed in approximately June 2004. According to petitioner, the trial court denied his motion on June 16, 2004; thereafter, the state court of appeals and supreme court both "denied to take 'authority'" over petitioner's appeal even though petitioner had properly filed it.

DISCUSSION

Because petitioner is in custody and his petition raises a viable constitutional claim of ineffective assistance of counsel, this court properly has jurisdiction over the petition under § 2254. Furthermore, the action is properly filed in this district because the judgment that petitioner is challenging was imposed by a court (Juneau County) located in this district. 28 U.S.C. § 2241(d). However, it is unlikely that this court will consider petitioner's claims on their merits because the petition appears to be untimely.

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year period of limitation within which a state prisoner may seek federal habeas relief from custody under a state judgment of conviction. 28 U.S.C. § 2244(d). The one-year period runs from the latest of several dates specified in subsections (A) through (D) of § 2244(d)(1).

Under § 2244(d)(1)(A), the one-year period begins to run on the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking direct review. For prisoners like petitioner whose convictions became final before the AEDPA's effective date, the one-year statute of limitations for filing a federal habeas petition began running on the AEDPA's effective date, April 24, 1996. See Freeman v. Page, 208 F.3d 572, 573 (7th Cir. 2000) (for state prisoners whose convictions became final before AEDPA's effective date, one-year limitation period did not start running until April 24, 1996 and all delay prior to that date is excluded).

Thus, under § 2244(d)(1)(A), petitioner had until April 24, 1997, within which to file a federal habeas petition. Petitioner did not file his habeas petition until more than seven years later, on October 28, 2004. Even excluding the time during which his first postconviction motion to modify his sentence was pending in the state courts, see § 2244(d)(2) ("time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"), the petition still was filed well outside the one-year period prescribed by § 2244(d)(1)(A). Petitioner's filing of his postconviction motion in 2004 could not operate to toll the federal statute of limitations because by then the statutory time had expired. Fernandez v. Sternes, 277 F.3d 977, 979 (7th Cir. 2000).

The petition does include a claim based upon newly-discovered evidence, which raises the possibility that § 2244(d)(1)(D) might apply, at least to the claim based on petitioner's lawyer's alleged failure to discover the Juneau County jail logs. Fielder v. Varner, 379 F.3d 113, 117-22 (3d Cir. 2004) (§ 2244(d)(1) must be applied on claim-by-claim basis and not to petition as whole). But see Walker v. Crosby, 341 F.3d 1240, 1245 (11th Cir. 2003) (reaching opposite result). Under that provision, the one-year limitations period runs from "the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence." Although petitioner does not say when or how he discovered the jail logs that allegedly show that Mavis's testimony was false, it seems certain that petitioner could have discovered the logs much earlier had he exercised due diligence.

Presumably, the jail logs were created at the time petitioner and Mavis were in jail around the time of trial in 1989-1990. If petitioner never actually spoke to Mavis in the jail or never was in jail with him, as he now contends, then certainly he would have known that at the time of trial; it follows that he would also have known at that time that jail logs might exist to corroborate that fact. In short, it is doubtful that petitioner will be able to show that he could not have discovered the factual predicate of his claims within one year before filing his federal habeas petition.

Because it is not the petitioner's burden to plead compliance with the statute of limitations, the court may not dismiss a petition as untimely without allowing the petitioner an opportunity to be heard. Gildon v. Bowen, 384 F.3d 883, 886 (7th Cir. 2004); Acosta v. Artuz, 221 F.3d 171, 122 (2d Cir. 2000). Accordingly, before dismissing the petition, I will allow petitioner the opportunity to show that his petition is timely. In particular, petitioner should explain in detail when he discovered the Juneau County jail logs and the circumstances that prevented him from discovering the evidence earlier. In his submission, petitioner may also attempt to show that the statute of limitations should be tolled for equitable reasons apart from those identified in § 2244(d)(1)(B)-(D). To make this showing, petitioner must allege facts that establish that "extraordinary circumstances" outside his control prevented timely filing of the habeas petition. United States v. Marcello, 384 F.3d 883 (7th Cir. 2004).

ORDER

IT IS ORDERED that petitioner has until November 26, 2004, within which to file a supplement to his habeas petition that shows that his petition is timely under 28 U.S.C. § 2244(d) or that extraordinary circumstances exist to warrant tolling the statute of limitations for equitable reasons.

Entered this 4th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge