

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

PAUL BATHE,

Plaintiff,

OPINION AND ORDER

v.

05-C-541-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Defendant.

Paul Bathe, a Wisconsin inmate at the Stanley Correctional Institution in Stanley, Wisconsin, has filed an application for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The subject of the petition is an August 25, 1994 judgment of conviction entered by the Circuit Court for Kenosha County for attempted first degree intentional homicide, conspiracy to commit robbery while armed and burglary while armed. Petitioner contends that the trial court violated the Eighth Amendment's proscription against cruel and unusual punishment when it sentenced him to consecutive, maximum sentences on each of the counts, for a total of 65 years. Before the court is respondent's motion to dismiss the petition on the ground that petitioner failed to file it within the one year limitations period set forth in § 2244(d). Because I agree that the petition is untimely, the petition will be dismissed.

As an initial matter, Dan Benik is not the proper respondent in this action because he is no longer the warden at the Stanley Correctional Institution. The new warden is Pamela Wallace. Accordingly, she should be substituted as respondent. Fed. R. Civ. P. 25(d). Although the state has responded on behalf of Dan Benik, the misnomer shall be disregarded because it does not affect the substantial rights of the parties. Id.

From the parties' submissions in connection with the state's motion to dismiss, I find the following facts.

FACTS

Petitioner was convicted on August 25, 1994 in the Circuit Court for Kenosha County of attempted first degree intentional homicide, armed robbery and armed burglary. The court imposed maximum sentences of 25 years, 20 years and 20 years, respectively, with each sentence to run consecutively.

Petitioner took a direct appeal from his conviction, arguing that a weapon seized from his car should have been suppressed and that his sentence was unduly harsh. On December 11, 1996, the Wisconsin Court of Appeals issued an order rejecting petitioner's claims and affirming his conviction. Br. in Supp. of Mot. to Dismiss, dkt. #6, Exh. A. On February 18, 1997, the Wisconsin Supreme Court denied his petition for review. Id., Exh. B.

Sometime in 2002, petitioner filed a motion in the state circuit court pursuant to Wis. Stat. § 974.06, Wisconsin's collateral attack statute. In the motion, petitioner alleged that his trial lawyer was ineffective for several reasons and his postconviction lawyer was ineffective for failing to raise the issue during postconviction proceedings. The trial court dismissed the motion without an evidentiary hearing. Petitioner appealed. In a decision issued February 25, 2004, the state court of appeals affirmed the trial court's decision. Traverse, dkt. # 7, App. 3.

On May 7, 2004, petitioner filed a motion for sentence modification pursuant to Wis. Stat. § 973.19. The circuit court rejected the motion, finding that it asserted the same claims that petitioner had presented in prior motions to the court. On April 20, 2005, the court of appeals issued an order summarily affirming the circuit court's order. With the exception of one claim not relevant to the instant petition, the state appellate court found that petitioner's challenges to his sentence were barred either because they had already been litigated on direct appeal or because petitioner had failed to provide a sufficient reason for not having raised them on direct appeal or in his § 974.06 motion. Br. in Supp. of Mot. to Dismiss, dkt. #6, Exh. D. The state supreme court denied petitioner's petition for review on July 28, 2005. Id., Exh. E.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one year limitations period for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation 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). Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled during the pendency of any properly filed application to the state for post-conviction relief. However, in order for a state post-conviction challenge to toll the federal statute of limitations, the petitioner must have filed it before his federal limitations period expired. See Blasewicz v. Kingston, 425 F.3d 1029, 1035 (7th Cir. 2005).

Petitioner does not deny that he did not file his federal habeas petition or any state court application for post-conviction relief until well over one year after his conviction became final. He argues that much of the time between the conclusion of his direct appeal and the filing of his first post-conviction motion in 2002 should not count against him

because during this time period, he was trying to find a lawyer to represent him and was transferred to an out-of-state correctional facility. Petitioner has provided an affidavit from John Pray, an attorney affiliated with the University of Wisconsin Law School's Legal Assistance to Institutionalized Persons (LAIP) program, who averred that students from his program reviewed petitioner's case during the time period from November 1997 to May 2000, at which time they told petitioner that they would not represent him. I construe petitioner's arguments as a request that this court apply the doctrine of equitable tolling.

Although the United States Supreme Court has never squarely addressed the question whether the doctrine of equitable tolling is available under the AEDPA, it has indicated that an applicant seeking equitable tolling must show two things: 1) that he has been pursuing his rights diligently; and 2) that some extraordinary circumstance stood in his way. Pace v. DiGuglielmo, 125 S. Ct. 1807, 1814 (2005). Petitioner cannot make this showing. Even assuming the time period from November 1997 to May 2000 could be excluded under the doctrine of equitable tolling, petitioner still has not explained why he waited at least a year and a half after he was turned down by LAIP to file his first state court post-conviction motion. Petitioner points out that he was incarcerated out of state for a year; however, according to his documentation, he was out of state only for the time period from September 1998 to September 1999. Traverse, dkt. #7, App. 2, at 2. Even assuming petitioner's removal from Wisconsin constitutes an "extraordinary circumstance," it still does not explain

his inaction from May 2000 to the time he filed his § 974.06 motion in 2002. Because petitioner has failed to show that extraordinary circumstances interfered with his ability to file his post-conviction motion on time in spite of his diligent efforts, he is not entitled to equitable tolling.

Petitioner also suggests that his petition is timely under § 2244(d)(1)(C), which allows a prisoner to bring a federal habeas petition within one year from the date on which the Supreme Court recognizes a new constitutional right, if that right was determined to apply retroactively to cases on collateral review. Petitioner cites two new cases on which he contends his state court motion for sentence modification was based, State v. Hall, 225 Wis. 2d 662, 648 N.W. 2d 41 (Ct. App. 2002) and Blakely v. Washington, 542 U.S. 296 (2004). The state appellate court's decision in Hall is of no help to petitioner because § 2244(d)(1)(C) refers only to cases decided by the United States Supreme Court. As for Blakely, that case did not establish the rule that sentences be proportional to the crime; rather, the Court held that juries, not judges, must find facts that increase the sentence that the defendant could have otherwise received on the basis of the jury's verdict alone. 542 U.S. at 303-304. The constitutional right on which petitioner's claim is based -- the Eighth Amendment right to be free from excessive punishments -- has been recognized since at least 1983, when the Supreme Court decided Solem v. Helm, 463 U.S. 277 (1983). Because petitioner contends only that his sentence was disproportionate to his crimes and has not

alleged that he was sentenced pursuant to any determinate sentencing scheme like that at issue in Blakely, Blakely affords him no relief under § 2244(d)(1)(C).

In sum, petitioner has not shown that he is entitled to either statutory or equitable tolling. Accordingly, because he filed his federal habeas petition more than one year after his conviction became final, the petition must be dismissed as untimely.

ORDER

IT IS ORDERED that:

1. Pamela Wallace is substituted for Daniel Benik as the respondent.
2. The petition of Paul Bathe for the issuance of a writ of habeas corpus is DISMISSED WITH PREJUDICE for petitioner's failure to file it within the one year limitations period set forth in 28 U.S.C. § 2244(d).

Entered this 5th day of December, 2005.

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